

Macdonald's Immigration Law & Practice

First Supplement to Seventh Edition

Ian A Macdonald QC
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Immigration Law and Practice in the United Kingdom

First Supplement to Seventh Edition

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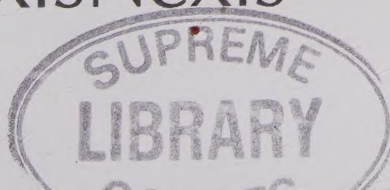
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Preface

After the publication of the seventh edition, we decided that, since change was happening so fast in this field, we should try to produce a supplement one year on with a new edition to follow a year later. Although it has been a struggle to achieve this goal, what with our own professional commitments and the raft of new statutes, statutory instruments, immigration rules, codes of practice and new case law, it still remains our aim.

The first change to note is the creation of the UK Borders Agency (UKBA). On 1 April 2007, the Border and Immigration Agency (BIA) was launched as a Home Office shadow agency, replacing the old Immigration and Nationality Directorate (IND). The BIA has now gone, replaced by the UKBA, established as a shadow agency of the Home Office on 3 April 2008. The UKBA will bring together the work of the old BIA, UK Visas and parts of HM Revenue and Customs at the border, and will work closely with the police and other law enforcement agencies on issues of border control and security. Two features should be noted. First, all those making decisions on entry and leave to remain, including entry clearance officers, now come under the same banner and the rather awkward arrangement between UK Visas under the Foreign Office and the immigration service under the Home Office no longer applies. Secondly, the emergence of the UKBA goes hand in hand with an eventual merger of immigration and customs functions. During its first four months of operation, 1,000 frontline staff were expected to be conferred with both immigration and customs powers and staff in England and Wales were to be equipped with police-like powers as set out in the UK Borders Act 2007. It is intended that a full merger will follow the enactment of the Borders, Citizenship and Immigration Bill 2008.¹

Since the publication of the seventh edition, the Criminal Justice and Immigration Act 2008 has received the royal assent. Parts of the Act concerning the repatriation of prisoners are now in force, the main immigration part of the Act is not yet in force. This creates a new special immigration status and allows the Secretary of State to designate to this status foreign criminals and their immediate family members, where the foreign criminals are liable to deportation, but cannot be removed from the UK because of s 6 of the Human Rights Act 1998. There have been four more commencement orders to the UK Borders Act 2007 since the end of 2008, bringing most of it into force. Meanwhile Parliament is busy with the Borders, Citizenship and Immigration Bill 2008, which is passing through its various stages.

¹ More information can be found at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/businessplan/>.

This Bill, however, is merely a foretaste of a much bigger and more far-reaching project – the so-called Simplification Bill. The UKBA's simplification project was formally announced in consultation, which opened in June 2007. It was indicated that simplification would include consolidation of the UK's primary legislation in the area of immigration. In July 2008 the government published the Draft (Partial) Immigration and Citizenship Bill.² The aim is to replace, with a single Act of Parliament, the many existing Immigration Acts, dating back to 1971, many of whose earlier provisions have already been amended, repealed and superseded by subsequent Acts. But it is not merely a consolidating Act. It will change familiar concepts of immigration law, such as leave to enter and remain, and make all sorts of amendments, which the government would describe as looking to 'streamline existing procedures and close any loopholes in order to support staff and enhance their decision making.' On any view it is a massive and daunting task. In the partial Bill there are more than 200 clauses, reckoned to be about 2/3 of the whole.

The government prides itself on making 'fundamental shakeups'. It has certainly made a fundamental shake up with the introduction of the planned 5 Tier Australian-based points system, announced in March 2006. Tier 1 (highly skilled migrants) was introduced in three stages between 29 February and 30 June 2008;³ the rest of Tier 1, which includes business investors, started up on 30 June 2008.⁴ Tiers 2 and 5 were implemented as from 27 November 2008.⁵ Tier 5 (students) is about to take off, but is too late for inclusion in this Supplement. A notable feature of the introduction of the points-based system is that it has been achieved by rule changes and the issue of Guidance notes and Codes of Practices for a whole variety of occupations, but without any need for statutory authorisation.

The main effect of these changes will be on commercial immigration law. Except during an inevitable transitional period, we can say goodbye to old familiars like work permits. The scheme also introduces an entirely new role for employers and schools, colleges and universities. They now have to become licensed sponsors (at considerable expense) before they can employ people or enrol students. And once the workers are employed or the students admitted, their sponsors are responsible for policing their progress and keeping records which the UKBA will have full access to. We give more detail of the advantages and drawbacks of the new system in chapter 10.

Another major change is the introduction of compulsory biometric immigration documents, otherwise known as BIDs. In fact they are the first identity cards, but go by the 'BID' name because they are introduced under immigration statutory powers rather than under the Identity Cards Act 2006.⁶ Initially, they are to apply only to those who seek leave to remain in specified family and student categories. According to the government the reason for singling out some 44,000 foreign students and 5,000 foreign spouses and partners as

² It was put out in draft for pre-legislative scrutiny (ie so that Parliament, and others, could review the proposed legislation before the Bill is formally introduced). It is 'partial' in that it is incomplete. A short introduction to the proposed legislation is contained in a document called Making Change Stick – see: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/draftbill/makingchangestick.pdf?view=Binary>.

³ HC 395 as amended by HC 321 and 607. See chapter 10.

⁴ HC 395 as amended by HC 607. See chapter 10.

⁵ HC 395 as amended by HC 1113. See chapter 10.

⁶ Sections 5 and 6 of the UK Borders Act 2007.

the guinea pigs is that there is 'evidence that these categories are susceptible to abuse by those who seek to breach the UK's immigration laws.'⁷ The working assumption is that around three years from the first introduction of compulsory ID cards for foreign nationals in November 2008 the government will require all of those applying for leave to enter or remain in the UK, to have a card. From 2012/2013 onwards they will start to issue ID cards to those foreign nationals already settled in the UK.⁸

Decisions of the Courts and Tribunals have come thick and fast. Because this is a Supplement and not a new edition, the key cases will be easy to identify and no particular mention need be made in a preface. However, we single out two, the one because the case is very interesting and the other because it is very important. In *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*⁹ the House of Lords endorsed the common law right of any subject of the Crown to enter and remain in the United Kingdom whenever and for as long as he or she pleases¹⁰ and discussed the limitations of the Prerogative power in the context of a ceded colony. Secondly, there is the ECJ decision in *Metock v Minister for Justice, Equality and Law Reform*¹¹ which dealt with family reunion under Community law and in particular with the first entry into Union territory of a third country national coming a country outside the EU. By its emphatic rejection of the need for the third country national family member to have been lawfully resident in another member state before being eligible to benefit from Community law, the Court has made a decision, which has led to serious questioning of the transposing of the Citizens' Directive into UK law in the EEA Regulations 2006.

At meetings with Home Office officials we have individually asked them to slow down, pause and think before introducing yet more changes. Everyone operating in this field wants simplification, but the projected Simplification Bill is so full of changes and amendments of substance that it really ought to be called a Complication Bill. The speed of change is not good for anyone.

We know that many of those operating the system cannot keep up. The result is conspicuously poor decision-making – all signs of information overload at the coal face of decision-making. Take for example, the Internal Departmental instructions (IDIs). These are used by decision-makers in taking vital decisions affecting entry and stay. Frequently they are out of date or plain wrong in the light of some new development – all signs that the Department is struggling to keep pace with its own frenetic, almost psychotic, need to change and tinker all the time.

In *R (on the application of Abdi) v Secretary of State for the Home Department*¹², a case concerning the policy for detention of foreign national prisoners after completion of their prison sentences, the court was told of a questionnaire sent out to CCD caseworkers asking questions about their

⁷ Explanatory Memorandum to the Immigration (Biometric Registration) Regulations 2008, SI 2008/3048, para 7.4 and p 24.

⁸ Explanatory Memorandum to the Immigration (Biometric Registration) Regulations 2008, above, pp 24–25.

⁹ [2008] UKHL 61, [2008] 4 All ER 1055, where the majority upheld the British government's decision to remove the Chagossians from the Chagos Islands to make way for the American base at Diego Garcia.

¹⁰ See *R v Bhagwan* [1972] AC 60.

¹¹ C-127/08 [2009] All ER (EC) 40.

¹² [2008] EWHC 3166 (Admin).

Preface

understanding of the policy on detention. It revealed extraordinary uncertainty and confusion by departmental officials in the Home Office. According to the judge, the result suggested that a significant minority did *not* 'correctly understand' the policy (judgment para 39).

Practitioners do not fare much better. We hear lots of stories – often tragic – of poor and careless advice and totally inadequate representation before Tribunals and Courts.

As authors we know how much more time we have had to spend just trying to make sense of, describe and discuss a massive amount of new immigration, nationality and asylum materials in putting together this supplement.

The government says it is committed to an immigration policy which is firm and fair. But there is no chance of it being fair in any sense, unless there is a body of immigration specialist advisers and practitioners in place, who know their business and their services are available or made available to migrants, sponsors and refugee claimants through a properly funded system of legal aid. Neither is happening. The cuts in legal aid have led to many of the most experienced, conscientious, and able practitioners either ceasing to do immigration work altogether or only doing privately-funded immigration work. The result is that good advice and representation is simply no longer sufficiently available and those still doing the work are either over-worked or unwilling or unable to do the necessary work to prepare their cases with sufficient thoroughness, experience or skill to do their clients justice.

We would like to thank those who have contributed to writing of this supplement: Adrian Berry, Kathryn Cronin, and Desmond Rutledge. Their help has been invaluable. We should also like to thank all those in chambers who have contributed to Garden Court Immigration Bulletin which has helped us and all their readers to keep up to date. Then there is ILPA, whose production line of information on upcoming legislation, new rules, new cases and a whole host of other valuable material has helped us enormously. We also have to express our appreciation of the Home Office for a wealth of explanatory notes and website explanations of what they are up to. As always our publishers have been helpful and indulgent of the number of times we have broken their deadlines; we thank them and also the indexer. Finally, we wish to express personal thanks to Amarjit Ahluwalia and William Toal and to Brigid Baillie.

The material in this supplement has been updated to 28 February 2009, although some of the material included post-dates this cut-off point.

IAM

RT

20 March 2009

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R v Wandsworth County Court, ex p Sivasubramaniam [2002] EWCA Civ 1738, [2003] 2 All ER 160, [2003] 1 WLR 475, [2003] 03 LS Gaz R 34, (2002) Times, 30 November, [2002] All ER (D) 431 (Nov)	18.171, 18.194
R v Wandsworth London Borough Council, ex p O [2000] 4 All ER 590, [2000] 1 WLR 2539, [2000] LGR 591, [2000] 34 LS Gaz R 41, [2000] All ER (D) 855, CA	13.145, 13.150
R v Wang [2005] EWCA Crim 293, [2005] All ER (D) 125 (Mar)	1.19, 12.11, 14.39
R v Westminster City Council, ex p Castelli (1995) 7 Admin LR 845	18.154
R v Westminster City Council, ex p MPA and X (1997) 1 CCLR 85	13.145
R v Westminster City Council, ex p Mount Cook Land Ltd [2003] EWCA Civ 1346, [2004] 2 P & CR 405, [2003] 43 EG 137 (CS), 147 Sol Jo LB 1272, (2003) Times, 16 October, [2003] All ER (D) 222 (Oct)	18.200
R v Williams [1982] 3 All ER 1092, [1982] 1 WLR 1398, 75 Cr App Rep 378, [1982] Crim LR 762, 126 Sol Jo 690, CA	15.78
R v Zausmer (1911) 7 Cr App Rep 41, CCA	12.16
R (on the application of A) v Liverpool City Council [2007] EWHC 1477 (Admin), (2007) Times, 1 August, [2007] All ER (D) 307 (Jun)	11.119, 13.62
R (on the application of A) v London Borough of Croydon [2008] EWHC 2921 (Admin), [2008] All ER (D) 19 (Dec)	13.61, 13.152
R (on the application of A) v London Borough of Croydon [2008] EWCA Civ 1445, [2009] 1 FCR 317, [2008] All ER (D) 236 (Dec)	11.6, 11.119, 13.61, 13.152
R (on the application of A) v National Asylum Support Service [2003] EWCA Civ 1473, [2004] 1 All ER 15, [2004] 1 WLR 752, [2004] LGR 1, [2003] 3 FCR 545, [2004] 1 FLR 704, [2004] Fam Law 96, 147 Sol Jo LB 1274, (2003) Times, 31 October, [2003] All ER (D) 402 (Oct)	13.66, 13.152
R (on the application of A) v Secretary of State for the Home Department (CO/6277/2005)	17.30
R (on the application of A) v Secretary of State for the Home Department [2006] EWCA Civ 1540, [2006] All ER (D) 178 (Oct)	12.158
R (on the application of A) v Secretary of State for the Home Department [2007] EWCA Civ 804, (2007) Times, 5 September, [2007] All ER (D) 467 (Jul)	17.42, 17.43
R (on the application of A) (Disputed Children) v Secretary of State for the Home Department [2007] EWHC 2494 (Admin), [2007] All ER (D) 20 (Nov)	12.121
R (on the application of A) v Secretary of State for the Home Department [2008] EWHC 2844 (Admin), [2009] 1 FLR 531, [2009] Fam Law 197, [2008] All ER (D) 196 (Nov)	11.5, 11.99
R (on the application of A) v West Middlesex University Hospital NHS Trust [2008] EWHC 855 (Admin), (2008) Times, 13 May, [2008] All ER (D) 335 (Apr)	13.170
R (on the application of A, D and Y) v Hackney London Borough Council [2005] EWHC 2950 (Admin), [2006] LGR 159, [2005] All ER (D) 251 (Dec)	13.139, 13.147, 13.148
R (on the application of AG) v Leeds City Council [2007] EWHC 3275 (Admin), [2007] All ER (D) 163 (Dec)	13.145

R (on the application of AK (Afghanistan)) v Secretary of State for the Home Department [2007] EWCA Civ 535, [2007] All ER (D) 173 (May)	12.176, 12.147
R (on the application of AM (Cameron)) v Asylum and Immigration Tribunal [2007] EWCA Civ 131	18.119
R (on the application of AM (Somalia)) v Secretary of State for the Home Department [2009] EWCA Civ 114, [2009] All ER (D) 248 (Feb)	18.106
R (on the application of AW) v Croydon London Borough Council [2005] EWHC 2950 (Admin), [2006] LGR 159, [2005] All ER (D) 251 (Dec); on appeal [2007] EWCA Civ 266, [2007] 1 WLR 3168, [2007] LGR 417, (2007) Times, 11 May, [2007] All ER (D) 59 (Apr)	13.139, 13.145, 13.147, 13.148
R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598, [2003] 3 LRC 297, (2002) Times, 8 November, [2002] All ER (D) 70 (Nov)	1.28, 12.104
R (on the application of Abdi) v Secretary of State for the Home Department [2008] EWHC 3166 (Admin), [2008] All ER (D) 247 (Dec)	17.30A, 17.53
R (on the application of Abdullah) v Secretary of State for the Home Department (CO/3709/04)	13.138
R (on the application of Acan) v Immigration Appeals Tribunal [2004] EWHC 297 (Admin), [2004] All ER (D) 193 (Feb)	1.27, 1.28, 11.112, 12.196
R (on the application of Adam) v Secretary of State for the Home Department [2004] EWHC 354 (Admin), [2004] All ER (D) 264 (Feb)	13.60
R (on the application of Ahmed) v Asylum Support Adjudicator [2008] EWHC 2282 (Admin), [2008] All ER (D) 12 (Oct)	13.138
R (on the application of Ahmed) v Secretary of State for the Home Department [2008] EWHC 1533 (Admin), [2008] All ER (D) 29 (Jul)	17.28
R (on the application of Akyuz) v Secretary of State for the Home Department [2006] EWCA Civ 541, [2007] 1 WLR 508, [2006] ICR 1314, [2006] All ER (D) 274 (May)	7.70
R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 All ER 929, [2001] 2 WLR 1389, 82 P & CR 513, [2001] 2 PLR 76, 151 NLJ 727, 145 Sol Jo LB 140, (2001) Times, 10 May, [2001] All ER (D) 116 (May)	8.12, 8.62, 18.166
R (on the application of Ali) v Asylum and Immigration Tribunal [2006] EWHC 2127 (Admin), [2006] All ER (D) 36 (Aug)	18.104
R (on the application of Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs [2006] EWHC 972 (Admin), [2006] NLJR 797, (2006) Times, 19 May, [2006] All ER (D) 46 (May); affd [2006] EWCA Civ 1279, [2007] 2 WLR 1219, [2007] 2 LRC 499, (2006) Times, 18 October, [2006] All ER (D) 138 (Oct)	12.104
R (on the application of Al-Skeini) v Secretary of State for Defence [2007] UKHL 26, [2007] 3 All ER 685, [2007] 3 WLR 33, [2007] NLJR 894, 22 BHRC 518, (2007) Times, 14 June, [2007] All ER (D) 106 (Jun)	8.12
R (on the application of Amirthanathan) v Secretary of State for the Home Department [2003] All ER (D) 29 (May); affd sub nom Nadarajah v Secretary of State for the Home Department and conjoined cases [2003] EWCA Civ 1768, 148 Sol Jo LB 24, [2003] All ER (D) 129 1.38,	8.23, 8.39, 8.62, 8.64, 12.116, 14.65, 16.65, 17.28, 17.29, 17.39, 17.46, 17.47 (Dec)
R (on the application of Anton) v Secretary of State for the Home Department; Re Anton [2005] EWHC 2730 (Admin), [2005] EWHC 2731 (Fam), [2005] 2 FLR 818	11.16, 11.17, 11.19, 11.23
R (on the application of Anufrijeva) v Secretary of State for the Home Department [2003] UKHL 36, [2004] 1 AC 604, [2003] 3 All ER 827, [2003] 3 WLR 252, [2003] Imm AR 570, [2003] 33 LS Gaz R 29, (2003) Times, 27 June, [2003] All ER (D) 353 (Jun)	13.17, 15.61, 17.26
R (on the application of Arslan) v Secretary of State for the Home Department [2006] EWHC 1877 (Admin)	7.166

- R (on the application of Asad) v Secretary of State for Foreign and Commonwealth Affairs [2007] EWHC 286 (Admin), [2007] All ER (D) 128 (Feb); revsd sub nom R (on the application of NA (Iraq)) v Secretary of State for Foreign and Commonwealth Affairs [2007] EWCA Civ 759, (2007) Times, 29 August, [2007] All ER (D) 409 (Jul) 1.57, 3.18
- R (on the application of Aslan) v Secretary of State for the Home Department [2006] EWHC 1855 (Admin) 7.166
- R (on the application of B) v Merton London Borough Council [2003] EWHC 1689 (Admin), [2003] 4 All ER 280, [2005] 3 FCR 69, [2003] 2 FLR 888, [2003] Fam Law 813, (2003) Times, 18 July, [2003] All ER (D) 227 (Jul) 11.117, 12.121, 13.62, 13.152, 17.30
- R (on the application of B) v Secretary of State for the Home Department [2002] EWCA Civ 1797 11.71
- R (on the application of B) v Southwark London Borough [2006] EWHC 2254 (Admin), [2007] 3 FCR 457, [2007] 1 FLR 916, [2006] All ER (D) 83 (Sep) 13.147, 13.153
- R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWHC 199 (QB), [2007] All ER (D) 127 (Feb); revsd in part sub nom R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139, [2007] All ER (D) 172 (Nov) 1.78, 18.191
- R (on the application of Badhu) v Lambeth London Borough Council [2005] EWCA Civ 1184, [2006] 1 WLR 505, [2006] LGR 81, [2006] HLR 122, (2005) Times, 19 October, [2005] All ER (D) 164 (Oct) 13.144, 13.156
- R (on the application of Baiai) v Secretary of State for the Home Department [2006] EWHC 823 (Admin), [2006] 3 All ER 608, [2007] 1 WLR 693, [2006] 2 FCR 131, [2006] 2 FLR 645, [2006] Fam Law 535, (2006) Times, 14 April, 150 Sol Jo LB 573, [2006] All ER (D) 151 (Apr); affd sub nom R (on the application of Baiai) v Secretary of State for the Home Department; R (on the application of Bigoku) v same; R (on the application of Tilki) v same [2007] EWCA Civ 478, [2007] 4 All ER 199, [2007] 3 WLR 573, [2007] 2 FCR 421, [2007] 2 FLR 627, [2007] Fam Law 806, [2007] Fam Law 666, 151 Sol Jo LB 711, [2007] All ER (D) 397 (May); on appeal [2008] UKHL 53, [2008] 3 All ER 1094, [2008] 1 FCR 1, [2008] 2 FLR 1462, [2008] Fam Law 994, [2008] Fam Law 955, [2008] NLJR 1225, (2008) Times, 13 August, 152 Sol Jo (no 31) 29, [2008] All ER (D) 411 (Jul) 8.15, 8.15, 8.103, 8.105, 11.4, 11.65, 11.68
- R (on the application of Baiai) v Secretary of State for the Home Department [2006] EWHC 1035 (Admin), [2006] All ER (D) 142 (May) 1.84
- R (on the application of Baiai) v Secretary of State for the Home Department (No 2) [2006] EWHC 1454 (Admin), [2006] 4 All ER 555, [2007] 1 WLR 735, [2006] All ER (D) 191 (Jun) 11.68
- R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61, [2008] 4 All ER 1055, [2008] 3 WLR 955, [2008] NLJR 1530, (2008) Times, 23 October, 152 Sol Jo (no 41) 29, [2008] 5 LRC 769, [2008] All ER (D) 219 (Oct) 1.26, 2.1A, 2.2, 2.18
- R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2001] QB 1067, [2001] 2 WLR 1219, [2001] 3 LRC 249, [2000] All ER (D) 1675 2.2
- R (on the application of Bashir) v Secretary of State for the Home Department [2007] EWHC 3017 (Admin), [2007] All ER (D) 493 (Nov) 17.41, 17.42, 17.43
- R (on the application of Bagdanavicius) v Secretary of State for the Home Department [2005] UKHL 38, [2005] 2 AC 668, [2005] 4 All ER 263, [2005] 2 WLR 1359, (2005) Times, 30 May, [2005] All ER (D) 407 (May) 1.44, 1.46, 8.51, 12.58
- R (on the application of Barlas) v Secretary of State for the Home Department [2007] EWHC 1709 (Admin), [2007] All ER (D) 359 (Jun) 3.15
- R (on the application of Beecroft) v Secretary of State for the Home Department [2008] EWHC 3189 (Admin), [2008] All ER (D) 46 (Dec) 17.53

R (on the application of Begum) v Social Security Comrs [2003] EWHC 3380 (Admin), [2003] 48 LS Gaz R 18, (2003) Times, 4 December, [2003] All ER (D) 61 (Nov)	13.6
R (on the application of Berhe) v Hillingdon London Borough Council [2003] EWHC 2075 (Admin), [2004] 1 FLR 439, [2003] Fam Law 872, [2003] 39 LS Gaz R 38, (2003) Times, 22 September, [2003] All ER (D) 01 (Sep)	13.153, 13.166
R (on the application of Bernard) v Enfield London Borough Council, [2002] EWHC 2282 (Admin), [2003] LGR 423, [2003] HLR 354, [2002] 48 LS Gaz R 27, (2002) Times, 8 November, 5 CCL Rep 577, [2002] All ER (D) 383 (Oct)	8.29, 17.53
R (on the application of Bibi) v Secretary of State for the Home Department [2005] EWHC 386 (Admin), [2005] 1 WLR 3214, [2005] All ER (D) 360 (Feb)	1.80
R (on the application of Bidar) v Ealing London Borough Council: C-209/03 [2005] QB 812, [2005] All ER (EC) 687, [2005] 2 WLR 1078, (2005) Times, 29 March, [2005] All ER (D) 235 (Mar), EC]	7.83, 7.106, 7.113
R (on the application of Blackwood) v Secretary of State for the Home [2003] EWHC 97 (Admin), [2003] HLR 638, (2003) Times, 10 February, [2003] All ER (D) 162 (Jan)	13.98
R (on the application of Bofo) v Secretary of State for the Home Department [2002] EWCA Civ 44, [2002] 1 WLR 1919, 146 Sol Jo LB 59, (2002) Times, 18 March, [2002] All ER (D) 31 (Feb)	12.104, 18.72, 18.75
R (on the application of Borak) v Secretary of State for the Home Department [2004] EWHC 1861 (Admin), [2004] 1 WLR 3129, (2004) Times, 15 September, [2004] All ER (D) 573 (Jul); affd on other grounds [2005] EWCA Civ 110, [2005] All ER (D) 163 (Jan)	12.177
R (on the application of C) v Birmingham City Council [2008] EWHC 3036 (Admin), [2008] All ER (D) 171 (Nov)	13.152
R (on the application of C) v Merton London Borough Council [2005] EWHC 1753 (Admin), [2005] 3 FCR 42, [2005] All ER (D) 221 (Jul)	12.121, 13.62, 13.152
R (on the application of Catal) v Secretary of State for the Home Department [2006] EWHC 1882 (Admin)	7.86, 7.103, 7.166
R (on the application of Carson) v Secretary of State for Work and Pensions [2005] UKHL 37, [2006] 1 AC 173, [2005] 4 All ER 545, [2005] 2 WLR 1369, (2005) Times, 27 May, [2005] All ER (D) 397 (May)	8.105
R (on the application of Cherwell District Council) v First Secretary of State [2004] EWHC 724 (Admin), [2004] 16 EG 111 (CS), [2004] All ER (D) 94 (Apr)	13.133
R (on the application of Chikwamba) v Secretary of State for the Home Department [2008] UKHL 40, [2009] 1 All ER 363, [2008] 1 WLR 1420, (2008) Times, 26 June, 152 Sol Jo (no 26) 31, [2008] All ER (D) 330 (Jun) ...	8.92A, 11.5, 11.49, 11.77
R (on the application of Christian) v Secretary of State for the Home Department [2006] EWHC 2152 (Admin), [2006] All ER (D) 35 (Jul)	15.75
R (on the application of Clift) v Secretary of State for the Home Department [2006] UKHL 54, [2007] 2 All ER 1, [2007] 2 WLR 24, (2006) Times, 21 December, 21 BHRC 704, [2006] All ER (D) 188 (Dec)	15.76
R (on the application of Conde) v Lambeth London Borough Council [2005] EWHC 62 (Admin), [2005] 1 FCR 189, [2005] HLR 452, [2005] All ER (D) 63 (Jan)	13.152
R (on the application of Cooper) v Secretary of State for the Home Department [2005] EWHC 1715 (Admin), [2005] All ER (D) 470 (Jul)	15.71, 15.72
R (on the application of D) v Secretary of State for the Home Department [2006] EWHC 980 (Admin), 150 Sol Jo LB 743, [2006] All ER (D) 300 (May); affd sub nom HK (Turkey) v Secretary of State for the Home Department [2007] EWCA Civ 1357, [2007] All ER (D) 310 (Dec)	17.25, 17.34, 18.142
R (on the application of de Franco) v Secretary of State for the Home Department [2007] EWHC 407 (Admin), [2007] All ER (D) 69 (Mar)	12.192
R (on the application of Dehn) v Secretary of State for the Home Department [2005] EWHC 3202 (Admin)	1.47
R (on the application of Dirshe) v Secretary of State for the Home Department [2005] EWCA Civ 421, [2005] 1 WLR 2685, (2005) Times, 5 May, 149 Sol Jo LB 511, [2005] All ER (D) 259 (Apr)	12.129

R (on the application of E) v Secretary of State for the Home Department [2006] EWHC 3208 (Admin), [2006] All ER (D) 329 (Dec)	12.111, 17.46, 18.26
R (on the application of Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, [2006] IRLR 934, (2006) Times, 17 October, [2006] All ER (D) 104 (Oct)	1.78
R (on the application of Erdogan) v Secretary of State for the Home Department [2008] EWHC 2446 (Admin), [2008] All ER (D) 102 (Sep)	18.72
R (on the application of Etame) v Secretary of State for the Home Department [2008] EWHC 1140 (Admin), [2008] 4 All ER 798, [2008] All ER (D) 326 (May); revsd sub nom R (on the application of BA (Nigeria)) v Secretary of State for the Home Department [2009] EWCA Civ 119, [2009] All ER (D) 263 (Feb)	18.25
R (on the application of Eyaz) v Immigration Appeal Tribunal [2003] EWHC 771 (Admin), [2003] All ER (D) 337 (Mar)	12.170
R (on the application of F) v The Secretary of State for the Home Department [2008] EWHC 317 (Admin), (2009) Times, 23 January, [2008] All ER (D) 235 (Dec)	2.6
R (on the application of FH) v Secretary of State for the Home Department [2007] EWHC 1571 (Admin), [2007] All ER (D) 69 (Jul)	12.126
R on the application of Forrester) v Secretary of State for the Home Department [2008] EWHC 2307 (Admin) (5 September 2008)	4.9A
R (on the application of G) v Barnet London Borough Council [2003] UKHL 57, [2004] 2 AC 208, [2004] 1 All ER 97, [2003] 3 WLR 1194, [2003] LGR 569, [2003] 3 FCR 419, [2004] 1 FLR 454, [2004] Fam Law 21, [2004] HLR 117, [2003] 45 LS Gaz R 29, 147 Sol Jo LB 1242, (2003) Times, 24 October, [2003] All ER (D) 385 (Oct)	13.152
R (on the application of GG) v Secretary of State for the Home Department [2006] EWHC 1111 (Admin), (2006) Times, 14 June, [2006] All ER (D) 143 (May); affd sub nom S v Secretary of State for the Home Department (sub nom R (on the application of GG) v Secretary of State for the Home Department) [2006] EWCA Civ 1157, (2006) Times, 9 October, [2006] All ER (D) 30 (Aug)	3.39, 3.42, 4.22, 8.39, 8.89, 17.11, 18.69, 18.72
R (on the application of Gedara) v Secretary of State for the Home Department [2006] EWHC 1690 (Admin), [2006] All ER (D) 99 (Jul)	12.62
R (on the application of Ghaleb) v Secretary of State for the Home Department [2008] EWHC 2685 (Admin), [2008] All ER (D) 80 (Dec)	12.126
R (on the application of Gillan) v Metropolitan Police Comr [2006] UKHL 12, [2006] 2 AC 307, [2006] 4 All ER 1041, [2006] 2 WLR 537, [2006] 2 Cr App Rep 525, (2006) Times, 9 March, 150 Sol Jo LB 366, 21 BHRC 202, [2006] All ER (D) 114 (Mar)	1.74, 8.39
R (on the application of Glushkov) v Secretary of State for the Home Department & Anor [2008] EWHC 2290 (Admin) (09 September 2008)	18.107
R (on the application of Grant) v Lambeth London Borough Council [2004] EWHC 1524 (Admin), [2004] LGR 867, [2004] 3 FCR 494, [2004] All ER (D) 04 (Jul); revsd [2004] EWCA Civ 1711, [2005] 1 WLR 1781, [2005] LGR 81, [2005] 1 FCR 1, [2005] HLR 415, (2005) Times, 5 January, [2004] All ER (D) 269 (Dec)	13.71, 13.148, 13.152
R (on the application of Guveya) v National Asylum Support Service [2004] EWHC 2371 (Admin), [2004] All ER (D) 594 (Jul)	13.139
R (on the application of H) v Wandsworth London Borough Council [2007] EWHC 1082 (Admin), [2007] 2 FCR 378, [2007] 2 FLR 822, [2007] Fam Law 802, [2007] All ER (D) 08 (Jun)	13.153
R (on the application of HBH) v Secretary of State for the Home Department (CO/7677/2007) unreported	17.30
R (on the application of HSMP Forum Ltd) v Secretary of State for the Home Department [2008] EWHC 664 (Admin), [2008] All ER (D) 96 (Apr)	10.120
R (on the application of Hamfi) v Immigration Appeal Tribunal [2004] EWHC 939 (Admin)	18.66
R (on the applicaiton of Harris) v Secretary of State for the Home Department [2002] EWCA Civ 100	18.186

R (on the application of Hasa) v Immigration Appeal Tribunal [2003] EWHC 396 (Admin), [2003] All ER (D) 232 (Feb)	12.177
R (on the application of Heffernan) v Rent Service [2008] UKHL 58, [2009] 1 All ER 173, [2008] HLR 738, (2008) Times, 20 August, [2008] All ER (D) 404 (Jul)	14.45A
R (on the application of Hicks) v Secretary of State for the Home Department [2006] EWCA Civ 400, [2006] All ER (D) 173 (Apr)	2.62
R (on the application of Hillingdon London Borough Council) v Secretary of State for Education and Skills [2007] EWHC 514 (Admin), [2007] All ER (D) 260 (Mar)	13.153
R (on the application of Hoxha) v Secretary of State for the Home Department [2005] UKHL 19, [2005] 4 All ER 580, [2005] 1 WLR 1063, (2005) Times, 11 March, 149 Sol Jo LB 358, 19 BHRC 676, [2005] All ER (D) 163 (Mar)	18.150
R (on the application of Husan) v Secretary of State for the Home Department [2005] EWHC 189 (Admin), (2005) Times, 1 March, [2005] All ER (D) 371 (Feb)	12.167
R (on the application of Hussein) v Immigration Appeal Tribunal [2003] EWHC 769 (Admin), [2003] All ER (D) 262 (Mar)	18.162
R (on the application of I) v Secretary of State for the Home Department [2005] EWHC 1025 (Admin), (2005) Times, 10 June, [2005] All ER (D) 440 (May)	11.117, 11.122, 13.152
R (on the application of Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982, [2005] INLR 633, (2005) Times, 19 August, [2005] All ER (D) 384 (Jul)	18.147, 18.166, 18.169, 18.170
R (on the application of Igor Ivan) v Secretary of State for the Home Department (CO/352/2005), unreported	17.34
R (on the application of Jamshidi) v Secretary of State for the Home Department [2008] EWHC 1990 (Admin), [2008] All ER (D) 304 (Jun)	17.43
R (on the application of Javed) v Secretary of State for the Home Department. See R v Secretary of State for the Home Department, ex p Javed	
R (on the application of Jegatheeswaran) v Secretary of State for the Home Department [2005] EWHC 1131 (Admin), [2005] All ER (D) 178 (Apr)	8.98
R (on the application of K) v Crown Court at Croydon [2005] EWHC 478 (Admin), [2005] 2 Cr App Rep (S) 578	14.37, 14.39
R (on the application of K) v Secretary of State for the Home Department [2006] EWHC 980 (Admin), 150 Sol Jo LB 743, [2006] All ER (D) 300 (May); affd sub nom HK (Turkey) v Secretary of State for the Home Department [2007] EWCA Civ 1357, [2007] All ER (D) 310 (Dec)	17.34, 18.142
R (on the application of K) v Secretary of State for the Home Department [2008] EWHC 1321 (Admin), [2008] All ER (D) 229 (May)	17.28
R (on the application of Kanidagli) v Secretary for the Home Department [2004] EWHC 1585 (Admin), [2004] NLJR 1141, [2004] All ER (D) 91 (Jul)	13.49
R (on the application of Kanwal) v Secretary of State for the Home Department [2007] EWHC 2803 (Admin), [2007] All ER (D) 24 (Dec)	4.9A
R (on the application of Karagoz) v Immigration Appeal Tribunal [2003] EWHC 1228 (Admin), (2003) Times, 11 June, [2003] All ER (D) 237 (May)	18.121, 18.125, 18.126
R (on the application of Karas) v Secretary of State for the Home Department [2006] EWHC 747 (Admin), [2006] All ER (D) 107 (Apr)	17.40, 17.45
R (on the application of Kariharan) v Secretary of State for the Home Department [2002] EWCA Civ 1102, [2003] QB 933, [2002] 3 WLR 1783, (2002) Times, 13 August, [2002] All ER (D) 373 (Jul), sub nom Secretary of State for the Home Department v Kariharan [2003] Imm AR 163	8.108, 16.60, 18.20, 18.46
R (on the application of Katshunga) v Secretary of State for the Home Department [2006] EWHC 1208 (Admin), [2006] All ER (D) 71 (May)	8.81
R (on the application of Khadir) v Secretary of State for the Home Department. See R v Secretary of State for the Home Department, ex p Hwez	
R (on the application of Khan) v Oxfordshire County Council [2004] EWCA Civ 309, [2004] HLR 706, (2004) Times, 24 March, [2004] All ER (D) 322 (Mar)	13.147, 13.150

- R (on the application of Kimani) v Lambeth London Borough Council [2003] EWCA Civ 1150, [2004] 1 WLR 272, [2003] 3 FCR 222, [2003] 2 FLR 1217, [2003] Fam Law 811, [2004] HLR 207, [2003] 37 LS Gaz R 32, (2003) Times, 6 August, [2003] All ER (D) 16 (Aug) 13.71, 13.147, 13.149
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C-113/89: Rush Portuguesa Lda v ONI [1990] ECR I-1417, [1991] 2 CMLR 818, ECJ	7.65, 7.77, 7.78, 9.18
C-154/89: EC Commission v France [1991] ECR I-659, ECJ	7.77
C-192/89: Sevince v Staatssecretaris van Justitie [1990] ECR I-3461, [1992] 2 CMLR 57, ECJ	7.46, 7.153, 7.154, 7.158
C-213/89: R v Secretary of State for Transport, ex p Factortame Ltd (No 2) [1991] 1 AC 603, [1990] ECR I-2433, [1990] 3 WLR 818, [1990] 3 CMLR 1, [1990] 2 Lloyd's Rep 351, [1990] 41 LS Gaz R 33, sub nom Factortame Ltd v Secretary of State for Transport (No 2) [1991] 1 All ER 70, [1990] NLJR 927, ECJ; apld sub nom R v Secretary of State for Transport, ex p Factortame Ltd (No 2) [1991] 1 AC 603, [1990] 3 WLR 818, [1990] 3 CMLR 375, [1990] 2 Lloyd's Rep 365n, [1991] 1 Lloyd's Rep 10, 134 Sol Jo 1189, [1990] 41 LS Gaz R 36, [1990] NLJR 1457, sub nom Factortame Ltd v Secretary of State for Transport (No 2) [1991] 1 All ER 70, HL	7.46, 7.47, 8.9
C-260/89: Elliniki Radiophonia Tileorass-AE v Pliroforissis and Kouvelas [1991] ECR I-2925, [1994] 4 CMLR 540, ECJ	1.39, 7.52, 7.107, 7.142, 8.7
C-288/89: Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media [1991] ECR I-4007, ECJ	7.71, 7.117
C-292/89: R v Immigration Appeal Tribunal, ex p Antonissen [1991] ECR I-745, [1991] 2 CMLR 373, ECJ	7.71, 7.126, 7.130, 7.129, 7.160
C-294/89: EC Commission v France [1991] ECR I-3591, [1993] 3 CMLR 569, ECJ	7.75
C-306/89: EC Commission v Greece [1991] ECR I-5863, [1994] 1 CMLR 803, ECJ	7.76
C-308/89: Di Leo v Land Berlin [1990] ECR I-4185, ECJ	7.55, 7.59, 7.88, 7.106
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C-355/89: Department of Health and Social Security v Barr and Montrose Holdings Ltd [1991] ECR I-3479, [1991] 3 CMLR 325, ECJ	6.16, 6.22
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C-163/90: Administration des Douanes et Droits Indirects v Legros [1992] ECR I-4625, ECJ	7.54
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C-302/90: Caisse auxiliaire d'assurance maladie-invalidité (CAAMI) v Faux [1991] ECR I-4875, ECJ	7.71
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C-332/90: Steen v Deutsche Bundespost [1992] ECR I-341, [1992] 2 CMLR 406, ECJ	7.66
C-351/90: EC Commission v Luxembourg: Access to Medical Professions, Re [1992] ECR I-3945, [1992] 3 CMLR 124, ECJ	7.75
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C-377/90: EC Commission v Belgium [1992] ECR I-1229, ECJ	7.75
C-4/91: Bleis v Ministère de l'Education Nationale [1991] ECR I-5627, [1994] 1 CMLR 793, ECJ	7.72
C-27/91: Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales de la Savoie (URSSAF) v Hostellerie Le Manoir Sàrl [1991] ECR I-5531, ECJ	7.70
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C-312/91: Metalsa Srl v Public Prosecutor (Italy) [1993] ECR I-3751, [1994] 2 CMLR 121, ECJ	7.46
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C-19/92: Kraus v Land Baden-Württemberg [1993] ECR I-1663, ECJ	7.59, 7.67, 7.117
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C-379/92: Peralta, criminal proceedings against [1994] ECR I-3453, ECJ	7.118
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C-432/92: R v Minister of Agriculture, Fisheries and Food, ex p S P Anastasiou (Pissouri) Ltd [1994] ECR I-3087, [1995] 1 CMLR 569, ECJ; on appeal [1999] 3 CMLR 469, HL	7.46
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C-32/93: Webb v EMO Air Cargo (UK) Ltd [1994] QB 718, [1994] 4 All ER 115, [1994] ECR I-3567, [1994] 3 WLR 941, [1994] 2 CMLR 729, [1994] ICR 770, [1994] IRLR 482, [1994] NLJR 1278, ECJ; apld sub nom Webb v EMO Air Cargo (UK) Ltd (No 2) [1995] 4 All ER 577, [1995] 1 WLR 1454, [1996] 2 CMLR 990, [1995] ICR 1021, [1995] IRLR 645, [1995] 42 LS Gaz R 24, 140 Sol Jo LB 9, HL	7.45, 7.48A
C-43/93: Vander Elst v Office des Migrations Internationales [1994] ECR I-3803, [1995] 1 CMLR 513, ECJ	7.61, 7.78
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C-46/93: Brasserie du Pecheur SA v Germany: [1996] QB 404, [1996] All ER (EC) 301, [1996] 2 WLR 506, [1996] ECR I-1029, [1996] 1 CMLR 889, [1996] IRLR 267, ECJ	7.49
C-48/93: R v Secretary of State for Transport, ex p Factortame Ltd [1996] QB 404, [1996] All ER (EC) 301, [1996] 2 WLR 506, [1996] ECR I-1029, [1996] 1 CMLR 889, [1996] IRLR 267, ECJ; apld [1998] 1 All ER 736n, [1998] 1 CMLR 1353, [1997] TLR 482, (1997) Times, 11 September, [1997] Eu LR 475, DC; affd [1999] 2 All ER 640n, [1998] 3 CMLR 192, [1998] NPC 68, (1998) Times, 28 April, [1998] Eu LR 456, CA; affd [2000] 1 AC 524, [1999] 4 All ER 906, [1999] 3 WLR 1062, [1999] 3 CMLR 597, [1999] 43 LS Gaz R 32, HL	7.49
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C-392/93: R v HM Treasury, ex p British Telecommunications plc [1996] QB 615, [1996] All ER (EC) 411, [1996] 3 WLR 203, [1996] ECR I-1631, [1996] 2 CMLR 217, [1996] IRLR 300, ECJ	7.49
C-415/93: Union Royale Belge des Societes de Football Association ASBL v Bosman [1996] All ER (EC) 97, [1995] ECR I-4921, [1996] 1 CMLR 645, ECJ	7.45, 7.67, 7.70, 7.107, 7.117, 7.118

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C-473/93: EC Commission v Luxembourg (public service employment), Re [1997] ECR I-3207, [1996] 3 CMLR 981, ECJ	7.1, 7.47, 7.72
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C-5/94: R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd [1997] QB 139, [1996] All ER (EC) 493, [1996] 3 WLR 787, [1996] ECR I-2553, [1996] 2 CMLR 391, ECJ	7.49
C-7/94: Landesamt für Ausbildungsförderung Nördrhein-Westfalen v Gaal (Oberbundesanwalt beim Bundesverwaltungsgericht intervening) [1995] All ER (EC) 653, [1995] ECR I-1031, [1995] 3 CMLR 17, ECJ	7.106
C-55/94: Gebhard v Consiglio dell 'Ordine degli Avvocati e Procuratori di Milano [1996] All ER (EC) 189, [1995] ECR I-4165, [1996] 1 CMLR 603, [1995] TLR 672, ECJ	7.117
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C-249/96: Grant v South-West Trains Ltd [1998] ECR I-621, [1998] 1 CMLR 993, [1998] ICR 449, [1998] IRLR 206, [1998] 1 FCR 377, [1998] 1 FLR 839, [1998] Fam Law 392, 3 BHRC 578, sub nom Grant v South West Trains Ltd: C-249/96 [1998] All ER (EC) 193, ECJ	8.81
C-262/96: Sürül v Bundesanstalt für Arbeit [1999] ECR I-2685, [2001] 1 CMLR 69, [1999] All ER (D) 462, ECJ	7.113, 7.115, 7.164
C-348/96: Calfa (criminal proceedings against) [1999] All ER (EC) 850, [1999] ECR I-11, [1999] 2 CMLR 1138, [1999] 19 LS Gaz R 30, ECJ	3.69, 7.136, 7.137, 7.141, 15.18
C-369/96 and C-376/96: Criminal proceedings against Arblade [2001] ICR 434, (1999) Times, 7 December, [1999] All ER (D) 1307, ECJ	7.79
C-416/96: El-Yassini v Secretary of State for the Home Department [1999] All ER (EC) 193, [1999] ECR I-1209, [1999] 2 CMLR 32, ECJ	7.36, 7.46, 7.50, 7.167
C-1/97: Birden v Stadtgemeinde Bremen [1998] ECR I-7747, [1999] 1 CMLR 420, ECJ	7.156, 7.157, 7.158
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C-210/97: Akman v Oberkreisdirektor des Rheinische-Bergischen-Kreises [1998] ECR I-7519, [2001] 1 CMLR 461, ECJ	7.156, 7.163
C-329/97: Ergat v Stadt Ulm [2000] ECR I-1487, ECJ	7.156, 7.162, 7.163, 7.165
C-337/97: Meusen v Hoofddirectie van de Informatie Beheer Groep [1999] ECR I-3289, [2000] 2 CMLR 659, [1999] All ER (D) 585, ECJ	7.117
C-340/97: Nazli v Stadt Nürnberg [2000] ECR I-957, [2000] All ER (D) 165, ECJ	7.134, 7.136, 7.137, 7.141, 7.156, 7.160, 7.165, 15.21, 15.34
C-424/97: Haim v Kassenzahnärztliche Vereinigung Nordrhein [2000] ECR I-5123, [2002] 1 CMLR 247, ECJ	7.49
C-37/98: R v Secretary of State for the Home Department, ex p Savas [2000] All ER (EC) 627, [2000] 1 WLR 1828, [2000] ECR I-2927, [2000] 3 CMLR 729, [2000] All ER (D) 638, ECJ	4.30, 7.46, 7.166, 9.25
C-65/98: Safet Eyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg [2000] ECR I-4747, [2000] 3 CMLR 1049, ECJ	7.103
C-69/98: Eyup, Re [2000] ECR I-4747, ECJ	7.161
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C-195/98: Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v Republik Österreich [2000] ECR I-10497, [2002] 1 CMLR 375, ECJ	7.50
C-224/98: D'Hoop v Office National de l'Emploi [2003] All ER (EC) 527, [2002] ECR I-6191, [2002] 3 CMLR 309, [2004] ICR 137, [2002] All ER (D) 180 (Jul), ECJ	7.82, 7.113
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C-356/98: Kaba v Secretary of State for the Home Department [2000] All ER (EC) 537, [2000] ECR I-2623, [2003] 1 CMLR 1150, ECJ	7.50, 7.115
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C-184/99: Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve [2003] All ER (EC) 385, [2001] ECR I-6193, [2002] 1 CMLR 543, [2002] ICR 566, (2001) Times, 16 November, [2001] All ER (D) 57 (Sep), ECJ	7.83, 7.126
C-192/99: R (on the application of Kaur) v Secretary of State for the Home Department (JUSTICE, intervening) [2001] All ER (EC) 250, [2001] ECR I-1237, [2001] 2 CMLR 505, [2001] All ER (D) 238 (Feb), ECJ	1.39, 2.6, 7.62
C-257/99: R (on the application of Barkoci) v Secretary of State for the Home Department [2001] All ER (EC) 903, [2001] ECR I-6557, [2001] 3 CMLR 1124, (2001) Times, 13 November, [2001] All ER (D) 86 (Sep), ECJ	9.25, 10.11

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C-413/99: Baumbast v Secretary of State for the Home Department [2002] ECR I-7091, [2002] 3 CMLR 599, [2003] ICR 1347, [2003] INLR 1, (2002) Times, 8 October, [2002] All ER (D) 80 (Sep), ECJ	1.40, 7.59, 7.85, 7.88, 7.91, 7.96, 7.103, 7.104, 7.106, 7.107, 7.109, 7.132, 13.23, 13.155
C-459/99: Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL v Belgium [2002] ECR I-6591, [2003] 1 WLR 1073, [2002] 3 CMLR 681, [2002] All ER (D) 113 (Aug), ECJ	1.40, 7.59, 7.64, 7.88, 7.97, 7.110, 7.123, 7.124, 7.142
C-60/00: Carpenter v Secretary of State for the Home Department [2003] QB 416, [2002] ECR I-6279, [2003] All ER (EC) 577, [2003] 2 WLR 267, [2002] 2 CMLR 1541, [2003] 2 FCR 711, [2002] INLR 439, (2002) Times, 20 July, [2002] All ER (D) 182 (Jul), ECJ ...	1.40, 7.50, 7.52, 7.64, 7.67, 7.88, 7.96, 7.97, 7.117, 8.83, 11.3
C-188/00: Kurz v Land Baden-Württemberg [2002] ECR I-10691, [2002] All ER (D) 268 (Nov), ECJ	7.156, 7.157, 7.158, 7.160
C-438/00: Deutscher Handballbund eV v Kolpak [2003] ECR I-4135, [2004] 2 CMLR 909, [2003] All ER (D) 71 (May), ECJ	7.70
C-109/01: Secretary of State for the Home Department v Akrich [2004] QB 736, [2004] All ER (EC) 687, [2003] ECR I-9607, [2004] 2 WLR 871, [2003] 3 CMLR 875, (2003) Times, 26 September, [2003] All ER (D) 150 (Sep), ECJ	1.40, 7.64, 7.95, 7.97, 7.98, 7.100
C-257/01: EC Commission v EU Council [2005] All ER (D) 115 (Jan), ECJ	7.39
C-317/01 and C-369/01: Abatay v Bundesanstalt für Arbeit [2003] All ER (D) 342 (Oct), ECJ	7.157, 7.166
C-405/01: Colegio de Oficiales de la Marina Mercante Española v Administración del Estado [2003] All ER (D) 61 (Oct), ECJ	7.72
C-413/01: Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst [2004] All ER (EC) 765, [2003] All ER (D) 75 (Nov), ECJ	7.71
C-138/02: Collins v Secretary of State for Work and Pensions [2005] QB 145, [2004] ECR I-2703, [2004] All ER (EC) 1005, [2004] 3 WLR 1236, [2004] 2 CMLR 147, [2005] ICR 37, (2004) Times, 30 March, [2004] All ER (D) 424 (Mar), ECJ	7.113, 7.124, 13.21
C-148/02: Garcia Avello v Belgium [2004] All ER (EC) 740, [2003] ECR I-11613, [2004] 1 CMLR 1, [2003] All ER (D) 38 (Oct), ECJ	1.40, 7.63, 7.68, 7.113
C-200/02: Chen v Secretary of State for the Home Department [2005] QB 325, [2005] All ER (EC) 129, [2004] 3 WLR 1453, [2004] 3 CMLR 1060, [2005] INLR 1, (2004) Times, 21 October, [2004] All ER (D) 253 (Oct), ECJ ...	1.40, 7.63, 7.68, 7.86, 7.103, 7.106, 7.109, 7.111, 7.132
C-275/02: Ayaz v Land Baden-Württemberg [2004] All ER (D) 188 (Sep), ECJ	7.105, 7.161
C-327/02: Panayotova v Minister voor Vreemdelingenzaken en Integratie [2004] All ER (D) 266 (Nov), ECJ	7.166, 10.11, 12.162
C-341/02: EC Commission v Germany [2005] All ER (D) 172 (Apr), ECJ	7.138
C-456/02: Trojani v Centre Public d'Aide Sociale de Bruxelles (CPAS) [2004] ECR I-7573, [2004] All ER (EC) 1065, [2004] 3 CMLR 820, [2004] All ER (D) 36 (Sep), ECJ	7.70, 13.23
C-467/02: Cetinkaya v Land Baden-Württemberg [2004] All ER (D) 193 (Nov), ECJ	7.162, 7.165
C-157/03: EC Commission v Spain [2005] ECR I-2911, [2005] All ER (D) 164 (Apr), ECJ	7.64, 7.97, 7.110, 7.123, 7.124
C-209/03: R (on the application of Bidar) v Ealing London Borough Council [2005] QB 812, [2005] All ER (EC) 687, [2005] 2 WLR 1078, (2005) Times, 29 March, [2005] All ER (D) 235 (Mar), ECJ	7.83, 7.106, 7.113
C-215/03: Oulane v Minister voor Vreemdelingenzaken en Integratie [2005] QB 1055, [2005] ECR I-1215, [2005] 3 WLR 543, (2005) Times, 21 February, [2005] All ER (D) 255 (Feb), ECJ	7.111
C-230/03: Sedef v Freie und Hansestadt Hamburg [2006] All ER (D) 07 (Jan), ECJ	7.155, 7.157, 7.158
C-445/03: European Commission v Luxembourg [2004] All ER (D) 287 (Oct), ECJ	7.78

C-503/03: European Commission v Spain [2006] ECR I-1097, [2007] All ER (EC) 797, ECJ	7.136
C-540/03: European Parliament v European Council [2007] All ER (EC) 193, [2006] 3 CMLR 779, [2006] 2 FCR 461, [2006] All ER (D) 320 (Jun), ECJ	7.114
C-1/05: Jia v Migrationsverket [2007] QB 545, [2007] All ER (EC) 575, [2007] 2 WLR 1005, [2007] 1 CMLR 1260, [2008] 3 FCR 491, [2007] All ER (D) 22 (Jan), ECJ	7.94, 7.95, 7.97, 7.111, 13.23
C-16/05: R (on the application of Tum) v Secretary of State for the Home Department [2008] 1 WLR 94, [2008] 1 CMLR 18, [2007] All ER (D) 115 (Sep), ECJ	7.166
C-77/05: United Kingdom v European Council [2007] All ER (D) 268 (Dec), ECJ	7.32, 7.37
C-137/05: United Kingdom v European Council [2007] All ER (D) 271 (Dec), ECJ	7.32, 7.37
C-341/05: Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet [2008] All ER (EC) 166, [2008] IRLR 160, [2007] All ER (D) 278 (Dec), ECJ	7.79
C-438/05: International Transport Workers' Federation v Viking Line ABP [2008] All ER (EC) 127, [2008] 1 CMLR 1372, [2008] ICR 741, [2008] IRLR 143, (2007) Times, 14 December, [2007] All ER (D) 158 (Dec), ECJ	7.79
C-294/06: R (on the application of Payir) v Secretary of State for the Home Department [2008] All ER (D) 155 (Jan), ECJ	7.83, 7.157
C-33/07: Ministerul Administratiei si Internelor-Directia Generala de Pasapoarte Bucuresti v Jipa [2008] 3 CMLR 715, [2008] All ER (D) 138 (Jul), ECJ	7.67, 7.120, 7.134
C-465/07: Elgafaji v Staatssecretaris van Justitie [2009] All ER (D) 157 (Feb), ECJ	12.188A
C-523/07: A (Area of Freedom, Security and Justice) [2009] ECR I-0000	11.15, 11.18
C-127/08: Metock v Minister for Justice, Equality and Law Reform [2009] All ER (EC) 40, [2008] 3 CMLR 1167, [2008] 3 FCR 425, [2008] All ER (D) 344 (Jul), ECJ	7.97A, 7.97B, 7.110A, 7.110B, 11.3, 11.51

INTRODUCING IMMIGRATION LAW

INTRODUCTION

1.1 The cornerstone of UK immigration law is still the Immigration Act 1971, which came into force on 1 January 1973, and the Immigration Rules made under it. However, the 1971 Act has been significantly amended and added to by a vast accretion of statute law: the British Nationality Act 1981, the Immigration (Carriers' Liability) Act 1987, the Immigration Act 1988, the Asylum and Immigration Appeals Act 1993, the Asylum and Immigration Act 1996, the Special Immigration Appeals Commission Act 1997, the Immigration and Asylum Act 1999, the Nationality, Immigration and Asylum Act 2002, the Civil Partnership Act 2004, the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, the Immigration and Nationality Act 2006, the UK Borders Act 2007, and part of the Criminal Justice and Immigration Bill 2008. Only the Immigration (Carriers' Liability) Act 1987 has been repealed in full by later Acts, but its provisions have been re-enacted and enlarged by the 1999 Act. Some consolidation has been done, but thirteen separate statutes still have to be consulted. In addition, the 1971 Act provisions have been modified as regards entry through the Channel Tunnel by the Channel Tunnel (International Arrangements) Order 1993.¹ As well as the Immigration Rules made under the 1971 Act, which have been made and amended, recast and consolidated on many occasions, there is a large body of statutory instruments, most made under provisions of the 1999 Act which, despite its size, often does no more than sketch fields, ranging from asylum support to the provision of immigration services, within which the regulations operate. There are further statutory instruments made under the 2002, 2004, 2006, 2007 and 2008 Acts, Codes of Practice under the several of these Acts, setting out, amongst other things, how penalties will be imposed on employers and how they, in turn, can avoid racial discrimination, and how lorry drivers, coach operators and others can avoid carriers' liability. Then there are the various procedure rules and practice directions for the Special Immigration Appeals Commission (SIAC) and the Asylum and Immigration Tribunal, which in April 2005 replaced the adjudicators and Immigration Appeal Tribunal which had been in existence since 1969. SIAC hears immigration appeals in national security cases, which are subject to their own procedure rules and practice directions. The Asylum and Immigration Tribunal is designed as a one-tier appeal system, which will sit in various combinations from a single immigration judge to a three-person legally qualified Tribunal headed by a High Court judge as President. SIAC also boasts a presiding High Court judge. A vast body of case law has come into being, both from the Tribunal and the courts, and is reported in two different sets of specialist reports as well as in various on-line sites. Keeping track of the law and practices have become an almost super human task and it will get worse if the government has its way on consolidation and reformation of immigration and asylum law immediately following on from the introduction during 2008 of the five-tier Australian-based points system.

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¹ SI 1993/1813, amended by SIs 1996/2283, 2000/913, 2000/1775, 2001/178, 2001/418, 2001/1544, 2001/3707, 2003/2799. See chapter 3, below.

A BRIEF HISTORY OF IMMIGRATION LAW

UK Borders Act 2007

1.23 The UK Borders Act 2007 received the Royal Assent on 30 October 2007, but only s 17 comes into force immediately. The rest will depend on the making of Commencement Orders.¹ The Act deals with a miscellany of matters as follows:

- **Powers at ports.** Sections 1–4 provide for the Secretary of State to designate suitably qualified immigration officers acting at ports in England and Wales and Northern Ireland to have the power to detain suspected criminals for up to three hours pending the arrival of the police.
- **Biometric registration.** Sections 5 and 6 confer a power to make regulations to require those subject to immigration control to apply for a document recording external physical characteristics – a ‘biometric immigration document’ (BID), which can then be used in specified circumstances where a question arises about a person’s status in relation to nationality or immigration. The Act also deals with the consequences of non-compliance with this compulsory registration.
- **Treatment of claimants.** This part of the Act contains a mixed bag of changes. Section 16 increases the number of conditions which can be attached to a limited leave to enter or remain under s 3(1)(c) of the Immigration Act 1971 to include a reporting and/or residency condition.² Section 17 provides that an asylum-seeker remains eligible for support during an appeal related to his or her asylum claim. Section 18 provides for a power of arrest without warrant by immigration officers of those suspected of offences relating to asylum support fraud. Section 19 cuts down the giving of post-decision evidence in an appeal against the refusal of a points-based application, which currently only applies to the Highly Skilled Migrants Programme (see chapter 10). Section 20 extends the government’s fee collecting powers to allow over-cost charges in connection with the sponsorship of migrants and cross-subsidies between certain in-country services and between certain in-country and overseas services. Section 21 makes provision for the Secretary of State to issue a code of practice to keep children safe from harm while they are in the UK.
- **Enforcement.** This part of the Act introduces a new offence of assaulting an immigration officer; gives immigration officers new powers to seize cash deal with the conditions under which cash may be seized and allows detained property to be forfeited and disposed of not just to the police but also to the Secretary of State.³ More powers of arrest are given to immigration officers in cases of illegal employment and the Act widens the ambit of the offence of facilitating an asylum-seeker’s entry to the UK and extends the territorial reach of the various facilitation

offences. Similar changes are made to widen the ambit and extend the territorial reach of existing trafficking for exploitation offences. See chapter 14 for more details.

- **Automatic deportation of criminals.** This is the part of the Act which is most media driven and has received the widest publicity. Sections 32–39 detail the conditions and procedure under which a foreign national prisoner will be automatically deported. They specify those foreign nationals subject to compulsory deportation and the sentences that will trigger it. See chapter 15 for more details.
- **Information.** Sections 40 to 43 deal with the information sharing arrangements between the Border and Immigration Agency (BIA) (now the UKBA), HM Revenue and Customs (HMRC) and Revenue and Customs Prosecution Office. The Act includes safeguards to protect confidentiality and wrongful disclosure. Sections 44 to 46 allow an immigration officer, a police constable or a designated police civilian to search premises for evidence of an arrested individual's nationality and to retain and copy these documents.
- **Border and Immigration Inspectorate.** Sections 48 to 56 establish a single independent inspectorate for the (BIA) (now the UKBA). This will replace the existing inspecting bodies. See below for more details.
- **Senior President of Tribunals.** Section 56 adds cases coming before the Asylum and Immigration Tribunal to the reporting remit of the Senior President of Tribunals under s 43(3) of the Tribunals, Courts and Enforcement Act 2007.

The UK Borders Act 2007 extends to the whole of the UK, with three exceptions, ss 1–4 relating to powers of detention for immigration officers at ports, s 25 relating to forfeiture of property, and s 31(1) and (2) relating to trafficking offences. These will only apply to England, Wales and Northern Ireland, but not Scotland. Provision of the Act may be extended to any of the Channel Islands or to the Isle of Man by Order in Council.

¹ Under the UK Borders Act 2007 (Commencement No 1 and Transitional Provisions) Order 2008, SI 2008/99, the following sections of the Act came into force on 31 January 2008: s 1–4 (detention at ports); ss 5–8 (biometric registration: regulations); s 10 (biometric registration: objection to penalty) for the purposes of making an order under sub-ss (2) and (4); s 11 (biometric registration: appeal in respect of penalty) for the purposes of making rules under sub-s (6); s 13 for the purposes of issuing a code of practice under sub-s (1) and making an order under sub-s (6) (biometric registration: code of practice regarding penalty); ss 14 and 15 (biometric registration: prescribed matters and interpretation); subject to Art 3, s 16 (conditional leave to enter or remain); s 18 (support for asylum-seekers: enforcement); s 20 (fees); ss 22 and 23 (assaulting an immigration officer: offence and power of arrest); subject to the transitional provision in Art 4, s 26 (disposal of property) for the purposes of making regulations under sub-s (5); ss 29–31 (facilitation and trafficking); ss 40–43 (supply and wrongful disclosure of information); and in the Schedule (repeals the entries relating to (i) the Immigration Act 1971; (ii) the Immigration and Asylum Act 1999; (iii) s 130 of the Nationality, Immigration and Asylum Act 2002; (iv) the Commissioners for Revenue and Customs Act 2005; and (v) the Immigration, Asylum and Nationality Act 2006. Under the UK Borders Act 2007 (Commencement No 2 and Transitional Provisions) Order 2008, SI 2008/309 the following sections will come into force on 29 February 2008: Subject to Art 5, ss 27 and 28 (police powers in relation to employment); on 31 March 2008, subject to Art 6, s 25 (forfeiture of detained property) and ss 44–47 (Search and seizure of nationality material); 1 April 2008, subject to Art 7, s 26 (disposal of property) so far as not already in force;

1.23 Introducing Immigration Law

ss 48–56 (matters pertaining to the setting up of the Borders and Immigration Inspectorate); the Schedule (repeals) to the extent it is not in force. The transitional provisions make savings for the arrest and other powers relating to employment begun before 29 February 2008. There have been four more commencement Orders: (i) the UK Borders Act 2007 (Commencement No 2 and Transitional Provisions) Order 2008, SI 2008/309, brought into force on 29 February 2008: s 25 (forfeiture of detained property) subject to transitional provisions; ss 27 (employment: arrest); and 28 (employment: search for personnel records) (subject to transitional provisions); ss 44–47 (search for evidence of nationality and seizure of nationality documents), on 31 March 2008; and ss 48–56 (Border and Immigration Inspectorate: appointment, office, reports, plans etc (ss 51–53 for the purposes of making orders); and the Schedule (repeals) to the extent to which it is not already in force; on 1 April 2008; (ii) the UK Borders Act 2007 (Commencement No 3 and Transitional Provisions) Order 2008, SI 2008/1818 brought into force on the 1 August 2008 the automatic deportation provisions of the UK Borders Act 2007. There are transitional provisions for those in custody at the time of commencement or whose sentences are suspended. This is provided such a person has not been served with a notice of a decision to make a deportation order under s 5 of the Immigration Act 1971 before commencement; (iii) the UK Borders Act 2007 (Commencement No 4) Order 2008, SI 2008/ 2822, which brought into force on 25 November 2008 the biometric registration provisions of the 2007 Act not yet in force, namely, ss 9 and 12, and the not yet operative parts of ss 10, 11 and 13; and (iv) the UK Borders Act 2007 (Commencement No 5) Order 2008, SI 2008/3136 which is to be read with the UK Borders Act 2007 (Code of Practice on Children) Order 2008, SI 2008/3158, which brought into force on 6 January 2009 the *Code of Practice for Keeping Children Safe from Harm* issued by the Secretary of State for the Home Department.

- ² A condition under s 3(1)(c)(iv) and (v) of the Immigration Act 1971 (general provisions for regulation and control) may be added to leave given before the passing of the 2007 Act; UK Borders Act 2007 (Commencement No. 1 and Transitional Provisions) Order 2008, SI 2008/99, Art 3.
- ³ Regulations made under s 26(5) of the 2007 Act may have effect in relation to property which came into the possession of an immigration officer or the Secretary of State before the passing of the 2007 Act: UK Borders Act 2007 (Commencement No 1 and Transitional Provisions) Order 2008, SI 2008/99, Art 4.

Criminal Justice and Immigration Act 2008

1.24 The Criminal Justice and Immigration Act 2008 creates a new special immigration status.¹ It allows the Secretary of State to designate to this status a foreign criminal and his or her family members,² where the foreign criminal is liable to deportation, but cannot be removed from the UK because of s 6 of the Human Rights Act 1998. A number of people are excluded from the ambit of the new rules:

- (i) those with the right of abode in the UK;
- (ii) those whose designation the Secretary of State thinks would breach either (a) the UK's obligations under the Refugee Convention, or (b) the person's rights under the EC law.³

The Act also makes further provision for the repatriation of prisoners by amending the Repatriation of Prisoners Act 1984, by enabling a British escort to deliver a prisoner to a point of arrival in the receiving country and paving the way for the UK to ratify the Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons which provides for the transfer of prisoners without their consent where the prisoner is to be deported at the end of the sentence or where a prisoner has fled from one jurisdiction to another in order to avoid imprisonment.⁴

- ¹ Criminal Justice and Immigration Act 2008, ss 130–137 and Sch 27, para 36. For more details, see Blackstone's Guide to the Criminal Justice and Immigration Act 2008, edited by Maya Sikand. These provisions are not yet in force.
- ² Criminal Justice and Immigration Act 2008, s 130(1)–(3).
- ³ Criminal Justice and Immigration Act 2008, s 130(4) and (5).
- ⁴ Criminal Justice and Immigration Act 2008, ss 93–96, brought into force on 14 July 2008 by the Criminal Justice and Immigration Act 2008 (Commencement No 2 and Transitional and Saving Provisions) Order 2008, SI 2008/1586.

Borders, Citizenship and Immigration Bill 2008

1.24A The Borders, Citizenship and Immigration Bill 2008 contains extensive provision in Part 1 for amalgamating Immigration and Customs functions. Part 2 will make changes to the acquisition of British citizenship by naturalisation and to the right of abode.¹ Part 3 makes a number of changes to immigration law. Clause 46 paves the way for the introduction of immigration controls at the borders between Ireland and the UK and other parts of the common travel area (see further in chapter 6). A power to impose a condition on a student's leave to enter or remain restricting his or her studies is contained in clause 47. This means that any changes of study would need Home Office permission, thereby reversing an important part of the very sensible Court of Appeal decision in *Omerenna Obed v Secretary of State for the Home Department*.² Clause 48 makes provision for the fingerprinting of foreign criminals liable to automatic deportation and clause 49 extends ss 1–4 of the UK Borders Act 2007 to Scotland. Part 4 introduces miscellaneous changes. First, clause 50 deals with the proposed new Tribunal structure for immigration appeals. Under the Tribunals, Courts and Enforcement Act 2007 a new two tier tribunal structure is established under s 3; the First-tier Tribunal and the Upper Tribunal. These new tribunals already encompass tribunals dealing with Social Security, Pensions, Mental Health Review and Special Educational Needs.³ Clause 50 of the BCI Bill now makes provision for the transfer of immigration and nationality judicial review applications in the High Courts of England and Wales and Northern Ireland and in the Court of Session in Scotland to the new Upper Tribunal. Clause 51 imposes a duty on the Secretary of State to have regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, when discharging any functions in relation to immigration, asylum or nationality.

¹ According to the government website the Bill 'will lay down a radical new approach to British citizenship that will require all migrants to speak English and obey the law if they want to gain citizenship and stay permanently in Britain – while speeding up the path to citizenship for those who contribute to the community by being active citizens. Under the new system, full access to benefits and social housing will be reserved for citizens and permanent residents – which means if you are not a citizen full access to benefits will not be allowed.'

² [2008] EWCA Civ 747, [2008] Imm AR 747.

³ See the Transfer of Tribunal Functions Order 2008, SI 2008/2833.

SOURCES OF IMMIGRATION LAW AND PRACTICE

The prerogative

1.26 The prerogative powers of the Secretary of State for the Home Department are another source of immigration law. Section 33(5) of the Immigration

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Act 1971 states that the Act ‘shall not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of her prerogative’. A similar reservation was made in the Aliens Restriction Act 1914, which was passed at the beginning of World War I. The view then was that it referred to a prerogative power to deal with enemy aliens, and it is thought that this is also the full and correct ambit of the reservation in the Immigration Act 1971. See 1.4–1.5 above. The issue of passports to British citizens involves a quite separate prerogative power, which we describe at 2.67–2.73 below. The prerogative power was recently discussed in the House of Lords in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*,¹ where Lord Hoffman, giving a majority opinion, said:

‘The Crown has no authority to transport anyone beyond the seas except by statutory authority. At common law, any subject of the Crown has the right to enter and remain in the United Kingdom whenever and for as long as he pleases: see *R v Bhagwan* [1972] AC 60. The Crown cannot remove this right by an exercise of the prerogative. That is because since the 17th century the prerogative has not empowered the Crown to change English common or statute law. In a ceded colony, however, the Crown has plenary legislative authority. It can make or unmake the law of the land.’

For further comment, see 2.22, below.

¹ [2008] UKHL 61, [2008] 4 All ER 1055.

The Immigration Rules

1.32 Where changes are made to the Immigration Rules, it is sometimes difficult to establish whether the old or new rules apply. The transitional provisions in the current Rules, HC 395, which provide that applications extant prior to their coming into force would be decided under the previous rules, do not unfortunately create a general principle applicable to the later amendments made to HC 395. Paragraph 4 of the Rules is quite specifically dealing with the transition from HC 251 to HC 395 on 4 October 1994. It may however be arguable from general principles of fairness and against retroactivity that the logic behind para 4 is one of general application and that applications extant prior to their coming into force will be decided under the previous rules.¹ We suggest that the same logic should apply with regard to the amendments, so that applications made before the amendments take effect should be dealt with under the unamended rules. Any other rule penalises the applicant for Home Office delays. However, the Tribunal has repeatedly held that absent transitional provisions to the contrary effect, the applicable rules are those in force at the time of the decision.² New editions of the Rules often contain transitional provisions which may give rise to problems of interpretation.³

¹ See HC 395, para 4; *R v Immigration Appeal Tribunal, ex p Nathwani* [1979–80] Imm AR 9, QBD.

² *PP (India)* [2005] UKAIT 00141; *MO (Nigeria)* [2007] UKAIT 00057; *EO (Turkey)* [2007] UKAIT 00062. See *MO (Nigeria) v Secretary of State for the Home Department* [2008] EWCA Civ 308, [2009] 1 WLR 126, below at 1.33, fn 2.

- ³ For reported decisions on transitional provisions see *Shamseddin v Secretary of State for the Home Department* [1981] Imm AR 66; *Kamry v Secretary of State for the Home Department* [1981] Imm AR 118; *Pope* [1987] Imm AR 10; *Minah Begum v Secretary of State for the Home Department* [1990] Imm AR 38; *Pardeepan v Secretary of State for the Home Department* [2000] INLR 447. See also chapter 18 below.

1.33 There has been considerable debate about the legal status of the Immigration Rules – whether they are rules of law or not. In *Pearson v Immigration Appeal Tribunal*¹ the Court of Appeal stated that although the Rules are not delegated legislation or rules of law, but rules of practice laid down for the guidance of those entrusted with the administration of the Act, they had the force of law for those hearing immigration appeals.² This is made clear by s 86(3) of the Nationality, Immigration and Asylum Act 2002, which provides that the Tribunal ‘must allow the appeal if it thinks that a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including Immigration Rules)’. It is, therefore, clear that the rules are far more a source of law than, for example, the Code of Practice for employers under s 23 of the Immigration and Nationality Act 2006,³ which is a relevant consideration in deciding whether an employer has discriminated unlawfully in hiring or refusing to hire someone. The Rules have more immediate and binding effect, as any cursory reading of the reported decisions of the Tribunal and the former IAT makes clear. The Tribunal is always concerned to see whether immigration officials have followed the Immigration Rules applicable to the case. If they have failed to do so, the appeal must be allowed.⁴ If the Rule gives the immigration official a discretion, the Tribunal can review the exercise of that discretion and decide that it ought to have been exercised differently.⁵ If, however, the wording of the Rule is in mandatory terms and the immigration officer has followed it, the prevailing view is that there is no exercise of discretion by the immigration officer to review on the merits and so there is no room for any decision under s 86(3)(b).⁶ As immigration law becomes more sophisticated, the Immigration Rules tend to be drafted in a more comprehensive form.⁷ The current Rules make it mandatory to refuse entry clearance, leave to enter, or a variation for a purpose not covered by the Rules,⁸ putting at risk all those whose immigration status is and remains regulated outside the Rules, such as carers of UK-based relatives, and asylum seekers granted exceptional leave. However, more and more concessionary policies have been incorporated into the rules since October 2000, in accordance with the requirements of consistency and transparency mandated by the ECHR.⁹

¹ [1978] Imm AR 212.

² See further *R v Secretary of State for the Home Department, ex p Hosenball* [1977] 3 All ER 452, [1977] 1 WLR 766, CA. In *MO (Nigeria) v Secretary of State for the Home Department* [2008] EWCA Civ 308, [2009] 1 WLR 126, it was held that the Immigration Rules are not delegated or subordinate legislation and therefore were not subject to the Interpretation Act 1978. Therefore, the Home Office was entitled to apply the Immigration Rules in force at the time that it considered an immigration application and not the Rules that were in force when the application was made; unless transitional provisions stated otherwise.

³ Which came into force on 31 August 2006: Immigration, Asylum and Nationality Act 2006 (Commencement No 2) Order 2006, SI 2006/2226.

⁴ Nationality, Immigration and Asylum Act 2002, s 86(3)(a), amended by Asylum and Immigration (Treatment of Claimants, etc) Act 2004, Sch 2, para 18.

⁵ NIAA 2002, s 86(3)(b) as amended.

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- ⁶ NIAA 2002, s 86(3) as amended. See e.g. *Kausar* [1998] INLR 141 (decided under the 1971 Act). Such a decision may be not in accordance with the law because of incompatibility with the Refugee or Human Rights Convention, or race discrimination, or because it contravenes general principles of administrative law: see chapter 18 below.
- ⁷ For a discussion of the appellate jurisdiction under the old rules, see the fourth edition at 2.51.
- ⁸ HC 395, paras 320(1) and 322(1). See also *Somasundaram v Entry Clearance Officer* [1990] Imm AR 16.
- ⁹ Former policies incorporated into the Immigration Rules include those on domestic workers in private households (now HC 395, paras 159A–H, inserted by Cm 5597 on 27 August 2002); ministers of religion not admitted in that capacity (now HC 395, paras 173, 174A–B, inserted by Cm 6297 on 3 August 2004); exercising access rights to a UK-based child (now HC 395, paras 246–248F, substituted and inserted by Cm 4851 on 2 October 2000); long residence (now HC 276A–D, inserted by HC 538 on 31 March 2003); Gurkhas and foreign or Commonwealth citizens discharged from HM forces (now HC 395, paras 276F–276Q, inserted by HC 1112 on 18 October 2004); domestic violence (now HC 395, para 289A–D, inserted by HC 104, 26 November 2002); unmarried partners (now HC 395, paras 295A–O, inserted by Cm 4851 on 2 October 2000); children brought to the UK for adoption (now HC 395, para 316A–D, inserted by Cm 5829 on 30 May 2003).

1.34 The debate about the legal status of the Immigration Rules has been given a twist by the enactment of s 50 of the IAN 2006. This section gave the Secretary of State the power to use the Immigration Rules to prescribe the procedures to be followed in making applications for leave. New rules have now been made.¹ This novel way of proceeding has now replaced s 31A of the Immigration Act 1971 which required a statutory instrument to set out the procedures for making immigration applications for leave, variations of leave and so forth, and s 25 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 which dealt with applications for permission to marry. So are the Rules still rules of practice with consequences in appeals and judicial review or are they now, at least in part, to be regarded as delegated legislation?²

¹ HC 395, paras 34–34J.

² When prescribed application forms were first made compulsory in 1996, it was done under the Immigration Rules (HC 395, para 32, as amended by HC 329, effective from 3 June 1996). In *R v Secretary of State for the Home Department, ex p Immigration Law Practitioners Association* [1997] Imm AR 189, Collins J held that the statutory power under s 3(2) of the Immigration Act 1971 was broad enough to allow the Secretary of State to redefine how an application should be made.

Immigration directorate instructions and policy guidance

1.36 In 1.2 we refer to a whole collection of Guidance notes and internal instructions, issued by the UKBA section of the Home Office and by the Foreign and Commonwealth Office. In many court and tribunal cases it been emphasised that the IDIs are instructions by the Secretary of State to her officers – they are not part of any statute, or statutory instrument, and they are not part of the Immigration Rules. The Secretary of State is not entitled by instructions to her officers to restrict the rights which would otherwise exist under legislation and the Immigration Rules. So it follows that the IDIs can be of relevance in an appeal only if they exactly reflect the contents of legislation and the Immigration Rules or if they are more generous than the combination

of those other sources.¹ The IDIs do give rise to a legitimate expectation that any policy approach that they contain will be followed² and the Secretary of State has an obligation to place before the Tribunal any policy material that may be of relevance to an issue in an appeal.³ IDIs are instructions to immigration officers, who although having clear statutory duties in relation to leave to enter, can be given instructions by the Secretary of State.⁴ It has been held that Entry Clearance Officers (ECOs) could have no duty imposed on them by the IDIs, which do not apply to ECOs, but only to Immigration Officers.⁵ In *(R on the application of NA (Iraq)) v Secretary of State for the Foreign and Commonwealth Affairs*⁶ it was held that under the Immigration Rules it was for the ECO to take the decision on the validity of a passport and, although he or she may be given guidance by the Secretary of State, he or she could not be instructed what decision should be. Nevertheless, there are occasions when the Tribunal or court may need to interpret an instruction to see in what situations it applies.⁷ Home Office policies, although not based on statute, delegated legislation, or the Immigration Rules, can make a decisive difference in determining the legality of Home Office actions, particularly in the area of detention, as we see in chapter 17.⁸ In *US (Nepal) v Secretary of State for the Home Department*⁹ the Court of Appeal found that the AIT had erred in law when it failed to look at relevant Immigration Directorate Instructions which set out a more generous and liberal policy in relation to abused domestic workers.

Latest changes noted, as at 4 February 2009: Chapter 2 – Visitors; 30 January 2009: Chapter 13, Section 5 – Revocation of deportation orders; 28 January 2009: Chapter 13, Section 1 – Deportation; 24 January 2009: Chapter 13, Section 5 – Revocation of deportation orders (not on site); 23 January 2009: Chapter 1 – Right of abode. This is not by any means a full trawl and readers will know that the instructions are always changing and should always consult the UKBA website. See [http://www.ukba.homeoffice.gov.uk/policy and law/](http://www.ukba.homeoffice.gov.uk/policy%20and%20law/).

¹ *JL (Domestic violence: evidence and procedure) India* [2006] UKAIT 00058.

² *R v Secretary of State for the Home Department, ex p Popatia and Chew* [2000] EWHC 556, QB.

³ *AA (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 12, (2007) Times, 2 February, [2007] All ER (D) 250 (Jan).

⁴ See the Immigration Act 1971, s 4(1) and Sch 1, para 1.

⁵ *MN (Non-recognised adoptions: unlawful discrimination?) India* [2007] UKAIT 00015 (12 February 2007).

⁶ [2007] EWCA Civ 759, (2007) Times, 29 August, [2007] All ER (D) 409 (Jul).

⁷ *KL (Student: IDI 'warning' about progress) India* [2007] UKAIT 00005 (12 January 2007).

⁸ For a recent example, see the very carefully constructed judgment of Wyn Williams J in *S R (on the application of S) v Secretary of State for the Home Department* [2007] EWHC 1654 (Admin), [2007] All ER (D) 290 (Jul) where the Admin Court was deciding the legality of the detention of a minor.

⁹ [2009] EWCA Civ 208, [2009] All ER (D) 217 (Jan).

Administrative practice and discretion outside the Immigration Rules

1.37 Unfortunately, the Immigration Rules are not a comprehensive code of all the practices regulating entry into the UK. There are still gaps, some of which are covered by well-known practices, which in some cases have an

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almost equivalent status to the Rules but for reasons best known to the Home Office are not incorporated into them. For example, there are numerous examples, which we set out in chapters 9 and 10 of special visitors who are allowed to come to the UK often for study, research or employment outside the Immigration Rules. Under the Consular Fees (Amendment) (No 2) Order 2007¹ the fees charged to three categories of sportsmen and entertainers were dramatically reduced following their protest. Yet the only place, where the basis of their entry could at that time be found was in the IDI, not the Rules. However, that deficiency has now been rectified – entertainers and sports persons have now found their way into the Rules.² Secondly, the Secretary of State or immigration official is frequently asked to sanction a waiver of part of a Rule, or a departure from the Rule, based on the particular personal circumstances of the applicant, usually of a compassionate nature. Alternatively, the departure may be of such general application that it has become something of a practice or general concession, at least for the time being. For example, under current Home Office policy, those given humanitarian protection are dealt with in the Immigration Rules, but those given discretionary leave are not. Most of these policies are now collected and put into the Immigration Directorate Instructions (IDI), Asylum Policy Instructions (API), Nationality Instructions (NI) and the Operational Enforcement Manual (OEM), published (or partly published – some parts are withheld) by the Home Office since 1998 as part of its commitment to greater transparency or openness. These instructions are an invaluable guide, not just to policies outside the Rules but also to latest Home Office practice in the interpretation of the Rules. The equivalent policies and practices in dealing with entry clearance applications are the Diplomatic Service Procedures (DSP), available on the UK Visas website. However, as the UKBA has largely taken overall responsibility for immigration home and abroad, the various instructions are now being more conveniently published under the policy section of the UKBA website.³ We refer to relevant IDI, API, DSP etc throughout this work. The Home Office has also recently published its European Directorate Instructions (EDI). These fall into a different category, since they merely represent Home Office interpretation – sometimes contentious – of binding EC law. As such, they should be read with discernment and care.

¹ SI 2007/2124.

² See chapter 9, below.

³ The UKBA website is to be found at <http://www.ukba.homeoffice.gov.uk>.

UK and EU law

1.40 The free movement provisions of the EC Treaty are reflected in s 7 of the Immigration Act 1988 and in the Immigration (European Economic Area) Regulations 2006.¹ The integration of domestic law with EU law on free movement, immigration and asylum proceeds apace. It was hoped that Articles 17 (ex Article 8) and 18 EC (ex Article 8a) would confer real citizenship rights on citizens of the EU, and particularly that the right of free movement would be an attribute of citizenship rather than ancillary to economic activity within the Community. That hope has been realised to a great extent through the *Baumbast*,² *Avello*³ and *Chen*⁴ cases, and free

movement has detached itself from the status of worker, student or self-employed person exercising rights of establishment, although it is still contingent on financial independence in these situations, and is still not available as against the national authorities of citizens' own States.⁵ The ECJ has also rejected the fiction of temporary admission in *Yiadam*,⁶ in holding that the safeguards against expulsion of those enjoying Treaty rights apply equally to those physically in the country for a period of time pending a decision on admission. The ECJ confirmed in *Akrich* that the motive for the exercise of free movement rights was not something which should concern Member States' authorities.⁷ However, the main finding in *Akrich* that to benefit from free movement rights the non-national spouse of an EU citizen exercising free movement rights must have been lawfully resident in a Member State, has now been overruled by the later ECJ decision in *Metock v Ireland*.⁸ This has led to serious questioning of the transposing of the Citizens' Directive into UK law in the EEA Regulations 2006. We examine these issues in chapter 7. Attempts to strengthen the human rights foundation of EC law have met with scant success outside the field of family life, where Article 8 ECHR has been applied to good effect in *Carpenter*⁹ and *MRAX*.¹⁰ In *Manjit Kaur*¹¹ the ECJ refused to get embroiled in the argument about the extent to which fundamental human rights contained in Protocols of the ECHR not signed by all Member States form part of the *corpus* of human rights on which the Community is founded, but may come alive again when the Lisbon Treaty becomes effective, since it incorporates more than a mere reference to the EU Charter of Fundamental Rights.¹² The terms of the treaties, whereby, first, 10, and now 12, new States have joined the EU, allow Member States to derogate from the free movement rights of nationals of ten of them,¹³ and the UK has done so to a limited extent, by requiring, as regards the eight East European countries, registration of employment as a prerequisite for stay in the country as a worker, and precluding reliance on welfare benefits for a period.¹³ As regards the two latest Member States, Bulgaria and Romania, a more severe regime for workers is in place (See chapter 7, below).

¹ SI 2006/1003.

² *Baumbast v Secretary of State for the Home Department* C-413/99 [2003] INLR 1.

³ *Avello v Belgium* C-148/02 [2004] All ER (EC) 740.

⁴ *Chen v Secretary of State for the Home Department*: C-200/02 [2005] QB 325, ECJ.

⁵ Except on return from the exercise of EC Treaty rights elsewhere in the EEA, as in *Case C-370/90: R v Immigration Appeal Tribunal and Surinder Singh, ex p Secretary of State for the Home Department* [1992] 3 All ER 798, [1992] Imm AR 565, ECJ; Immigration (European Economic Area) Regulations 2000, reg 11.

⁶ *R (on the application of Yiadam) v Secretary of State for the Home Department* C-357/98 [2001] All ER (EC) 267, ECJ.

⁷ *Secretary of State for the Home Department v Akrich* C-109/01 [2004] QB 756, [2004] INLR 36.

⁸ C-127/08 [2009] All ER (EC) 40.

⁹ See chapter 8, below, and *Carpenter v Secretary of State for the Home Department* C-60/00 [2003] QB 416, ECJ.

¹⁰ *Movement contre le racisme, l'antisemitisme et la xénophobie ASBL v Belgium* C-459/99 [2002] ECR I-6591, ECJ. The principles of Art 8 also underlie the *Baumbast and R* decision (fn 2 above).

¹¹ *R v Secretary of State for the Home Department, ex p Kaur (Manjit)* (7 March 2001, unreported), ECJ.

¹² See chapter 7 below.

¹³ Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/ 1219. For Bulgaria and Romania see chapter 7, below.

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THE PERSONNEL OF IMMIGRATION CONTROL

Border and Immigration Agency

1.50 On 1 April 2007, the Border and Immigration Agency (BIA) was launched as a Home Office shadow agency. It replaced the old IND and has since become the UKBA. Its launch was accompanied by great fanfare and market speak.¹ The government spin doctors assured us it was not a 'big bang' nor a trial. Instead it was being 'rolled out' – like a new lawn, purchased from the local garden centre. During the 'roll-out' period there would be a mix of old and new branded items in circulation as old items, carrying IND brand, such as the very successful Work Permits UK, are phased out. The use of a single identity under the BIA logo would signify a move away from 'a culture of individual Businesses' towards 'an organisation that thinks and acts together, an organisation with a reputation for being fair, effective, transparent and trusted'. The first act in this brave new world was an announcement that new increases in immigration fees would take effect on 2 April 2007 for all those coming to the UK to work, stay, or study. The ostensible purpose of these massive hikes is to 'support the improvement of the UK immigration system for genuine applicants', when in fact we know from the rather more obscure statutory provisions that the genuine applicants are having an extra cost placed on the benefits they would get on coming to Britain, but in effect being made to pay for policing the baddies, referred to in the publicity as taking 'tough action against those who abuse' the system.² The website of the new agency is the same as the old IND one except that for 'ind' substitute with 'bia', see: <http://www.bia.homeoffice.gov.uk>.

The BIA has now gone, replaced by the new UK Border Agency (UKBA), established as a shadow agency of the Home Office on 3 April 2008. The UKBA will bring together the work of the Border and Immigration Agency, UK Visas and parts of HM Revenue and Customs at the border, and will work closely with the police and other law enforcement agencies on issues of border control and security. The new 25,000 strong organisation includes more than 9,000 warranted officers operating in local communities, at the border and across 135 countries worldwide, with wide-ranging search, seizure and detention powers. During its first four months of operation, 1,000 frontline staff were expected to be conferred with both immigration and customs powers and staff in England and Wales will be equipped with police-like powers as set out in the UK Borders Act 2007. A full merger will follow the enactment of the Borders, Citizenship and Immigration Bill 2008.³

¹ See, for example, letter to ILPA and other organisations from the Operations and Transition Director of Managed Migration, dated 3 April 2007.

² See further on fees, 1.84.

³ The UKBA will link with the 3,000 police stationed at ports and airports following an agreement with the Association of Chief Police Officers. Targets were announced for the new agency in its business plan. They included targets to: expel 5,000 foreign national prisoners from Britain in 2008, up from 4,200 in 2007; sustain 2007's increase in the seizure of class A drugs by seizing at least 2,400 kg of cocaine and 550 kg of heroin by April 2009; increase by 50 per cent the number of asylum cases concluded in less than six months; extend the UK's visas regime to cover a larger proportion of the world's

population; and increase detention capacity by 20 per cent over 2008 and 2009 to help increase the number of immigration offenders UKBA can remove from the country. More information can be found at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/businessplan/>.

Immigration officers

1.53 Immigration officers are part of the immigration service, which consists of immigration officers, chief immigration officers and immigration inspectors, all of whom are appointed by the Secretary of State under the Immigration Act 1971.¹ They have their own statutory functions as immigration officers, but they are also civil servants² and can, therefore, be asked to make decisions to deport on behalf of the Secretary of State.³ Their functions are to examine those who arrive in this country⁴ and to grant, refuse, suspend or cancel leave to enter.⁵ They also have important policing functions under ss 28A–K of, and Schs 2 and 3 to, the 1971 Act, Part VII of the Immigration and Asylum Act 1999 and s 14 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. The policing function has been added to by the IAN Act 2006 and by the UK Border Act 2007 and will be further enhanced by their incorporation into the UKBA and the combining of the immigration functions of the UKBA with those of HM Revenue and Customs under the Borders Citizenship and Immigration Bill 2008. It is probably true to say that their function of granting leave to enter now been greatly diminished by the practise of moving the grant of any leave over six months to overseas posts, by combining the grant of entry clearance in these cases with leave to enter, but this loss of function is more than compensated by their increasing role of policing Britain's borders and working more closely with police and intelligence services to stop the entry of criminals, alleged terrorists and people smugglers. Amongst other things, it is a criminal offence to obstruct immigration officers in carrying out their functions under the 1971 Act,⁶ or to assault them.⁷

¹ Immigration Act 1971, Sch 2, para 1(2). The paragraph enables customs officers to be employed as immigration officers by arrangement with the Commissioner of Customs and Excise. In Scotland, immigration officers are appointed by the Scottish ministers: Scotland Act 1998 (Transfer of Functions to the Scottish Ministers) Order 1999, SI 1999/1750.

² See per Woolf LJ in *R v Secretary of State for the Home Department, ex p Oladehinde and Alexander* [1990] 2 WLR 1195 at 1203.

³ *R v Secretary of State for the Home Department, ex p Oladehinde* [1991] 1 AC 254, [1990] 3 All ER 393, HL. See also *Jazayeri* [2001] UKIAT 00014, [2001] INLR 489.

⁴ And at Eurostar stations, on Eurostar and in ports at Dover, Calais, Boulogne and Dunkirk, to be extended to Belgian ports: see modifications made to Immigration Act 1971, Sch 2 by the Channel Tunnel (International Arrangements) Order 1993, SI 1993/1813 as amended; Nationality, Immigration and Asylum (Juxtaposed Controls) Order 2003, SI 2003/2818. See further 3.26–3.30 below.

⁵ Immigration Act 1971, Sch 2, paras 2–6, as amended by the Immigration (Leave to Enter and Remain) Order 2000, SI 2000/1161. In doing so they are entitled to mark passports: *R v Secretary of State for the Home Department, ex p Raju* [1986] Imm AR 348, QBD.

⁶ Immigration Act 1971, s 26(1)(g).

⁷ UK Border Act 2007, ss 22 and 23. For this and other criminal offences, see chapter 14 below.

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Sponsors

1.62 Sponsors only feature in the Immigration Rules in relation to overseas students ‘sponsored’ by their government or other institution and in connection with family visits and family reunion, and they barely get a mention in our main chapters. However, they are destined to become key players in the government’s Managed Migration strategy, now that the points-based immigration scheme has finally commenced. We describe this in chapter 10. Now employers must become sponsors of their overseas employees etc and soon universities and colleges will become sponsors of their overseas students and they must all pay fees to the government to become qualified to act as sponsors. *NOTE:* The changes in the Immigration Rules in HC 321, 607 and 1113 set out detailed rules for points-based Tier 1, 2 and, in part, 5 Migrants and the Immigration and Nationality (Fees) (Amendment) Order 2008¹ sets out the basis on which sponsors will be charged licence fees, but they have come too late for inclusion in the discussions in the present edition and will be dealt with in a future Supplement.

¹ SI 2008/166. See 1.89A below.

Immigration advisers

Professionally qualified practitioners

1.66 Concern has also been voiced about members of the legal profession, both by the Lord Chancellor and the Legal Aid Board, the predecessor to the Legal Services Commission. In 1998 the Lord Chancellor’s Advisory Committee on Legal Education and Conduct reported that immigration law was an area where solicitors and barristers lack both knowledge and expertise, involving as it did many non-traditional sources such as the quantity of administrative guidance, with some of which many practitioners were unfamiliar.¹ The Legal Aid Board went further, complaining of a significant increase in poor quality, ill-supervised and sometimes unnecessary work.² To meet the criticisms, there have been several reforms, including franchising and immigration contracts, which involve solicitors demonstrating compliance with key quality criteria; and the Law Society’s setting up of a specialist panel of immigration practitioners who meet fairly rigorous criteria of competence and proper case management. The most recent initiative has been the Law Society’s Accreditation Scheme. From August 2005, no publicly funded work may be undertaken by a practitioner who is not accredited.³ In *R v K*,⁴ the Court of Appeal dealt with a barrister who had been called to the Bar but was not able to obtain a place in chambers. He went on to provide legal services for clients in various areas of the law. He provided the requisite details of his activities to the Bar Council and he made his status clear to those with whom he dealt. He fell within, and had complied with, the conditions set out in the Code of Conduct of the Bar of England and Wales, para 206.1. Nevertheless, the court held that he was not qualified to provide immigration advice or services for the purposes of the Immigration and Asylum Act 1999, s 84 and upheld his conviction under s 91 of that Act.

- ¹ Advisory Committee on Legal Education and Conduct, *Improving the quality of immigration advice and representation: A report* (July 1998).
- ² Legal Aid Board (now Legal Services Commission) *Access to quality services in the immigration category* (May 1999). We deal in chapter 18 below with funding of immigration and asylum appeals.
- ³ Accreditation, like registration of unqualified advisers, is at three levels. The Legal Services Act 1999, s 4(8) enables the Legal Services Commission to require accreditation of those providing publicly funded legal services. For details of accreditation scheme, see the Law Society's website.
- ⁴ [2008] EWCA Crim 1900, [2009] 1 All ER 510.

SOME PRINCIPLES OF UK IMMIGRATION LAW AND PRACTICE

The Common Travel Area

1.70 The Common Travel Area is a passport-free zone which comprises the Republic of Ireland, the United Kingdom, the Isle of Man, Jersey and Guernsey.¹ The area's internal borders are subject to immigration controls, as we set out in chapter 6, but only to minimal or non-existent border controls. There has never been a formal agreement between Ireland and the UK regarding the Common Travel Area² and passports have never been required in the zone, except during wartime, when travel restrictions were introduced between Britain and Ireland on the outbreak of war in 1939. After the war the Irish re-instated their previous provisions allowing free movement between Ireland and the UK.³ However, the British declined to do so pending the agreement of a 'similar immigration policy'⁴ in both countries. Consequently, the British maintained immigration controls between the island of Ireland and Great Britain up until 1952.⁵ Then in 1953, the British began referring to the Common Travel Area in legislation for the first time.⁶ The existence of the Common Travel Area has meant that the Republic has been required to follow changes in British immigration policy. This was notably the case in 1962 when Irish law was changed in response to the Commonwealth Immigrants Act 1962. The 1962 Act imposed immigration controls between the UK, UK colonies and independent Commonwealth countries while in the Republic the Aliens Order 1962 replaced Ireland's previous provision exempting all British subjects from immigration control,⁷ with one exempting only those born in the UK. The scope of the Irish provisions were much more restrictive than the British legislation. They excluded a large number of people who were not born in the UK but whose right to reside in the UK was not restricted by the 1962 Act. After the BNA 1981, however, it was also less restrictive, in that it excluded from Irish immigration control any persons born in the UK who were not British citizens, for example because neither parent was settled there at the time of the birth. This discrepancy between Britain's definition of a British citizen with a right to abode in the UK and Ireland's definition was not resolved until 1999.⁸ Thereafter under Irish law all British citizens – including those from the Isle of Man and Channel Islanders who are excluded from the territorial reach of the EU's Freedom of Movement provisions – became exempt from Irish immigration control and are therefore immune from deportation. With limited exceptions⁹, they have never been treated as foreigners under Irish law. While British and Irish citizens enjoy the right to live in each other's countries under European Community law, the provisions

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which apply to them under the Common Travel Area are generally more far reaching than those which apply to other EEA nationals. The current rules relating to the Common Travel Area are due for a big shakeup. For more details, see chapter 6, below.

- ¹ See further Wikipedia, 'The Common Travel Area'; Bernard Ryan, 'The Common Travel Area between Britain and Ireland', (2001) 64 (6) *Modern Law Review* 855; JM Evans, 'Immigration Act 1971', *The Modern Law Review* (1972) 35 (5) 508.
- ² See Ryan, *op cit*. The agreement was referred to in a Dáil debate on 4 June 1925, albeit indirectly, (*Dáil Debates* volume 12 columns 317–318).
- ³ By the Aliens Order 1946 (Ireland).
- ⁴ Under Secretary of State for the Home Department, Geoffrey de Freitas, House of Commons Debates volume 478 columns 842–849 (28 July 1950).
- ⁵ House of Commons Debates volume 446 columns 1158–1166 (28 January 1948), volume 463 column 543 (24 March 1948), and volume 478 columns 842–849 (28 July 1959). The existence of the 1952 agreement was conceded in an Irish Parliamentary question on 3 June 1980 (*Dáil Debates* volume 321 column 1379).
- ⁶ The Aliens Order 1953.
- ⁷ The Aliens (Exemption) Order 1935 (Ireland).
- ⁸ The Aliens (Exemption) Order 1999 (Ireland) which exempted all (and only) British citizens from immigration control.
- ⁹ The only exception being that between 1962 and 1999 those British citizens born outside the UK were not exempt. See Evans, *History of British nationality law and the Republic of Ireland*.

The definition of discrimination

1.74 The acts of discrimination made unlawful by s 19B of the Race Relations Act 1976 cover three types of discrimination,¹ namely, direct race discrimination, indirect race discrimination and discrimination by way of victimisation. Extended discussion of these concepts is beyond the scope of this work but they can be summarised as follows:

- direct discrimination occurs when one person treats another less favourably on racial grounds;
- indirect discrimination occurs when one person applies to another, without justification, an apparently neutral requirement or condition which that other cannot comply with and which is to the detriment of that other;² and
- victimisation occurs when one person treats another person less favourably by reason of that other having made a complaint of race discrimination.

Motivation is irrelevant in determining discrimination³ and a person may be liable for an unlawful act even if acting from benign motives.⁴ The race relations legislation firmly prohibits decisions made on the basis of stereotypical assumptions. So, in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*⁵ the governments of the UK and Czech Republic introduced a special pre-clearance immigration control scheme at Prague airport, the aim of which was to reduce the numbers of those seeking asylum in the UK, the majority of such individuals being Roma. The House of Lords drew the inference that those of Roma origin were subject to more intrusive questioning and treated with more scepticism than others wishing to travel. This amounted to direct discrimination on racial grounds.⁶ Such acts of

discrimination may also violate Article 14 of the ECHR.⁷ The Race Relations Act 1976 (Amendment) Regulations 2008, SI 2008/3008 came into force on 22 December 2008 and amend the 1976 Act in order to give full effect (in Great Britain) to Article 2(2)(b) (indirect discrimination) of Council Directive 2000/43 EC of 29th June 2000 concerning the principle of equal treatment between persons, irrespective of racial or ethnic origin, in the areas of employment (and related matters), social protection, social advantage, education and access to and supply of, goods and services which are available to the public, including housing. The Regulations amend the Directive-based definition of indirect discrimination on grounds of race or ethnic or national origins which applies in those areas covered by the Directive.

¹ Race Relations Act 1976, s 3(3)(a).

² There is another, wider, definition of indirect discrimination in s 1(1A) of the Race Relations Act 1976 that applies to certain activities of public authorities.

³ *Nagarajan v London Regional Transport* [2000] 1 AC 501.

⁴ *James v Eastleigh Borough Council* [1990] 2 AC 751.

⁵ *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55, [2005] 2 AC 1.

⁶ Some members of the House of Lords seemed to doubt the reasoning in the *Roma Rights case* in the later case of *R (on the application of Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12, [2006] 2 AC 307. However, any expressions of disagreement were clearly *obiter* since the issue of discrimination was not before the House in *Gillan*.

⁷ See *A and X v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 where the House of Lords held that the indefinite detention of foreign nationals was unlawful. The decisive factor was the acceptance by the security services that British nationals (who could not be interned) were also as likely to be engaged in terrorist activity as foreign nationals. Contrast this with *Saadi v United Kingdom*, [2007] Imm AR 38 where a Chamber of the European Court of Human Rights held that there was no violation of Article 5(1) of the Convention, whether taken by itself or in conjunction with Article 14, when asylum-seekers were held for a period of seven days under the fast-track procedure in order to determine their claims. The Grand Chamber heard argument on 16 May 2007 and its decision is awaited.

RACE DISCRIMINATION

Discrimination on other proscribed grounds

1.82 The days when discrimination by the immigration authorities on grounds of sex were held not to be covered by the existing Sex Discrimination Act have now gone.¹ The various pieces of equality legislation now outlaw certain other forms of discrimination based on sex,² disability,³ religion or belief,⁴ sexual orientation⁵ and age.⁶ There are specific provisions that make it unlawful for a public authority to discriminate on all these grounds, save for age.⁷ However, where a claim is brought, there is no general exemption from liability for certain acts of immigration authorities, as there is in respect of race discrimination. Furthermore, in relation to sex and disability discrimination, there are no equivalent provisions to those found in⁸ the race discrimination legislation that require a claimant to have raised an allegation of discrimination in immigration proceedings, or bind a county court if a finding of discrimination is made in a claimant's favour. In addition, whilst the religion or belief and sexual orientation provisions indicate that a county court is bound by a finding of unlawful discrimination made in immigration proceedings, they only preclude a claim being brought where 'the question of

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the lawfulness of the act could be raised (and has not been raised) in immigration proceedings (disregarding the possibility of proceedings brought out of time with permission).⁹ This wording suggests that, unlike the position in claims of race discrimination, a claimant who has raised and failed on a religion, belief or sexual orientation issue in immigration proceedings can nevertheless revisit it in civil proceedings.

¹ *Re Amin* [1983] 2 AC 818, HL.

² Sex Discrimination Act 1975.

³ Disability Discrimination Act 1995. See *Gichura v Home Office* [2008] EWCA Civ 697, [2008] ICR 128, where it was held that there is no reason to exclude services provided to a person held in an immigration removal centre from the ambit of the Disability Discrimination Act 1995.

⁴ The Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660.

⁵ The Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661 and the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263.

⁶ The Employment Equality (Age) Regulations 2006, SI 2006/1031.

⁷ Section 21A of the Sex Discrimination Act 1975, s 21B of the Disability Discrimination Act 1995, s 52 of the Equality Act 2006 (religion or belief) and reg 8 of the Equality Act (Sexual Orientation) Regulations 2007. Again, space does not permit any discussion of discrimination law and particular care needs to be taken when considering disability discrimination.

⁸ Section 67 of the Equality Act 2006 (religion or belief) and reg 21 of the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263.

⁹ See the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, reg 21.

FEES

Domestic fees

1.88 Orders and regulations have already been made under s 51 of the IAN 2006 and a further fees order and new regulations have greatly reformed the whole process of fee charging: see 1.89A below. The Immigration and Nationality (Fees) Order 2007¹ does not change what has gone on before. It provides for a fee to be charged in respect of applications and services which the Home Office currently has the power to charge for and has in fact prescribed fees in respect of these matters under their current powers. The whole idea of the Order is bring the fee charging regime under the umbrella of the s 51 powers described above and to repeal the current powers under which fees are prescribed, when the new fees are specified in regulations made under s 51(3) of the 2006 Act.² Changes to the basic administrative fees were made in April 2005 to include some of the costs of providing the appeals system for applicants who seek leave to remain in the UK.³ In addition, s 42(1) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, allows an amount to be prescribed which is intended to exceed the administrative cost of determining the application and reflects benefits that the Secretary of State thinks are likely to accrue to the person who makes the application or to whom the application relates, if the application is successful. Neither of these charging powers have been referred to in the Order, but are apparently incorporated in the regulations, as we shall see, since they have been made pursuant to s 42(1).⁴ The 2007 Order sets out the types of applications for immigration or nationality for which a fee is to be paid. The actual fee levels have been specified in subsequent regulations. The Order also sets out the

services in relation to nationality for which a fee is to be paid.⁵ They are: leave to remain; variation of leave; the fixing of a leave stamp, sticker or other attachment on a passport or other document; an immigration employment document; naturalisation as a British citizen or BOC; registration as a British citizen; BOC or as a British subject; permission to marry or to form a civil partnership in the UK; fees in respect of various other nationality services; the arrangement of a citizenship ceremony and the administration of a citizenship oath and pledge; and the supply of a certified copy of a notice, certificate, order, declaration or entry given under the BNA 1981 or any former nationality statute or the 1997 Act.

¹ SI 2007/807.

² See the Explanatory Memorandum to SI 2007/807, para 4.4.

³ Explanatory Memorandum to SI 2007/807, para 7.1.

⁴ Explanatory Note to the Immigration and Nationality (Fees) Regulations 2007, SI 2007/1158, para 2.

⁵ The Immigration and Nationality (Fees) Order 2007, SI 2007/807.

Fee levels

1.89A The Immigration and Nationality (Fees)(Amendment) Order 2008, SI 2008/166 and the Immigration and Nationality (Fees) (Amendment) Order 2009, SI 2009/420 are made under s 51(3) of the IAN 2006 and amend the Immigration and Nationality (Fees) Order 2007, SI 2007/807, ('the 2007 Order') so as to require applications for sponsorship licences to be accompanied by a specified fee contained in regulations. The 2008 amendment Order sanctions fees to be charged for applications for sponsorship licenses under the new points-based system. These may be A or B rated. This Order also amends the 2007 Order to provide for fees to be specified in regulations for:

- (a) entry clearance to the UK;
- (b) a transit visa for a person passing through, but not entering, the UK;
- (c) a document recording biometric information in relation to a person subject to immigration control;
- (d) a certificate of entitlement for the right of abode in the UK.

The 2009 amendment Order makes provision for fees to be charged for applications for letters or documents relating to immigration or nationality status and for attendance of immigration officials outside their offices or out of hours.

New fees have been set by amendments to the Immigration and Nationality (Fees)(Amendment) Regulations 2008, SI 2008/544, the Immigration and Nationality (Fees)(Amendment No 2) Regulations 2008, SI 2008/695 and the Immigration and Nationality (Fees)(Amendment No 3) Regulations 2008, SI 2008/3017. Then there are the Immigration and Nationality (Cost Recovery) (Fees) (Amendment) Regulations 2008, SI 2008/218, the Immigration and Nationality (Cost Recovery) (Fees) (Amendment No 2) Regulations 2008, SI 2008/1337, the Immigration and Nationality (Cost Recovery) (Fees) (Amendment No 3) Regulations 2008, SI 2008/2790 and the Immigration and

1.89A *Introducing Immigration Law*

Nationality (Cost Recovery Fees) Regulations 2009, SI 2009/421. These deal mainly with fees for applications by migrants under the new points-based system and for sponsorship licences.

Chapter 2

RIGHT OF ABODE AND CITIZENSHIP

INTRODUCTION

2.1A Changes in the acquisition of British citizenship by naturalisation and on the right of abode are under way, but are not yet here. Perhaps it is not surprising that nothing is to be done in the new Borders, Citizenship and Immigration Bill to abolish the distinctions, discussed in this chapter, between different classes of British nationals, very few of whom, apart from British citizens, have the right of abode. The marginalisation of British nationals without a right of abode began to be unravelled in a piecemeal way so far as BOCs and BOTCs were concerned in 2002¹ but there are no plans to take this process any further, notwithstanding that the current statutory provisions, arguably, fall short of the standards set by international and common law standards.² ‘The *civis britannicus*’ concept so central to the British Nationality Act 1948 is not, it seems, going to be revived.

¹ See the discussion on the BOTA 2002 and the NIAA 2002 at 2.14ff.

² Sir William Holdsworth, *A History of English Law*, vol X, p 393, states: ‘The Crown has never had a prerogative power to prevent its subjects from entering the kingdom, or to expel them from it,’ cited by Lord Bingham in his dissenting judgment in *R (on the application of Bancoult) v Secretary of State for the Home Department* [2008] UKHL 61, [2008] 4 All ER 1055 at para 70. Plender, *International Migration Law* (1988, 2nd edn), ch 4, p 133 states: ‘The principle that every state must admit its own nationals to its territory is accepted so widely that its existence as a rule of law is virtually beyond dispute ...’

2.1B The new Bill was described on the Home Office website in the following terms when it was introduced in the House of Lords on 14 January 2009:

‘The Borders, Citizenship and Immigration Bill will lay down a radical new approach to British citizenship that will require all migrants to speak English and obey the law if they want to gain citizenship and stay permanently in Britain – while speeding up the path to citizenship for those who contribute to the community by being active citizens.

‘Under the new system, full access to benefits and social housing will be reserved for citizens and permanent residents – which means if you are not a citizen full access to benefits will not be allowed.’

Clauses 37 to 39 drastically amend s 6 of, and Sch 1 to, the British Nationality Act 1981 (‘BNA 1981’), which deal with naturalisation as a British citizen. In particular the qualifying criteria in Sch 1 are to be completely overhauled, introducing such alien concepts as ‘probationary citizenship leave’ and ‘qualifying temporary residence leave’. ‘Earned citizenship’ (not a phrase used in the Bill) is clearly to be the order of the day.¹ Other clauses deal with British citizenship for children whose father or mother is a member of the armed forces (cls 40 and 42); removing restrictions based on gender discrimination in relation to citizenship by descent through the female line (cl 41), and extending the requirement to be of ‘good character’ (for example paying your

2.1B Right of Abode and Citizenship

taxes and having no convictions)² to all naturalisations and registrations (cl 43), as well as making what can be described as tidying up amendments and additional definitions relevant to the earlier amendments.

¹ Described on the HO website on 15 January 2009 as a 'bill to make newcomers to the UK earn the right to stay here' (our emphasis).

² Explanatory Notes to the Borders, Citizenship and Immigration Bill.

THE RIGHT OF ABODE

2.2 When British nationality was reorganised in 1948, possession of British citizenship gave an automatic right of abode to all British nationals, not just Citizens of the UK and Colonies (CUKCs). It was a common law concept. After Commonwealth immigration control was introduced in 1962, the right of abode became a status of enormous importance. Between 1962 and 1973, when the Immigration Act 1971 came into force, it remained a common law concept, subject to such derogations as were required by clear provisions of the Commonwealth Immigrants Act 1962.¹ After 1973 it took on a statutory form, and became quite separate from the broad concept of British nationality and the status of Commonwealth citizen or British subject which went with it. But the definition of persons who had a right of abode was still linked to one or more of the categories of British subject. It is therefore necessary to look at the outlines of British nationality law. Although there is no prerogative power to expel British subjects from a territory to which they belonged, in the *Bancoult case*, the majority in the House of Lords upheld the British government's decision to remove the Chagossians from the Chagos Islands to make way for the American base at Diego Garcia. Section 3 of the Colonial Laws Validity Act 1865 made it clear that no colonial law was to be void or inoperative on the ground of repugnancy to the law of England, unless it was repugnant to the provisions of some Act of Parliament which was made applicable to the colony by express words or necessary intendment and so power to expel from a ceded colony given by an Order in Council was not invalid and the decision to expel was neither unreasonable nor a breach of a legitimate expectation.²

¹ *DPP v Bhagwan* [1972] AC 60, [1970] 3 All ER 97, HL. See further Sir William Holdsworth, *A History of English Law*, vol X, p 393, cited in 2.1A, fn 2 above; Laws LJ, in para 39 of his judgment in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 ('*Bancoult (I)*'), which the Secretary of State accepted, stated: 'For my part I would certainly accept that a British subject enjoys a constitutional right to reside in or return to that part of the Queen's dominions of which he is a citizen. Sir William Blackstone says in *Commentaries on the Laws of England* (1809, 15th edn), vol 1, p 137: 'But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal.' Compare *Chitty, A Treatise on the law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (1820), pp 18, 21. Lord de Grey CJ in *Fabrigas v Mostyn* (1773) 20 St Tr 82 at col 181. See further Lord Bingham's dissenting speech in *Bancoult* at para 70 and Lord Rogers at para 89 who said: 'On the basis of these various authorities it appears to me certainly arguable that there is a "fundamental principle" of English law that no citizen should be exiled or banished from a British colony and sent to a foreign country.'

² *R (on the application of Bancoult) v Secretary of State* [2008] UKHL 61, [2008] 4 All ER 1055 per Lord Rogers at para 96.

Right of abode and international human rights law

2.6 Protocol 4 of the European Convention on Human Rights (ECHR) contains provisions which give the nationals of signatory States rights which are akin to the right of abode in UK domestic law. First, it provides that no-one shall be deprived of the right to enter the territory of the State of which he or she is a national.¹ Secondly, no-one shall be expelled, by means of a collective or individual measure, from the territory of the State of which he or she is a national.² Thirdly, once lawfully in the country, everyone (not just nationals) has a right to move freely throughout the territory, to choose a residence and to leave the country,³ subject to such restrictions as are in accordance with the law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, the prevention of crime, the protection of health and morals or for the protection of the rights and freedoms of others.⁴ However, the right of abode in UK domestic law is not conferred on all British nationals and so there are important groups of British nationals, who do not enjoy its benefits. Protocol 4 would give them a broadly equivalent right, which is the principal reason why it has not been ratified so far by the British government.⁵ Notwithstanding this, the principles of the Protocol are still important for UK immigration law. First, the wording of Article 3(2) 'no-one shall *be deprived of* the right to enter ...' (our emphasis) is posited on the existence of a right of entry of nationals.⁶ This reflects the position in international human rights law, under which there is a duty on a State to admit its own nationals.⁷ Secondly, notwithstanding the non-ratification of Protocol 4 by the UK, the ECHR and all the human rights contained in it (including the Protocols) are part of the *corpus* and general principles of EC law,⁸ and may therefore be used in the construction of EC law.⁹ Thirdly, the Government is gradually moving into line with the international human rights position by a series of law changes which have extended the territorial reach of British citizenship to all British overseas territories and have conferred a much more extensive entitlement to registration as a BC on certain BOCs, British subjects and BPPs.¹⁰

¹ ECHR, Protocol 4, Art 3(2).

² ECHR, Protocol 4, Art 3(1).

³ ECHR, Protocol 4, Art 2(1) and (2). Notification of overseas travel plans by a sex offender was not a ban on the right of exit and, not therefore a breach of either ECHR or Art 4 of the Citizen's Directive 2004/38/EC: see *R (on the application of F) v Secretary of State for Justice*; *R (on the application of Thompson) v Secretary of State for Justice* [2008] EWHC 317 (Admin) at 2.7, fn 5, below.

⁴ ECHR, Protocol 4, Art 2(3).

⁵ See Laurie Fransman 'Human Rights and British Nationality' in Butterworths *A Guide to the Human Rights Act 1998* (1999) pp 134ff.

⁶ See *East African Asians v United Kingdom* (1973) 3 EHRR 76, para 242, per Professor JES Fawcett.

⁷ See eg the UN International Covenant on Civil and Political Rights, 1966 Art 12(4) which provides that no one shall be arbitrarily deprived of the right to enter his own country. For texts see Brownlie and Goodwin-Gill *Basic Documents on Human Rights* (4th edn, 2002) OUP. See further Universal Declaration of Human Rights, Art 13(2), Brownlie and Goodwin-Gill *op cit*; Fransman fn 5 above, para 3.1. This right has in fact been relied on by the British Government in arguing (unsuccessfully) against the application of EC law to the return to the UK of a British national who has gone to another Member State of the EU in the exercise of her free movement rights: *ex p Surinder Singh* [1992] Imm AR 565, ECJ, at 22, quoted in *Fransman* above.

2.6 Right of Abode and Citizenship

- ⁸ EU Treaty, Art 6 (ex Art F.1); *Elliniki Radiophonia Tiléorassi AE v Pliroforissis and Kouvelas* [1994] ECR I-2951 ECJ; *B v Secretary of State for the Home Department* [2000] Imm AR 478, paras 13–14.
- ⁹ In the referred application of *Manjit Kaur* it was argued that Art 3(2) of Protocol 4 could and should be used as an aid to the construction of Art 8 of EC Treaty (now after amendment Art 17 EC), so as to entitle a BOC to enter and remain in the UK. This question was not dealt with in the judgment of the court: see Case C-192/99: *R (on the application of Kaur) v Secretary of State for the Home Department* [2001] ECR I-237, [2001] All ER (EC) 250, ECJ.
- ¹⁰ See the BOTA 2002, ss 3 and 4 and the NIAA 2002, s 12, discussed below at 2.14–2.18.

Restrictions on the right of abode

2.7 The statutory definition of the right of abode refers to ‘let or hindrance’ which may be lawfully imposed on any person. The extent of this exception is uncertain and untested, but is thought to include the following six restrictions:

- (i) lawful imprisonment and other restrictions (eg bail conditions restricting residence) imposed by criminal courts in the exercise of their normal jurisdiction;¹
- (ii) lawful detention and other restrictions imposed under other statutory powers, for example, under the Mental Health Act 1983. This will include non-derogable Control Orders imposed under the Prevention of Terrorism Act 2005 and geographical restrictions imposed under Anti-Social Behaviour Orders (ASBOs) introduced by the Crime and Disorder Act 1998 and amended many times since.²
- (iii) restrictions lawfully imposed on the movement of children by an order of a court in matrimonial, wardship and Children Act 1989 proceedings;³
- (iv) restraints imposed by the issue of a writ ‘*ne exeat regno*’, restraining the subject from leaving the kingdom, now largely superseded by injunction;⁴
- (v) restrictions, other than normal bail conditions, requiring surrender of a passport and a ban on foreign travel. This concerns measures taken, for example to deal with football hooliganism and foreign travel by paedophiles;⁵
- (vi) restrictions on entry of polygamous wives.⁶

¹ See *R v Saunders*: Case 175/78 [1980] QB 72, [1979] 2 All ER 267 at 275, ECJ where a similar exemption with regard to EC free movement provisions is discussed. Any loss of liberty must also be justifiable under ECHR, Art 5: see 8.58 below.

² See *Maya Sikand Anti Social Behaviour Orders* (2006) LAG.

³ See *Re Arif (Mohamed) (an infant)* [1968] Ch 643, sub nom *Re A (an infant)*, *Harif v Secretary of State for Home Affairs* [1968] 2 All ER 145, CA.

⁴ For discussion of the writ ‘*Ne exeat regno*’ see the fourth edition of this work at 6.6.

⁵ Section 86 of the Sexual Offences Act 2003 falls short of a ban on leaving the country but gives the Secretary of State power to make regulations for sexual offenders to give the police their travel details for travel outside the UK. Under the Sexual Offences Act 2003 (Travel Notification Requirements) Regulations 2004, SI 2004/1220, sex offenders were subject to, among other things, travel notification requirements. The relevant statutory provisions required an offender who intended to leave the United Kingdom for a period of three days or longer to specify the date on which he would leave the UK, the country to which he would travel and his point of arrival in that country and, if more than one country, his point of arrival in each such additional country, the identity of any carrier or carriers he intended to use, details of his accommodation for his first night outside the UK,

the date on which he intended to return and the point of arrival. Under s 82 these would last for an indefinite period in the case of someone sentenced to a period in excess of 30 months. In *R (on the application of F) v Secretary of State for Justice*; *R (on the application of Thompson) v Secretary of State for Justice* [2008] EWHC 317 (Admin) the High Court held that the Sexual Offences Act 2003, s 82 was incompatible with Art 8 ECHR in subjecting certain sex offenders to notification requirements indefinitely without the opportunity for review.

- ⁶ Immigration Act 1988, s 2. The restrictions do not prevent a wife who entered the UK in that capacity before 1 August 1988 from returning to this country, or from being issued with a certificate of entitlement or entry clearance enabling her to do so, irrespective of the presence in the UK of other wives. Nor do they apply to a wife who has been in the UK at any time since her marriage if she was then the only wife to have entered, or been cleared for entry to, the UK. It may be possible in such a case to treat the misconceived certificate of entitlement application as an application for citizenship. See ID1 (Jun/06) Ch 1, s 1, para 6.

RIGHT OF ABODE AFTER THE TWO ACTS OF 2002

2.18 Although BOTA 2002 widens the number of territories a connection with which qualifies a person for acquiring British citizenship, the right of abode does not have an equivalent territorial scope. It still remains a right confined to the territory of the UK.¹ The position of people who wish to move from one overseas territory to another or from the UK to one of the overseas territories is not dealt with in UK legislation. One possibility is that the position will be regulated by reviving and adapting the common law right of abode;² another is that it will remain a matter for local law. BOTA 2002 applies to the UK, the Channel Islands, the Isle of Man, and all the overseas territories.³ It should not be difficult for Parliament to clarify the position. If you have a universal British citizenship covering a wide stretch of territories, it is no great matter to enact that there is a right of abode with the same territorial reach.

¹ Immigration Act 1971, s 1(1).

² *DPP v Bhagwan* [1972] AC 60, [1970] 3 All ER 97, HL. See further *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2008] 4 All ER 1055.

³ BOTA 2002, s 8(4).

Descent

2.53 Where a child is born outside the UK, the BNA 1981 as enacted provides for automatic transmission of citizenship from parent to child for just one generation.¹ The Act provides that persons born overseas after commencement automatically become BCs from birth if their mother or father was a BC otherwise than by descent at the time of their birth, or was in Crown or similar designated service outside the UK or was working for a Community institution somewhere outside the UK.² But children born after 21 May 2002, the appointed day under the BOTA 2002, in one of the qualifying overseas territories to a parent, who is a BC by descent, will no longer be subject to the 'one generation' rule; in fact these children will be BCs by birth, although their children born overseas (ie outside the UK or a qualifying territory) will be subject to the descent rules. Similarly, under the BOTA amendments, Crown and other designated services is given a broader definition and the 'one

2.53 *Right of Abode and Citizenship*

generation' rule will not apply to BCs in such Crown or other designated service, where recruitment has taken place in the UK or a qualifying territory.³ The 'one generation' rule may nevertheless produce some harsh results and so citizenship by descent is complemented by a scheme of registration to alleviate its deficiencies.⁴

¹ BNA 1981, s 2. Citizenship by descent is defined in the BNA 1981, s 14. See further British Nationality (Hong Kong) Act 1997, s 2. It should also be noted that BOTCs, who become BCs under s 3 of the BOTA 2002 and were BOTCs by descent immediately before commencement of that section, are BCs by descent, unless they have become BCs otherwise than by descent: see the BOTA 2002, s 3(3).

² BNA 1981, s 2(1)(b) and (4). Detailed provisions relating to designated service are now contained in the British Citizenship (Designated Service) Order 2006, SI 2006/1390. The British Citizenship (Designated Service) (Amendment) Order 2008, SI 2008/135 adds service for the Welsh Assembly Government to those forms of service that, for the purposes of s 2 of the BNA 1981, confer citizenship on a person born outside the United Kingdom and the qualifying territories where at the time of birth his father or mother is a British citizen and is serving outside those locations. On the other hand, the British Overseas Territories Citizenship (Designated Service) (Amendment) Order 2008, SI 2008/1240 amends the British Dependent Territories Citizenship (Designated Service) Order 1982 so as to remove service for the Hong Kong Tourist Association and the Hong Kong Trade Development Council from the types of service designated as qualifying an individual born outside the British overseas territories as a British overseas territories citizen.

³ BNA 1981, s 2, as amended by the BOTA 2002, Sch 1, para 2.

⁴ BNA 1981, s 3(2)–(6). See also the amendments to these provisions in the BOTA 2002, Sch 1, para 3. In *R (on the application of Ullah) v Secretary of State for the Home Department* [2001] EWCA Civ 659, [2001] Imm AR 439, the Court of Appeal held that a BC by descent cannot naturalise so as to confer citizenship on future children born abroad.

Deprivation of citizenship

2.62 The grounds upon which a BC may be deprived of citizenship under the BNA 1981, as amended by the NIAA 2002 as from 1 April 2003 are as follows:

- (a) where the Secretary of State is satisfied it is conducive to the public good to deprive the person of his or her British nationality;¹
- (b) where registration or naturalisation has been obtained by fraud, false representation or concealment of material facts.²

For the first time, those acquiring British citizenship by birth or descent may be deprived of citizenship, provided that they would not thereby become stateless.³ The powers under (b) above (including a new right of appeal) apply to cases where the person has acquired citizenship by registration or naturalisation under the law in operation before 1 April 2003, if the Secretary of State is satisfied that the registration or naturalisation was obtained by fraud, false representation or concealment of a material fact.⁴ In exercising the powers under new s 40, the Secretary of State is not confined to evidence coming into existence after commencement, but can have regard to anything which occurred before commencement on which he or she could have relied (alone or with other matters) in making an order under s 40 before commencement.⁵ The language of these provisions suggest that the new powers do not have retrospective effect, at least in relation to deprivation of citizenship acquired by birth or descent.⁶ Section 56(2) of the IAN 2006 enables the AIT, on an

appeal against deprivation of nationality, to receive evidence in private.⁷ Under s 40(3) of the BNA 1981, as originally enacted, persons who were registered or naturalised as a BC might be deprived of their citizenship if they had shown themselves 'by act or speech to be disloyal or disaffected towards Her Majesty'.⁸ In *R (on the application of Hicks) v Secretary of State for the Home Department*⁹ H was an Australian citizen who had been seized in Afghanistan and was being held at Guantanamo Bay by the US authorities. He satisfied the conditions for British citizenship by descent from his mother under the BNA 1981, s 4C and, accordingly, applied for registration as a BC. The Secretary of State proposed to grant British citizenship but at the same time to make an order depriving H of citizenship under s 40 of the 1981 Act. The Court of Appeal held that the deprivation would not be lawful since the conduct of H in Afghanistan, where he was alleged to have trained with terrorists, could not constitute disloyalty or disaffection towards the UK, for the purposes of the BNA 1981, s 40(3)(a) as originally enacted, a State of which he was not then a citizen, to which he owed no duty and on which he made no claim.¹⁰

¹ BNA 1981, s 40(3)(a), inserted by the IAN 2006, s 56(2), which came into force on 16 June 2006: Immigration, Asylum and Nationality Act 2006 (Commencement No 1) Order 2006, SI 2006/1497. For the position under s 40(3) (a) before appeal see fn 8 below and the accompanying text. The 'conductive' wording replaces the phrase 'seriously prejudicial to the interests' of the UK, which is taken from the European Convention on Nationality (Strasbourg, 6 September 1997) which the government had intended to ratify.

² BNA 1981, s 40(3) as substituted.

³ BNA 1981, s 40(2), (4) as substituted; cf s 40(3) (as enacted) (deprivation of citizenship for disloyalty, trading with the enemy etc), which applied only to certain registered or naturalised citizens. The Special Immigration Appeals Commission (SIAC) found in *Al Jedda v Secretary of State for the Home Department* [2008] UKSIAC 66/2008 (23 May 2008) that an Iraqi with British nationality regained his Iraqi nationality/citizenship due to laws passed by the occupying powers at the latest on 28 June 2004, and he did not relinquish that nationality in writing under Art 10.1 of the Iraqi Nationality Law 2006. He was not, therefore, made stateless by the decision of the Secretary of State to revoke his British citizenship. Thus the order of the Secretary of State to deprive him of his British nationality was not unlawful under s 40(4) of the 1981 Act.

⁴ BNA 1981, s 40(6), as substituted by the NIAA 2002, s 4(1). In *Tobura Bibi v Secretary of State for the Home Department* [2007] EWCA Civ 740, [2007] All ER (D) 267 (Jul) at para 13 the Court of Appeal thought it was highly unlikely that the power of deprivation subsists beyond the citizen's death, nor did it have retrospective effect.

⁵ NIAA 2002, s 4(4).

⁶ This view accords with that set out in *Butterworths Immigration Law Service*, A[2604]. See further the *obiter dictum* in *Tobura Bibi*, above, at para 13.

⁷ BNA 1981, s 40A(3)(e), inserted by the IAN 2006, s 56(2).

⁸ BNA 1981, s 40(3)(a), before repeal by the NIAA 2002, s 4.

⁹ [2006] EWCA Civ 400, [2006] All ER (D) 173 (Apr).

¹⁰ The Court of Appeal held that s 40(3)(a) of the BNA 1981, as originally enacted, did contemplate circumstances in which conduct before grant of citizenship could provide grounds for revocation of citizenship, as did its statutory predecessors. An allegiance might also arise, the breach of which might constitute disloyalty or disaffection, without the person being a citizen: *Joyce v DPP* [1946] AC 347, [1946] 1 All ER 186, 31 Cr App Rep 57, HL, considered.

2.68 *Right of Abode and Citizenship*

BRITISH PASSPORTS AND IDENTITY CARDS

Identity cards

2.68 Under the Identity Cards Act 2006, provision is made for the issue of identity cards (ID cards) to all UK residents and individuals, who have resided in the UK, for example, or are proposing to enter the UK. The scheme will not be compulsory except for foreign nationals. The government is proceeding under two different sets of legislation. So far as foreign nationals are concerned, the UK Border Agency obtained new powers in ss 5 and 6 of the UK Borders Act 2007¹ to enable the Secretary of State to make regulations which require foreign nationals, subject to immigration control, to apply for an identity card for foreign nationals known as a 'Biometric Immigration Document' (BID) in the Act, and to register their biometric identifiers (for example, facial image and fingerprint identifiers) for verification purposes. Since these new powers currently affect applications for leave to remain we deal with them in more detail in chapter 4. Initially these identity cards are only required for (i) students, and (ii) spouses and other partners applying for settlement.² Estimates are that approximately 44,000 students will be affected and approximately 5,000 spouses and partners.³ The working assumption is that around three years from the first introduction of compulsory ID cards for foreign nationals in November 2008, the government will require all of those applying for leave to enter or remain in the UK, to have a card. From 2012/2013 onwards they will start to issue ID cards to those foreign nationals already settled in the UK.⁴

¹ For the full range of powers see the UK Borders Act 2007, ss 5, 6(3), (6), 7, 8 and 15(1)(g).

² Immigration (Biometric Registration) Regulations 2008, SI 2008/3048.

³ Explanatory Memorandum to the Immigration (Biometric Registration) Regulations 2008, above, p 24.

⁴ Explanatory Memorandum to the Immigration (Biometric Registration) Regulations 2008, above, pp 24–25.

2.68A The programme for issuing ID cards to foreign nationals is similar to that which introduces ID Cards to British Citizens, detailed by IPS in the National Identity Scheme Delivery Plan published on 6 March 2008. The intended programme is as follows: (i) in the second half of 2009, to start issuing identity cards to people both British and foreign nationals working at airports; (ii) from 2010 to issue identity cards on a voluntary basis to young people; (iii) from 2011/12 onward to start to enrol British citizens at high volumes offering a choice of receiving a separate identity card, passport or both. From 2010 through to 2012 and beyond the ID Card for British Citizens will be issued on a voluntary basis unless a decision is made to bring in compulsion which would require further primary legislation. By 2014 the government's expectation is that a large proportion of the UK population will have enrolled onto the National Identity Register and will have been issued with an ID card. The exact number and take up will depend on how the public perceive the benefit of having an ID card.¹ However, the picture is not quite as rosy or as voluntary as the government's spin would have it.

¹ Explanatory Memorandum to Immigration (Biometric Registration) Regulations 2008, above, p 25.

2.68B If people want an ID card they will have to apply for it and their personal details will then be entered on the National Identity Register and they will be issued with a card.¹ However, the Act also creates a creeping form of compulsion. Section 4 of the Identity Cards Act 2006 gives the Secretary of State the power to designate documents for the purposes of the Act, for example passports.² Once a passport becomes a designated document, anyone applying for one will have their details entered onto the National Identity Register.³ The power to designate documents will apply to any other documents issued by a Minister of the Crown, a government department, a Northern Ireland department, the National Assembly for Wales, or any other person who carries out statutory functions on behalf of the Crown, such as residence permits for foreign nationals. In their case the ID card and resident document are likely to be contained in one document.⁴ But this is not likely to happen in the case of a British passport where a separate ID card is going to be issued alongside the new passport.

¹ Identity Cards Act 2006, s 2.

² This must be done by order which will be subject to affirmative resolution in Parliament. These documents are referred to in the Act as 'designated documents'. Persons responsible for issuing designated documents are referred to in the Act as 'designated documents authorities'.

³ Identity Cards Act 2006, s 6(7).

⁴ Identity Cards Act 2006, s 6(1) and (2).

CONTROL OF ENTRY

INTRODUCTION

3.1A The message coming through from the government on entry to the UK is one of toughness and more security. In October 2008 they announced 'Tough new rules to safeguard the visitor route into the UK from abuse.' We deal with those in chapter 9. Then there will be 11 more countries requiring a visa. By 2010 they are hoping to be able to track over 99% of foreign nationals from outside the EEA in and out of Britain. Compulsory identity cards or Biometric Immigration Documents (BID) have already been introduced for foreign students, spouses and partners seeking leave to remain. Soon, the Immigration (Biometric Registration) Regulations 2008, SI 2008/3048 will apply to leave to enter and the compulsory ID card will replace stamps in the passport as all details of the leave will be held on a chip embedded in the ID document. We deal with this development in chapters 2 and 4. The biometric ID cards will also operate as part of biometric and automated security checks being planned for a shake-up of EU border controls. The main development covered in this chapter is the 'tough' new rules dealing with bans on re-entry to the UK for those who previously breached UK immigration law. See 3.55A–3.55C below. Tough new rules, shake-ups and biometric surveillance are the order of the day in the brave new world of immigration law.

EXAMINATION AT THE PORT OF ENTRY

Passenger information

3.37 The immigration officer may come to this examination holding information about the passengers. Carriers bringing passengers to the UK (whether owners or agents of ships or aircraft or the operators of the Channel Tunnel through trains) must on request supply information about the passengers to the immigration officer.¹ The information to be supplied by shipping companies and airlines includes not just name and nationality, as previously, but also gender, date of birth, type of travel document held and expiry date, ticket number, date and place of issue, how it was paid for, the passenger's itinerary, the names of all other passengers appearing together on one reservation, and (if the passenger is in a vehicle) its registration number.² IAN 2006, s 31 will make yet further amendments to enable the collection of passenger lists and crew information in advance of the arrival of a ship or aircraft into the UK and not just on arrival.³ The duty to provide this information will be placed on owners and agents and not just captains. The effect of the Immigration and Police (Passenger, Crew and Service Information) Order 2008, SI 2008/5 is to enable immigration and police officers to (a) request specific passenger, crew and service information from air, sea and rail carriers in respect of movements

into or out of the UK and (b) to specify the form and manner in which some of this data should be supplied. See further 14.32 below.

¹ Immigration Act 1971, Sch 2, para 27, modified in relation to the Channel Tunnel by SI 1993/1813, Sch 4, para 1(11)(r), allows the Secretary of State for the Home Department to make Orders requiring the provision of passenger lists giving names and nationality of passengers and crew. Paragraph 27B requires carriers to provide passenger information. Paragraph 27C requires them to notify the Secretary of State of the arrival of any ship or aircraft expected to carry non-EEA nationals.

² Immigration (Passenger Information) Order 2000, SI 2000/912.

³ Immigration Act 1971, Sch 2, para 27, as amended.

GENERAL GROUNDS FOR REFUSING ENTRY CLEARANCE OR LEAVE TO ENTER

3.54 An application for leave to enter, or for entry clearance, will be determined according to the detailed Immigration Rules dealing with the particular purpose for which the applicant wishes to come to the UK – visit, study, business, family reunion and so forth. Qualifying under these rules does not, however, guarantee that leave to enter will be granted, because the person may fail on general grounds, relating, broadly, to past conduct, lack of proper documents, non-cooperation with the immigration authorities, restricted returnability, public policy or public health. The Immigration Rules set out these general grounds for refusal in two additional lists – one where leave to enter or entry clearance ‘is to be refused’ and one where it ‘should normally be refused’. They do not apply in cases where the person seeking entry already has entry clearance because in that situation the grounds for refusing leave to enter are much more restricted. These are set out at 3.76–3.78 below. Entry clearance or leave to enter is to be refused¹ under HC 395, paragraph 320 in the following cases:²

- (1) entry is being sought for a purpose not covered by the Rules;
- (2) the person seeking entry is currently the subject of a deportation order;
- (3) failure to produce a valid national passport or other document satisfactorily establishing identity and nationality;
- (4) failure to show that he or she is acceptable to the immigration authorities in another part of the common travel area to which the applicant wishes to travel;
- (5) failure to produce entry clearance, if one was required;
- (6) the Secretary of State has personally directed that exclusion is conducive to the public good;
- (7) refusal on medical grounds (unless the person is settled in the UK or there are strong compassionate circumstances);
- (7A) where false representations have been made or false documents [or information] have been submitted (whether or not material to the application, and whether or not to the applicant’s knowledge), or material facts have not been disclosed, in relation to the application;
- (7B) [see 3.55A below];

Grounds on which entry clearance or leave to enter should normally be refused are as follows:

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- (8) failure by a person arriving in the UK to provide information to the immigration officer;
- (8A) failure, by a person outside the UK, to provide information, documents or medical reports required to the immigration officer;
- (9) failure by a returning resident to meet the requirements of paragraph 18 of the Rules;
- (10) production of a passport which is from an unrecognised territory or which is otherwise unacceptable;
- (11) [deleted];
- (12) [deleted];
- (13) restricted returnability of a person other than those eligible for admission for settlement or a spouse eligible for admission under paragraph 282;
- (14) refusal by a sponsor to give an undertaking in writing to be responsible for the applicant's maintenance and accommodation for the period of any leave granted;
- (15) the making of false representations or the failure to disclose any material fact for the purpose of obtaining a work permit;
- (16) failure, in the case of an unaccompanied child under the age of 18 years other than an asylum seeker, to provide written consent to the application from his parent(s) or legal guardian;
- (17) save in relation to a person settled in the UK, refusal to undergo a medical examination;
- (18) save where admission would be justified for strong compassionate reasons, conviction in any country of a serious criminal offence;
- (19) exclusion is conducive to the public good in the light of the person's character, conduct or associations.
- (20) failure to comply with a requirement relating to the provision of physical data (eg, fingerprints) required by regulations made under s 126 of the Nationality Immigration and Asylum Act 2002.³

¹ The IDI make clear that even the 'mandatory' grounds are not wholly mandatory, and that 'in practice, there are occasions where refusal is not appropriate': IDI Jun 04, Ch 9 s 2. NOTE: Amendments made by HC 321, paras 33 and 34 came too late for inclusion and will be dealt with in a later supplement or edition.

² We use the numbering of the immigration rule. This Rule must be read with HC 395, para 26, which allows the word 'entry clearance officer' to be used for 'immigration officer' where appropriate, and para 39 which gives entry clearance officers the same discretion in relation to medical examinations as immigration officers.

³ Inserted by HC 370 from 27 February 2004.

Deceivers and immigration offenders

3.55A The General Grounds for Refusal in HC 395, para 320, have been amended during 2008 by HC 321 HC 607 and HC 1113.

HC 1113 has amended para 320(7A), in support of Tiers 2 and 5 of the Points-based System, as from 25 November, to ensure that the provision of false information to a sponsor in order to get a Certificate of Sponsorship becomes a ground for refusal. Similar changes have been made for similar reasons to paras 321(ii) and 322(1A).

HC 321 has amended para 320 by the insertion of para 320(7B) to provide for the mandatory refusal of applications in which deception has been used. This amendment came into force on 29 February 2008, and provides that all applications in which any kind of deception (not just the submission of forged documents) has been used should automatically be refused. Then from 1 April 2008 mandatory refusal for specified periods was required in the case of applicants who had previously breached immigration laws. The idea was to exclude any kind of discretion on the part of the entry clearance officers. However, the result was that the rules became so absurdly draconian that the Secretary of State had to think again and modify her stance.¹ The rules applied to overstayers, illegal entrants, those who had used deception (eg submitting false documents) in an immigration application; or who had breached their conditions of stay while in the UK (for example by working illegally). The new rules set out a clear period of either one, five or ten years during which a previous immigration offender will have any future applications to come to the UK refused. Applicants who have been refused entry clearance after having used deception in their applications will have any future applications they make refused for ten years. Other immigration offenders (other than those who overstayed for 28 or fewer days and left at their own expense) will be refused for the following periods:

- (a) One year if, following their breach, they left the UK voluntarily at their own expense;
- (b) Five years if, following their breach, they left the UK voluntarily at public expense;
- (c) Ten years if they were removed or deported from the UK following their breach.

¹ See Immigration Minister, Liam Byrne MP, Hansard 13 May 2008, cols 1350–1354, or at <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080513/debtext/80513-0028.htm#0805147000250>. The concessions he announced took effect immediately, but he undertook to put them in the Immigration Rules at the earliest available opportunity.

3.55B Amendments were made by HC 607 which came into force on 30 June 2008. First, they provide that para 320(7B) will not apply where the applicant was under the age of 18 at the time of his or her last breach of immigration law. Secondly, para 320(7B) no longer applies to applications made in the following categories of the Immigration Rules:

- (1) a spouse, civil partner or unmarried/same-sex partner (paras 281 or 295A of HC 395);
- (2) a fiancé(e) or proposed civil partner (para 290);
- (3) a parent, grandparent or other dependant relative (para 317);
- (4) a person exercising rights of access to a child (para 246); and
- (5) a spouse, civil partner, unmarried or same-sex partner of a refugee or person with Humanitarian Protection (paras 352A, 352AA, 352FA and 352FD).

Now it gets more complicated. For these latest amendments are subject to a further exception, as announced by the Minister in the debate in the House of Commons on 13 May 2008, which required a new para 320(11) in the Rules,

3.55B *Control of Entry*

to give the immigration authorities a discretion to refuse applicants who are exempt from automatic refusal under para 320(7B) as a result of the above amendments, but who have contrived in a significant way to frustrate the intentions of the Immigration Rules. Now that a discretion has been allowed to creep into the Rules, guidance on how it should be exercised will need to be given.¹

¹ 'Guidance will be issued to explain the circumstances in which a person is likely to be considered to have contrived in a significant way to frustrate the intentions of the Immigration Rules. An example could be a person who has entered into a bogus marriage.' Explanatory Statement to HC 607, para 7.41.

3.55C But it does not end there. The government has announced two further concessions to para 320(7B) – one covering people who were in the UK on 17 March 2008 who went home voluntarily by 1 October 2008 and the other covering people whom the Home Office has accepted were trafficked to the UK.¹ These were not incorporated into the Immigration Rules in the Statement of Changes HC 607, as they are both temporary.² However, these two concessions will not apply to a person who has contrived in a significant way to frustrate the intentions of the Immigration Rules.

¹ The precise details of the first concession can be found in the Lord Bassam's speech in the House of Lords on 17 March 2008: see Hansard 17 March 2008, cols 96–100 or <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80317-0014.htm>. The second concession was announced in a letter dated 14 May 2008 from Liam Byrne MP to Chris Huhne MP.

² The first because it is time-limited and the second because it is an interim measure pending the UK's ratification of the Council of Europe Convention on Action against Trafficking in Human Beings: Explanatory Statement to HC 607, para 7.43.

3.55D Where migrants have left the UK at public expense, the government will also require them to repay the cost of their departure, once they have introduced primary legislation that allows them to do so.¹

¹ Explanatory Statements to HC 251 and 607.

CONTROL AFTER ENTRY

EXTENDING AND VARYING LEAVE

4.1A Applications for leave to remain and the means by which leave is granted are in the process of fundamental change. Since 25 November 2008 the biometric registration provisions of the UK Borders Act 2007 have started to operate. They enable the Secretary of State to introduce compulsory ID cards for certain foreign nationals who apply for leave to remain. The ID card is not simply a means by which the government can link each and every foreigner to a single identity but it will also be the repository of the actual leave by virtue of the biometric chip within the card. As the government put it in its Explanatory Memorandum to the Biometric Registration Regulations 2008, SI 2008/3048, it will 'provide clear evidence of the holder's immigration status (the card will be the biometric immigration document issued under the Regulations)'. We deal with this in more detail at 4.12A.

Applying for variation of leave

4.7 Applications for variation of leave or for all time limits to be removed should always be made before the expiry of the existing leave. A late application is inadvisable for at least three reasons:

- (i) the right of appeal is lost;¹ only an application made during the currency of existing leave gives the applicant the benefits of s 3C of the Immigration Act 1971, extending the leave until the determination of the application or any subsequent appeal;
- (ii) the requirement to make an application for an extension during the currency of existing leave is repeated in paragraph 32 of the Immigration Rules and a refusal of further leave cannot be challenged as not being in accordance with the Immigration Rules;²
- (iii) there is a risk of being removed for overstaying or breach of conditions.³

¹ Section 82(2)(d) and (e) of the Nationality, Immigration and Asylum Act 2002, like the Immigration Act 1971, s 14, requires extant leave in order to appeal against refusal to extend it. See 4.15 below.

² See *JL (Domestic violence: evidence and procedure)* India [2006] UKAIT 00058.

³ Under the Immigration and Asylum Act 1999, s 10.

Compulsory application forms

4.7A Prior to the new changes described below, applications for leave to remain or a variation of leave by non-EEA nationals had in general to be made on compulsory prescribed application forms under the provisions of s 31A of the Immigration Act 1971,¹ and be accompanied by the right fee.² Now the

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way in which these applications are to be made and the forms which are to be used will be prescribed in the Immigration Rules.³ Until the changes, the current Regulations were the Immigration (Leave to Remain) (Prescribed Forms and Procedures) 2007,⁴ which revoked the 2006 Regulations.⁵ The pre-existing rules will continue to apply to applications made before 29 February 2008, where old prescribed forms have been used.⁶

¹ Immigration Act 1971, s 31A, inserted by the Immigration and Asylum Act 1999, s 165 from 1 August 2003, SI 2003/1862, and amended by the Nationality, Immigration and Asylum Act 2002/2002, s 121 from 1 February 2003 (SI 2003/1), remains in force but will eventually be repealed by the IAN 2006, s 50(3).

² Immigration and Nationality Fees Order 2007, SI 2007/807, art 3, which is phrased in the language of an imperative 'must' and not that of discretion. For a more general discussion of the Home Secretary's discretion, which might inform any discussion about a need to make an exception, for example, in the case of an indigent applicant seeking to remain under the domestic violence rule, see 1.84ff, where there is a general discussion of fees.

³ This has now been done by HC 321, which took effect on 19 February 2008. Full details were published too late for inclusion in this work, and readers should consult the BIA website on <http://www.bia.homeoffice.gov.uk>.

⁴ SI 2007/882 which came into force on 2 April 2007.

⁵ SI 2006/1548 which came into force on 22 June 2006.

⁶ HC 395, para 34H.

4.7B Compulsory application forms for immigration applications made in the UK were first introduced in 1996. They were prescribed under the Immigration Rules in operation at that time – para 32 of HC 395 as amended by para 2 of HC 329. Since August 2003, application forms and procedures have been prescribed by Regulations made under s 31A of the Immigration Act 1971. Then in 2006, s 50(1) of the Immigration, Asylum and Nationality Act 2006 (IAN 2006) enacted powers to make immigration rules requiring a specified procedure to be followed when making an application or claim in connection with immigration. The rules can require specified forms to be used, specified information and documents to be provided, and they can direct the manner in which a fee is to be paid as well as providing for the consequences of non-compliance. On 29 February 2008, s 50(3)(a) of the IAN 2006 swept away the old powers under s 31A of the Immigration Act 1971 and the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007 ceased to have effect. In their place, prescribed forms and procedures are dealt with under the Immigration Rules.

4.7C HC 395, paras 34–34J, introduced by HC 321 as from 29 February 2008, provide for the compulsory use of specified forms to make applications for leave to remain and for indefinite leave. They prescribe the procedures for making applications by post, in person, by courier and online. They provide for the procedure which is to apply where an applicant wishes to vary the application. They set out the rules for determining the date when an application is made and provide that if a request is made for the return of a passport for travel outside the common travel area, the application will be treated as withdrawn.

4.7D Section 50(2) of the IAN 2006 allows new or revised application forms to be specified administratively. There will no longer be any need to make

Regulations by statutory instrument. The intention is that forms will be specified by announcement on the website of the UK Border Agency of the Home Office, and the forms will be clearly marked as specified from the relevant date. The changes will have a wider application than the existing Regulations which only apply to applications for leave to remain in the United Kingdom, whereas the Immigration Rules will apply to any application or claim in connection with immigration for which a form is specified in accordance with the Immigration Rules. In the future it is intended that forms will be specified for immigration applications made overseas (Explanatory Statement to HC 321, para 7.31).

4.7E Transitional arrangements have been made for applications for leave to remain made before 29 February 2008 but considered after that date. There are also transitional provisions for applications made within 21 days of the date on which a new form is specified in accordance with the Immigration Rules, which permit the use of the form that was permitted immediately prior to the date of such specification. In conjunction with these changes, paras 32 and 33 of the Immigration Rules have been deleted, as the provisions therein are now redundant.

4.8 The application must be completed as required, and signed by the applicant, or, in the case of a minor, by the parent or legal guardian, and must be accompanied by the documents and photographs specified in the form.¹ Online applications require completion of the confirmation box by the applicant or the applicant's adviser and the forms direct the manner in which mandatory photographs and documents are to be sent.²

¹ Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007, 2007/882, reg 16. Now HC 395, para 34A(vi).

² HC 395, para 34A (vii).

4.9 The formal requirements for successful completion of an application form are now contained in HC 395, para 34A. Paragraph 34C makes it quite clear that an application or claim which does not comply with the requirements of para 34A is invalid and will not be considered. This is a more rigid stance than earlier regulations would suggest.¹ There are transitional arrangements for applications made before 29 February 2008 and there is some leeway where a new form is introduced and the applicant uses the old form.² But there is no allowance made for formal non-compliance. This is a very good reason for making an application well before the expiry date of a leave giving the applicant a second chance to put things right before it is too late. The alternative is litigation. The Immigration Rules make it clear that there will be no consideration of the application and so no decision and no appeal. Some early decisions under the old law suggest the thrust of such challenges. In *Derouiche*,³ the Tribunal found that the wording of the form FLR(S) was misleading and imprecise and that, since it had to be used by applicants who may not speak or understand English, rejection of an application for a minor non-compliance was unfair and unjust. In *Ravichandran and Jeyanthan*⁴ the Court of Appeal indicated that whether an application or notice of refusal was invalid because of a failure to comply with statutory requirements about its

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content was a much more nuanced question than much of the case law suggested, and that in each case the court or tribunal should concentrate on what the rules intended should be the just consequence of non-compliance. The first question is whether there has been substantial compliance with the procedural requirements, even if there has not been strict compliance. The second is whether the non-compliance is capable of being waived, and if so, whether it has been. That will not arise in this situation, which is predicated on the Secretary of State's refusal to waive the non-compliance. The third is what are the consequences of non-compliance.⁵

¹ If the application is rejected, it will be considered a valid application at the date of its original submission provided any defects have been promptly remedied. This was the effect of SI 2007/882, reg 17.

² HC 395, paras 34H and 34I.

³ *Derouiche* [1998] INLR 286.

⁴ *R v Immigration Appeal Tribunal, ex p Jeyanthan; Ravichandran v Secretary of State for the Home Department* [2000] Imm AR 10, [2000] INLR 241, at 247. See 18.84, below.

⁵ *Ravichandran* above, per Woolf MR at 17.

4.9A In more recent decisions the Court has shown a willingness in a suitable case to contrast formal procedural compliance with substantial compliance with the requirements for leave to enter or remain, In *R (on the application of Kanwal) v Secretary of State for the Home Department*,¹ the need for formal compliance triumphed. An application for leave to remain, made in time but using an old application form, was held to be invalid and was not rectified by the later submission of the correct form. The correct form having been submitted after the leave expired, the application for leave to remain was properly treated by the Home Office as out of time. In *R (on the application of Forrester) v Secretary of State for the Home Department*,² A, lawfully in the country, marries a man settled in the UK for some 38 years. She sends in her prescribed form accompanied by a cheque. The cheque bounces. So the HO reject her application because the proper fee has not been paid. A submits a fresh application but this is out of time and the HO refuses leave and threatens her with criminal penalties for overstaying if she fails to up sticks and leave. The issue was whether form triumphed over substance. Sullivan J was quite clear about where the Court stood.

'The defendant is given a discretion, and she is given a discretion on the basis that it will be exercised with a modicum of intelligence, common sense and humanity. It might be asked, in these circumstances, what possible reason there could have been for not exercising the discretion in this claimant's favour.' (para 7)

'One would have thought that anyone standing back and looking at this case would have concluded that such a decision was manifestly disproportionate and unreasonable'. (para 9)

'It is one thing to say that one should have a fair and firm immigration policy, it is quite another to say that one should have an immigration policy which is utterly inflexible and rigid and pays not the slightest regard to the particular circumstances of the individual case'. (para 13)

Enough said. This insistence of form over substance does not only arise in the area of prescribed forms on leave to remain, but also in the operation of the

points system, where the rigidity of form is the order of the day. If the government wants to mess with big business wanting to recruit qualified overseas staff, and they reject applications because this or that document is missing and the applications are formally deficient but substantially sound, it will be creating a litigation time bomb, in which it will more often be on the losing side, as in *Forrester*. It ought to be a warning but we doubt if it will be, owing to the inbuilt rigidity of the points system. Ticking boxes and insistence on formal compliance is intended to eliminate the need for discretion, but in reality it is no proper substitute for it.

¹ [2007] EWHC 2803 (Admin), [2007] All ER (D) 24 (Dec).

² [2008] EWHC 2307 (Admin).

Fees

4.10 The appropriate fee must also be enclosed with the application. Section 5 of the Immigration and Asylum Act 1999 gave the Secretary of State the power to charge fees for applications for leave to remain, and s 42 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 allows these fees to be set exceeding the administrative costs, and reflecting the benefits deemed likely to accrue to successful applicants.¹ Section 5 provided that no application 'is to be entertained by the Secretary of State unless the fees has been paid in accordance with the regulations.' Section 5 has now been replaced by s 51 of the IAN 2006, which attempts to consolidate the fee fixing power for immigration and nationality services under one statutory power. It gives the Secretary of State the power to make orders which may confer a discretion to reduce, waive or refund all or part of a fee and make provisions as regards the consequences of a failure to pay a fee.² None of these discretionary powers have so far found their way into the Immigration and Nationality (Fees) Order 2007,³ nor the Immigration and Nationality (Cost Recovery Fees) Regulations 2007,⁴ or the Immigration and Nationality (Fees) Regulations 2007, which set the current fees payable for different kinds of leave to remain.⁵ Successive regulations setting fees for leave to remain and variations of leave have been notable for introducing massive fee increases in these and other areas. It should be noted that applications made in person are generally more expensive than applications made by post. See 1.84 ff for the updated position.

¹ See now IAN 2006, s 51, which came into force on 31 January 2007 (by virtue of SI 2007/182) and s 52(1)–(6), which came into force on 7 March 2007 (by virtue of SI 2007/467). For further detail see 1.84ff above.

² IAN 2006, s 51(3), which came into force on 31 January 2007 (by virtue of SI 2007/182). The current powers under which fees are prescribed in respect of the various applications and services specified in the Immigration and Nationality (Fees) Order 2007, SI 2007/907 will be repealed when the new fees are specified in regulations made under s 51(3) of the 2006 Act: Explanatory Memorandum to SI 2007/807, para 4.4.

³ SI 2007/936, and the Immigration and Nationality (Fees) Order 2007, SI 2007/802, both of which, in effect, make the payment of the correct fee a 'must'. For more discussion of this and other aspects of fees, see 1.84ff above.

⁴ SI 2007/936.

⁵ SI 2007/1158. By virtue of regulation 21, an application referred to in these regulations will not be considered to be validly made unless it is accompanied by the specified fee. However, in respect of leave to remain applications, made before 21 May 2007 where such

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an application is not accompanied by that fee, the Secretary of State will write to the applicant to inform them that they need to pay that fee. If the fee is not paid within 28 days of that letter being posted, the application will be treated as invalid.

Identity cards

4.12A The Immigration (Biometric Registration) Regulations 2008 made under ss 5 and 6 of the UK Borders Act 2007 are the first of the regulations which inaugurate the start of compulsory ID cards for foreign nationals. These Regulations impose a requirement to apply for the ID card only on those who apply for leave to remain in specified marriage, partner and student categories and their dependants applying at the same time as the principal applicant.¹ The specified categories are those applying-

- a) as a student;
- b) as a student nurse;
- c) to re-sit an examination;
- d) to write up a thesis;
- e) as a prospective student;
- f) as a sabbatical officer;
- g) as the spouse or civil partner of a person settled in the United Kingdom;
or
- h) as the unmarried or same-sex partner of a person present and settled in the United Kingdom.²

Those who apply will be photographed and fingerprinted,³ unless they are an unaccompanied child under the age of 16.⁴ Under reg 9 the government can use this biometric information for seven specified government functions including the prevention, investigation or prosecution of crime, but the photographs and fingerprints must be destroyed or made inaccessible if the person turns out to be a British citizen or Commonwealth citizen with a right of abode under s 2(1)(b) of the Immigration Act 1971.⁵ At the end of the application process the successful applicant will be issued with a biometric immigration document (BID) aka an ID card, which can contain up to 19 separate pieces of personal information.⁶ Once issued with the new ID card, applicants may be asked to surrender other immigration or nationality documents in their possession.⁷ The Regulations also contain powers to require the surrender of an ID card, or to order its cancellation and impose obligations on the holder to give notice to the Secretary of State that certain things have happened and to apply for a replacement document *in certain circumstances*.⁸

¹ The Immigration (Biometric Registration) Regulations 2008, SI 2008/3048, paras 3 and 23. The reason for singling out some 44,000 foreign students and 5,000 foreign spouses and partners as the guinea pigs is that there is 'evidence that these categories are susceptible to abuse by those who seek to breach the UK's immigration laws': Explanatory Memorandum to SI 2008/3048, para 7.4 and p 24. This is a bit like trying to eliminate shoplifting from Selfridges by making every single shopper there pass through a security check and empty their pockets and bags, except that in the case of Selfridges there would be an outcry but with foreign students and spouses there is none.

² The Immigration (Biometric Registration) Regulations 2008, para 4.

³ The Immigration (Biometric Registration) Regulations 2008, paras 5 and 8.

⁴ The Immigration (Biometric Registration) Regulations 2008, para 7.

- ⁵ The Immigration (Biometric Registration) Regulations 2008, paras 11 and 12.
- ⁶ The Immigration (Biometric Registration) Regulations 2008, paras 13 and 15.
- ⁷ The Immigration (Biometric Registration) Regulations 2008, para 14.
- ⁸ The Immigration (Biometric Registration) Regulations 2008, paras 16–20.

4.12B Non-compliance with the requirement to apply for an ID card can be met with immigration sanctions or a civil penalty. Under the Regulations there are a number of immigration sanctions. These include refusing to issue a biometric immigration document, refusing or rejecting an immigration application, cancelling or varying (by curtailment) existing leave. Then there are the civil penalties. Sections 9(1) of the UK Borders Act 2007 enables the Secretary of State to impose a civil penalty regime where a person fails to comply with a requirement of the Regulations. A Code of Practice about the sanctions for non compliance with the biometric registration regulations has also come into force.¹ It establishes the circumstances when the Secretary of State may impose a civil penalty, and the amount of any civil penalty notice issued. It also sets out when an immigration sanction will be imposed rather than a civil penalty.

¹ The Immigration (Biometric Registration) (Civil Penalty Code of Practice) Order 2008, SI 2008/3049.

Cancellation of leave to remain

4.24 Under s 3B of the Immigration Act 1971¹ the Secretary of State may make provision with respect to the giving, refusing or varying leave to remain, including any appropriate supplemental provision, which may include a power to cancel leave to remain in appropriate cases. Cancellation on arrival of advance leave to enter is not unfamiliar, since it is similar to the power to refuse entry to someone holding an entry clearance.² But cancellation of leave to remain is unfamiliar. There is an automatic cancellation of leave to enter or remain, when someone becomes an ‘excluded person’ under s 8B(2) of the Immigration Act 1971,³ but there is no general power to cancel leave to remain. Where a person fails to comply with a requirement to make an application for a biometric immigration document, otherwise known as an identity card, the Secretary of State has power to cancel or vary leave to enter or remain under reg 23(1)(d) of the Immigration (Biometric Registration) Regulations 2008, SI 2008/3048. Article 13(7) of the Immigration (Leave to Enter and Remain) Order 2000 provides that non-lapsing leave may be cancelled while its holder is outside the UK, in the case of a leave to enter by an immigration officer, and by the Secretary of State in the case of a leave to remain.⁴ The power to seek information and documents is the same as that of an immigration officer conducting an examination at the port, with the additional power of calling for a medical report (since there is no power to refer the person abroad to a medical inspector). A failure to provide the requested information, documentation or report is itself a ground for cancellation of leave.⁵ The Immigration rules state that an immigration officer at the port may cancel leave to remain,⁶ although in fact this may not be correct, since Sch 2 to the 1971 Act gives immigration officers at the port powers to cancel leave to enter, but there is no mention of cancellation of leave to remain.⁷ Cancellation of leave to enter is dealt with at 3.23 above.

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¹ Inserted by Immigration and Asylum Act 1999, s 2.

² See chapter 3. Under the Immigration Act 1971, Sch 2, para 2A(9) such cancellation is treated as a refusal of leave to enter at a time when the person refused had a current entry clearance, except where entry is sought for a different purpose from that in the entry clearance. This ensures an in-country right of appeal: NIAA 2002, s 82(2)(a) read with s 92(3)(a), subject to the exception: see the AI(TC)A 2004, s 18, 28.

³ Immigration Act 1971, s 8B, inserted by the Immigration and Asylum Act 1999, s 8 (war criminals).

⁴ SI 2000/1161, Art 13(7)(a) and (b).

⁵ SI 2000/1161, Art 13(8), (9).

⁶ HC 395, para 10B, inserted by HC 704.

⁷ Immigration Act 1971, as amended by the Immigration and Asylum Act 1999, Sch 14, para 57, Sch 2, para 2A(1).

EXERCISING THE DISCRETION TO VARY LEAVE

The ‘no switching’ rule

4.30 Prior to 1980, persons in the UK as visitors, students and other temporary entrants could obtain extensions of leave to set up in business¹ or become persons of independent means. Since then, the policy has swung against such changes being allowed, and is now swinging back again. The current Immigration Rules generally prevent switching categories, but contain some important exceptions. For example, no visitors, entering the UK on or after 1 July 2006, can now switch to student,² and neither visitors nor students may remain as au pairs or working holidaymakers.³ Visitors may not remain (under the Rules) for employment,⁴ investment⁵ or to set up in business,⁶ but students may be granted extensions of stay for Department of Employment-approved training,⁷ or for post-graduate medical or dental training,⁸ and graduates, student nurses, trainee doctors and dentists, working holiday-makers, highly skilled migrants and innovators may switch to work permit employment,⁹ as may certain doctors;¹⁰ Turkish nationals admitted as visitors, students or for some other purpose may apply to remain for business or self-employment in accordance with the standstill clause in the Ankara Agreement,¹¹ and graduates, medical trainees, working holidaymakers, work permit holders and innovators can apply to remain as highly skilled migrants,¹² who in turn, together with the other groups, may remain as innovators.¹³ Work permit holders, highly skilled migrants, innovators and business persons may remain as investors.¹⁴ Men or women admitted in a temporary capacity can stay on if they qualify under the unmarried partners’ rule¹⁵ or (if granted leave for more than six months or as a fiancé(e)) the marriage rules,¹⁶ and those admitted for marriage or unmarried relationship whose relationship has broken down may stay for contact with the children of the relationship.¹⁷ Those admitted in a temporary capacity can stay on under the marriage or civil partnership rules at HC 395, para 295D, as amended by HC 582, and those admitted for marriage or civil partnership may stay for contact with children under HC 395, para 248A, as amended by HC 582. Finally, people visiting family members settled in the UK may apply to remain with them permanently as dependent relatives.¹⁸ This paragraph has to be read in the light of the changes brought about by the introduction of Tiers 1, 2 and 5 of the points-based system, which has revoked the pre-existing immigration rules as from the date of the introduction of these various tiers. See chapter 10 for more details.

- ¹ Visitors could set up in business, but the wording of HCs 80 and 82 may have excluded students. The old rules are relevant because of the 'standstill' provisions of the EC-Turkey Association Agreement: see fn 6 below.
- ² HC 395, para 60(i), as amended. See 9.31 below.
- ³ HC 395, para 92(i) (au pair); HC 395, para 98(i) has been repealed by HC 302. There is now no scope for switching to working holidaymaker under the rules. But a working holidaymaker may switch to, for example, work permit employment: HC 395, para 131D.
- ⁴ HC 395, para 128. A concession operates to allow switching into shortage occupations in exceptional circumstances: see 10.64 below.
- ⁵ HC 395, para 227.
- ⁶ HC 395, para 206. Note, however, the position of Turkish nationals: see fn 11, below.
- ⁷ HC 395, para 119(i).
- ⁸ HC 395 para 73. As regards doctors, dentists and student nurses and midwives, it should be noted that the rules have been radically recast. See 9.49–9.50 for student nurses and 9.51 below for doctors and dentists; and 10.35ff for overseas nurses and midwives. As regards transitional provisions for doctor visitors being allowed to follow certain courses, see 9.52 below.
- ⁹ HC 395, para 132, inserted by HC 346, with reference to paras 131A–F, inserted by Cmnd 5597, Cm 5949, Cm 6339.
- ¹⁰ See fn 8 above.
- ¹¹ See 7.167, below. All those from the other Association Agreement countries in southern and Eastern Europe are now EU Member States and are covered by EC law: see 7.6ff, below.
- ¹² HC 395, para 135E, inserted by HC 346, with reference to paras 135DA–135DD, inserted by Cm 6339, 135DE–135DF, inserted by HC 1112, and 135DG, inserted by HC 346.
- ¹³ HC 395, para 210D–210DE, 210E, inserted by Cm 6339, HC 538, amended by HC 1112. There are now two intermediate 'stepping stone' categories to full work permit or similar status. The first is the SEGS scheme, whose requirements have recently been liberalised (see below at 10.121). The second allows students who have obtained qualifications in Scotland to switch to the Fresh Talent: Working in Scotland Scheme under HC 395, paras 143A to 143F (see 10.123 below).
- ¹⁴ HC 395, para 227A–D, inserted by HC 346.
- ¹⁵ HC 395, para 295D.
- ¹⁶ HC 395, para 284, as amended by Cm 5959.
- ¹⁷ HC 395, para 248A, inserted by Cm 4851.
- ¹⁸ HC 395, paras 298(ii)(a) and 299; 317 and 318.

General grounds for refusing variations and curtailing leave

4.31 General grounds for refusing leave to remain are contained in HC 395, para 322. Prior to 1994, an application for leave to remain for a purpose not covered by the Immigration Rules, if refused, attracted a right of appeal on its merits.¹ The loophole was closed by the 1994 rules,² which provided that (1) a variation of leave 'is to be refused' if leave is being sought for a purpose not covered by the rules. The Secretary of State may of course still allow such an application outside the rules, but a refusal is not appealable on the merits.³ Another mandatory ground was inserted in 2008 by HC 321 and then amended by HC 1113 to cover false information given to a sponsor by a Tier 2 applicant in order to get a certificate of sponsorship. It now reads: '(1A) where false representations have been made or false documents [or information] have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application.' The wording of the new rule is problematic. One interpretation is that false representations and so forth are confined to the application being considered and false representations in

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para 322(1) (see below) deals with false representations etc used in an earlier application for leave to enter or to vary leave.

In addition to these general grounds on which an extension of leave must be refused under the rules, there are further grounds on which such an application 'should normally' be refused.⁴ These are:

- (2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave;
- (3) failure to comply with any conditions of leave;
- (4) failure by the person concerned to maintain or accommodate himself and any dependants without recourse to public funds;
- (5) the undesirability of permitting the person concerned to remain in the light of his or her character, conduct or associations or because of a threat to national security;
- (6) refusal by a sponsor to give an undertaking in writing to be responsible for maintenance and accommodation or failure to honour such an undertaking;
- (7) failure by the applicant to honour any declaration or undertaking given orally or in writing as to the intended duration and/or purpose of his or her stay;
- (8) failure, except by those who qualify for settlement or who are married to someone settled in the UK, to satisfy the Secretary of State that he or she will be returnable to another country if allowed to remain in the UK for a further period;
- (9) failure to produce within a reasonable time documents or other evidence required by the Secretary of State to establish a claim to remain under the Rules.⁵ This has now been amended by HC 104 to include information as well as documents or other evidence. This additional ground for refusing an application could arise where the applicant has failed to provide information requested on the application form or where the applicant has failed to provide information requested in addition to that already provided in the application form;
- (10) failure, without providing a reasonable explanation, to attend for interview;
- (11) failure in the case of a child (other than an asylum seeker) making an application to remain other than in conjunction with his or her parents, to produce written consent to the application from a parent or legal guardian to the Secretary of State, if required to do so.

Rule 323 provides that a person's leave to enter or remain may be curtailed (i) on any of the grounds set out in paragraphs (2)–(5) above; (ii) if the person ceases to meet the requirements of the Rules under which leave to enter or remain was granted; (iii) is the dependant of an asylum seeker whose leave to remain was curtailed prior to 2 October 2000 under the now repealed s 7 of the Asylum and Immigration Appeals Act 1993; (iv) is someone whose grant of asylum or humanitarian protection is revoked under HC 395, paras 339A (i)–(vi) and 339G (i)–(vi).

- ¹ Since there was no applicable rule, there was no application to depart from the Immigration Rules, and so the appellate authority was not precluded from exercising its own discretion: see eg *Rahman (Jinnah) v Secretary of State for the Home Department* [1989] Imm AR 325.
- ² HC 395, para 322(1).
- ³ The refusal will be appealable on asylum or human rights grounds if as a result of the refusal, the person has no leave to enter or remain: Nationality, Immigration and Asylum Act 2002, ss 82(2)(d), 88(4) and 84(1)(b), (c), (g). See chapter 18 below.
- ⁴ HC 395, para 322(2)–(11). We retain the numbering of the sub-paragraphs here.
- ⁵ See *R v Secretary of State for the Home Department, ex p Animashaun* [1990] Imm AR 70, QBD. The asylum equivalent of this rule, HC 395, para 340, combined with absurdly short compliance times, led to over a third of asylum claims being rejected on non-compliance grounds at one time, and to widespread anger at the cynical abuse of the procedure by the Secretary of State to inflate refusal figures for political purposes.

4.31A A new para 323A, inserted by HC 1113 to take effect on 27 November 2008 creates additional situations where leave to remain will be curtailed. It applies to Tier 2 and Tier 5 migrants who no longer have a licensed sponsor for reasons referred to in the new rule. We deal with this in more detail in chapter 10.

Chapter 5

SETTLEMENT AND RETURN

SETTLEMENT

Settlement under the Immigration Rules

5.13 Under the Immigration Rules certain categories of immigration status never lead directly to settlement, for example, visitor,¹ student, working holiday,² au pair,³ work training,⁴ seasonal agricultural worker⁵ and teachers and language assistants on approved exchange schemes.⁶ In all these cases the person is expected to leave at the end of the allotted period and they cannot generally switch into a category which qualifies for settlement.⁷ But in other categories settlement is given straightaway or the persons are admitted for a limited period with a view to eventual settlement. Thus spouses and civil partners⁸ are given a two-year initial period before qualifying for settlement, unless they have already been married for four years, when indefinite leave should be granted.⁹ Unmarried partners, whether of the same or opposite sex, are also given a two-year leave with a view to settlement.¹⁰ So too are any children who come with the spouse or unmarried partner.¹¹ Otherwise, children and other dependent relatives obtain immediate settlement on arrival.¹² Children born in the UK who are not British citizens may also qualify for immediate settlement if one of their parents qualifies for it, or acquires a right of abode, or the child goes into local authority care.¹³ Bereaved spouses and unmarried partners of settled persons who died during the initial two-year probationary period qualify for settlement,¹⁴ as do non-custodial parents exercising access rights to children resident in the UK (for whom the qualifying period is 12 months).¹⁵

It should be noted that many of the categories of entry and stay outlined above have now been subsumed into Tier 1, 2 or 5 of the points-based scheme, and others, such as students, are expected to be covered by the introduction of further Tiers during 2009. However, the old Rules which have been placed in an Appendix of the current Rules, still apply to applications made before the new Tiers became effective. The new rules on the recently introduced Tiers provide for settlement in most of the new categories provided the migrant satisfies the requirements of the particular applicable rule. They all continue the need for a knowledge of English and the British way of life. The Rules need to be consulted in each case.

¹ HC 395, para 44.

² Categories like student and working holiday, although not directly leading to settlement, may now do so indirectly by the loosening of the previous inflexibility of switching. For example, students can now enter the world of work in a variety of ways, if they have the right qualifications and working holiday makers, now subsumed into Tier 5 of the new points-based system in much narrower and more precise form (see chapter 10, below), can do much the same (see chapter 9 below). There are also three intermediate categories of employment or training which are stepping stones to settlement categories. These are: the SEGS scheme; the *Fresh Talent: Working in Scotland Scheme*; and overseas qualified nurses or midwives (see chapter 10 below).

- ³ HC 395, para 92.
- ⁴ HC 395, para 119.
- ⁵ HC 395, para 107 (amended by HC 1224).
- ⁶ HC 395, para 113.
- ⁷ There are exceptions for certain students, trainees and for working holiday-makers, who may now switch into work permit employment: see chapter 10.
- ⁸ All references to 'spouses' should now read 'spouses and civil partners': see changes set out in HC 582 which took effect on 5 December 2005
- ⁹ HC 395, para 282. Not all of this time need be spent in the UK: *Qureshi* (18312) [1999] 5 ILD 4 at 23; IDI, Ch 8, s 1. NB this used to be a period of 12 months, but was extended to two years from 1 April 2003 by Cmd 5949 and is now in line with the position for unmarried and same-sex partners under para 295B. Spouses of former Gurkhas and foreign or Commonwealth members of HM Forces applying under paras 276R–W (inserted by HC 164 from 1 January 2005) need to have been married for only two years to obtain immediate settlement. As to the difficulties caused by the entry clearance granting leave for a period of two years and part of that time being used for travel back to the UK and so forth, thus curtailing the two-year period required in the UK to achieve settlement, see *TA (Spouse, requirements for indefinite leave) Pakistan* [2007] UKAIT 00011.
- ¹⁰ HC 395, para 295B, G, inserted by Cm 4851, para 32.
- ¹¹ HC 395, para 302.
- ¹² HC 395, paras 299, 308 and 317.
- ¹³ HC 395, paras 305–308. Indefinite leave is generally granted where children are likely to remain in care for the foreseeable future. See IDI, Ch 8, s 3, Annex P, and Ch 11 below.
- ¹⁴ HC 395, para 287(b), inserted by Cm 4851, para 30 (spouses), HC 395, paras 295M–O as inserted (unmarried partners).
- ¹⁵ HC 395, para 248D, inserted by Cm 4851, para 22.

5.14 Apart from family reunion, the other categories of applicant, now subsumed into Tiers 1, 2 or 5 of the new points-based system, who may qualify for eventual settlement are work permit holders,¹ highly skilled migrants,² those in permit-free employment,³ business and self-employed persons,⁴ innovators,⁵ writers, composers and artists,⁶ investors and retired persons of independent means⁷ and Commonwealth citizens with grandparents born in the UK who wish to take or seek employment in the UK.⁸ Under the Immigration Rules, these last groups of people qualify for settlement if they have 'spent a continuous period of five years in the UK in this capacity'.⁹ The Rules require continuity of residence in the UK for five years while in a particular capacity. A person whose continuity of residence in the UK has been broken would only qualify for an extension of stay in the same capacity and not for settlement. The general practice is to disregard absences of three months in any one year, and, exceptionally, longer periods.¹⁰ While the legal effect of settlement is to allow people to change jobs or business, its grant is dependent in many cases on the prospect of being able to continue in the existing capacity. In employment cases, continuation with the present employer is an express requirement and the employer must give a certificate to this effect.¹¹ In business cases, evidence of the continuing viability of the business and the applicant's involvement with it is required.¹²

- ¹ HC 395, para 134, as amended by HC 1016 which took effect on 3 April 2006.
- ² HC 395, para 135G, as inserted by HC 538 and as amended by HC 1016 which took effect on 3 April 2006.
- ³ HC 395, paras 142, 150, 158, 167, 176 and 184, as amended by HC 1016 which took effect on 3 April 2006.
- ⁴ HC 395, paras 209 and 222, as amended by HC 1016 which took effect on 3 April 2006 (self-employed or business under EC Association agreement). The government plans to increase the qualifying period of settlement to five years: see fn 1 above.
- ⁵ HC 395, para 210G, as amended by HC 1016 which took effect on 3 April 2006.

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- ⁶ HC 395, para 238, as amended by HC 1016 which took effect on 3 April 2006.
⁷ HC 395, paras 230 and 269, as amended by HC 1016 which took effect on 3 April 2006.
⁸ HC 395, para 192, as amended by HC 1016 which took effect on 3 April 2006.
⁹ This phrase recurs in almost all of the settlement rules just referred to, viz paras 134, 142, 150, 158, 167, 176, 184, 192, 209, 210G, 222, 230, 238 and 269. Paragraph 135G (dealing with highly skilled migrants) provides more flexibility, envisaging movement between this and other work or business categories during the four-year period. See further chapter 10 below. For all employment related categories of entry to the UK the qualifying period for settlement ('indefinite leave to remain') was changed to five years, as indicated in the footnotes above, by HC 1016 which took effect on 3 April 2006. According to the Home Office this brings the UK in line with the European norm for these purposes: see Explanatory Memorandum to the Statement of Changes in the Immigration Rules laid on 30 March 2006 (HC 1016). See also 5.17 below.
¹⁰ In *Shahbakhti* (16978) [1999] 5 ILD 1 at 30, 20 months' absence in four years was too long for a work permit holder.
¹¹ HC 395, para 134.
¹² HC 395, para 209.

Knowledge of English and British way of life

5.15 HC 398, which came into force on 2 April 2007, requires those subject to immigration control and in a category that leads to settlement to demonstrate sufficient knowledge of the English language and sufficient knowledge of life in the UK before settlement can be granted.¹ The policy behind this is explained as follows: 'Applying to live permanently in the UK thus becomes linked to the exercise of a particular choice to do so and a willingness to embrace the language and the main precepts of its civic organisation.'² For those applicants who are not fully conversant with the English language, the means of qualifying is by following to completion and qualification a course that combines language tuition with citizenship materials. For those with a reasonable knowledge of the English language the 'Knowledge of Life in the UK' test has been prepared which combines the test with familiarity and ability at a much more developed level.³ These rules changes are intended to ensure that no one will be refused leave to remain in the UK simply because they have not passed the tests.⁴ The provisions allow for them to be granted further leave to remain providing they continue to qualify under the Immigration Rules as they will have done to this point. Not every category of resident seeking indefinite leave is covered by the scheme. There are exceptions: victims of domestic violence; bereaved spouses who entered as dependants; minors; those who are 65 or older, and a discretionary exception on the grounds of the applicant's physical or mental condition.⁵ Then there are the parents and grandparents over the age of 65 and other dependant relatives, coming to join their families in the UK. Foreign and commonwealth citizens and Ghurkhas⁶ serving in the armed forces who are eligible for settlement on discharge are not going to be required to take the test, nor their spouses or partners. Spouses and partners of those in Crown Service overseas, who may not have opportunities to come to the UK to take the test in between a series of postings, are to be allowed to have a designated person certify that they have sufficient knowledge of the English language and of life in the UK.⁷

¹ HC 398, inserting new clauses 33B–33F into HC 395 and amending other rules so that the tests apply different categories of residents: work permit (para 134(iii)); journalists (para 142(iii)); sole representatives (para 150(iii)); diplomatic servants (para 158(iii)); domestic workers (para 159G(iii)); overseas government employees (para 167(iii)); ground

staff of foreign airlines (para 184(iii)); highly skilled migrants (para 135G(iii)); ministers of religion (para 176(iii)); Commonwealth citizens of UK ancestry (para 192(ii)); spouses or civil partners of those with limited leave to enter or remain in the UK under paragraphs 128–193 (other than of persons admitted under the Sectors Based Scheme under paragraphs 135I–135K) (substituted paras 194–196 and substituted paras 196A–196F); business people (para 209(iii)); innovators (para 210G(ii)); writers, composers and artists (para 238(ii)); businesses under EEA Association Agreement (para 222(vi)); investors (para 230(ii)); spouses and civil partners of a person with limited leave to enter or remain in the UK under paragraphs 200–239 (substituted paras 240–242 and new paras 242A–242F); parents exercising access rights to a child (para 281D(vi)); spouses or civil partners of a retired person of independent means (substituted paras 271–273 and new paras 273B–273F); long residents (new paras 276A2–276A4); civil partners of a person with the right of abode or indefinite leave to enter or remain (substituted paras 281(i)(b) and 282); unmarried and same sex partners of a person with the right of abode or indefinite leave to enter or remain (substituted paras 295A(1)(b) and 295B).

² Explanatory Memorandum to HC 398, para 7.

³ HC 395, para 33B and 33C, inserted by HC 398. Under these provisions a person has sufficient knowledge of the English language and sufficient knowledge about life in the UK if he or she has attended a course which used teaching materials derived from the document entitled ‘Citizenship Materials for ESOL Learners’ (ISBN 1-84478-5424) and has thereby attained a relevant accredited qualification; or has passed the test known as the ‘Life in the UK Test’. A relevant accredited qualification is either: (a) an ESOL ‘Skills for Life’ qualification in speaking and listening at Entry Level approved by the Qualifications and Curriculum Authority; or (b) two ESOL units at Access Level under the Scottish Credit and Qualifications Framework approved by the Scottish Qualifications Authority.

⁴ Explanatory Memorandum to HC 398, para 7. According to the BIA website there will be transitional arrangements so that applications for ILR from those who do not satisfy the English language and knowledge of UK life tests will be considered instead as an application to extend temporary stay in the UK. This will last until 31 January 2008. After 1 February 2008, such applications will simply be refused: See BIA Knowledge of language and life in the United Kingdom at <http://www.bia.homeoffice.gov.uk/ukresidency/>. This means that if someone has not successfully completed the tests, they should apply for an extension of limited leave rather than ILR. Such an application should be in keeping with the immigration rules and the above Explanatory Memorandum.

⁵ HC 395, para 33D, as inserted by HC 398. The other exceptions are not expressly mentioned in the rules, but are derived from the fact that the rules dealing with all these matter are unamended: see Explanatory Memorandum to HC 398, para 7.

⁶ The position of Gurkhas will have to change after the high Court decision in *R (on the application of Deo Prakash Limbu v Secretary of State for the Home Department and ECOs, Kathmandu and Hong Kong)* (2008) LTL 1/10/2008 which dealt a body blow to the arbitrary cut-off date in 1997, when the Gurkhas moved their HQ from Hong Kong to the UK. The Court held that a discretionary policy allowing Gurkha veterans who had been discharged before July 1997 entry clearance to settle in the United Kingdom only if they could establish a sufficient connection with the UK was unlawful, where the factors establishing such a connection had focused on physical presence in the UK rather than reflecting the purpose of the policy, which had been to honour an historic debt. Long military service performed by the Gurkhas for the Crown at the instigation of the UK government amounted to a connection with this country wherever it was performed.

⁷ HC 395, para 33B(c), as inserted by HC 398.

Other methods of acquiring settlement

5.18 Settlement within the Immigration Rules may also be given to a variety of people. Many of the categories below were previously dealt with as discretionary policies outside the rules, but most have now been brought within the rules. First, there are refugees. The practice, introduced in 1998, was to give refugees settlement immediately, but that was all changed from 1 April 2003.¹ The current position is that refugees should normally be

5.18 Settlement and Return

granted five years leave to enter or remain rather than being given immediate indefinite leave as previously, but with no guarantee of indefinite leave at the end of that period.² Those refused asylum may be given 'Humanitarian Protection' which is now part of the rules and subject to the same provisions as regards length of leave.³ Secondly, settlement may also now be given under the Rules to persons who have lived in the UK for a continuous period of ten years, if here lawfully, and 14 years if any part of that time has been unlawful.⁴ Thirdly, a policy which remains outside the rules provides that British Overseas citizens who have been in the UK with limited leave for seven years may be granted settlement.⁵ Another circumstance which may result in the grant of settled status under the Rules is domestic violence occurring during the two-year initial period following admission.⁶ There are also rules allowing for the grant of settlement to bereaved spouses and civil partners, unmarried partners and bereaved unmarried partners, all cases which were brought within the framework of the Immigration Rules in October 2000.⁷ In addition, persons benefiting from the Secretary of State's policies precluding enforcement action against overstayers and illegal entrants on family life grounds may be eligible for a discretionary grant of settlement.⁸ The same may also result from the application of ECHR, Article 8, although current Home Office policy is to grant an initial period of limited leave before granting indefinite leave.⁹ A concession whereby Gurkhas and other foreign and Commonwealth soldiers serving in HM Forces were granted settlement on discharge has now been brought within the Immigration Rules.¹⁰

¹ APU Notice x, *Humanitarian Protection and Discretionary Leave*, contained in the Asylum Policy Instructions (API).

² HC 395, paras 330 or 335 and 339Q(i) (residence permits); API (October 2006) xxiv, para 8 (Indefinite leave to remain or ILR). See chapter 12 below. Refugees arriving under Gateway and other resettlement schemes are granted immediate settlement. For further information on Gateway, see the API on the Gateway Protection Programme: API xxiv, para 3. There has as yet been no decision to introduce English language and knowledge of British life tests, which applicants granted limited leave would be required to pass before qualifying for ILR: API xxiv, para 2.3.

³ HC 395, paras 339C, 339E and 339Q(ii); API xv, *Humanitarian Protection*, para 7 (five years) and 9 ILR. See further chapter 12 below.

⁴ HC 395, paras 276A–D, commonly referred to as the 'ten year rule' and '14 year rule'. Previously this operated as a long-standing policy outside the rules. See chapter 16 below. In the situation where the concession and the new long residence rule do not coincide, the more favourable provisions of the concession may apply: *OS (10 years' lawful residence) Hong Kong* [2006] UKAIT 00031. See further *MW (Lawful residence) Pakistan* [2007] UKAIT 00008; *MO (Long residence rule – public interest proviso Ghana)* [2007] UKAIT 00014. This case law has been updated and MO has been as good as overruled. The details are in 16.47 and 16.47A, below.

⁵ See letter from the Home Office to JCWI referred to in *R v Secretary of State for the Home Department, ex p Patel* [1993] Imm AR 257, QBD and 392, CA. This form of settlement is likely to become redundant, because BOCs with no other citizenship or nationality can now register British citizens and obtain a right of abode. See 2.19 above.

⁶ See HC 395, paras 289A–C, as amended HC 582, which took effect on 5 December 2005. See further the situation where the applicant has no extant leave; this does not prevent her application being a valid application for indefinite leave to remain: *JL (Domestic violence: evidence and procedure) India* [2006] UKAIT 00058.

⁷ See HC 395, paras 287(b) (bereaved spouses and civil partners), 295G (unmarried partners) and 295M (bereaved unmarried partners).

⁸ See DP3/96 (previously DP2/93, replaced on 16 March 1996), DP4/96 dealing with divorced or separated parents, and DP5/96 dealing with families with children resident in the UK for seven years (reduced from ten years by a ministerial statement of 24 February 1999), see chapter 11 below.

- ⁹ *R (on the application of Isiko) v Secretary of State for the Home Department* [2001] 1 FLR 633, CA. See IDI and API on discretionary leave, following a claim for asylum.
- ¹⁰ HC 395, paras 276E–Q, inserted by HC 1112 from 18 October 2004.

Chapter 6

COMMON TRAVEL AREA, CREW MEMBERS AND EXEMPTED GROUPS

COMMON TRAVEL AREA

6.3 Until the Immigration Act 1971 (IA 1971), the common travel area was a purely administrative arrangement allowing free travel between Northern Ireland and the Republic of Ireland, between Britain and Ireland, and between these places and the Isle of Man and the Channel Islands. Since 1971 the common travel area has been given full statutory recognition, but this has also meant it has become hedged around by quite complicated rules, as we shall see. The Borders, Citizenship and Immigration Bill¹ is about to complicate things further. Clause 46 amends s 1(3) of the Immigration Act 1971 to provide the power to enable the routine control of all persons arriving in the UK, by aircraft or ship from another part of the Common Travel Area (CTA), namely, the Channel Islands, the Isle of Man and the Republic of Ireland. The clause does not affect the position that persons arriving from the CTA do not require leave to enter the UK, unless they fall within one or more of the existing exceptions in s 9(4) of, or Sch 4 to, the IA 1971, or in an order made under s 9(2) and (6) of that Act. We deal with these in the paragraphs which follow. Furthermore, as presently drafted, the clause does not extend to the land border between the North and South of Ireland. The clause also amends s 11(2) of the IA 1971 to provide that references to disembarkation and embarkation in that Act apply to journeys from the UK to other places in the CTA or from such places to the UK.

¹ Introduced in the House of Lords on 14 January 2009 [HL Bill 15].

The Islands and the EC

6.22A However, in the case of deportation and recommendations for deportation the position is different. In *Camacho v Attorney General of Jersey*¹ the Jersey Court of Appeal dealt with the question of whether an EU national who had been sentenced to 6½ years after conviction of a long series of offences, including the supply of heroin, should be recommended for deportation under the IA 1971, s 3(6) as applied to Jersey by the Immigration Jersey Order 1993.² The Court held that the position in Jersey should be distinguished from that in the UK, because the limitations on deportation under the public policy provisions in Directive 221/64 and now the Citizens' Directive,³ did not apply to Jersey.⁴

The Court also departed from the guidance given in *R v Carmona*⁵ that a sentencing court need not consider the ECHR rights of an offender whose offence justifies a recommendation for deportation. The Jersey Court thought it was significant that in Jersey there was no appeal against the actual decision

to deport, as in the UK but also took the view that a recommendation which did not take account of the Convention right would lack both utility and realism. The position is the same in Guernsey.⁶

¹ [2007] JCA 145.

² SI 1993/1797.

³ Directive 2004/38/EC.

⁴ *Pereira Roque v Lieutenant Governor* [1998] JLR 246, ECJ, followed.

⁵ [2006] EWCA Crim 508, [2006] 1 WLR 2264 at para 22.

⁶ *Odette and Odette v Law Officers*, CA (Criminal Appeals 361 and 362 – 28 March 2007), cited in *Camacho*, where the Jersey Court agreed with the outcome, but not necessarily all the reasons: *Ibid* para 49.

SOVEREIGN IMMUNITY

6.47A The State Immunity Act 1978, s 14 gives immunity to a sovereign or other head of state recognised as such by the Secretary of State at the Foreign Office, and to members of a government department and s 20(1) and (3) makes express provision for exemption from immigration control for a sovereign or other head of state, members of his family and his private servants. Sovereign immunity is based on the rules of customary international law. Essentially it is the combination of two factors: (i) a consequence of the absolute independence of every sovereign authority, and (ii) international comity which induces every sovereign state to respect the independence of every other sovereign state.¹ Although these rules are now regulated in the UK by statute, decisions of UK and overseas courts and the practices of states very much inform the proper construction of the statutory provisions.² Pre-1978 English Court decisions are, therefore, relevant insofar as they contain statements of the legal principles identifying the ambit and remit of international law as it affects sovereign immunity, but they are not authority about whether a particular state is still recognised as a sovereign state today. One question which has been a live issue for some time is the position of states within a federal system. The US position is that because none of the states in the USA have any responsibility for foreign affairs they do not count as sovereign states under international law. However, this is neither the only view nor the predominant one. In *Mellenger v New Brunswick Development Corp*, it was held by the Court of Appeal that sovereign immunity extends to the constituent states of a country which has a federal constitution such as a Canadian province.³ At present the issues of immigration exemption have only been litigated at the first level of AIT and more authoritative guidance is awaited.

¹ See *The Parliament Belge* [1874–80] All ER Rep 104.

² See *Aziz v Aziz* [2007] EWCA Civ 712, [2008] 2 All ER 501, per Lawrence Collins LJ at 88–92). It is also clear that s 20 of the 1978 Act was not intended to confer on heads of state any privileges or immunities beyond those conferred by customary international law: see *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet (No 3) (Amnesty International intervening)* [2000] 1 AC 147, [1999] 2 All ER 97, per Lord Browne Wilkinson at p 112 or 203; per Lord Hope at p 145 or 240.

³ [1971] 2 All ER 593. Lord Denning MR stated as follows:

‘The British North America Act 1867 gave Canada a federal constitution. Under it the powers of government were divided between the dominion government and the provincial governments. Some of those powers were vested in the dominion

6.47A Common Travel Area, Crew Members and Exempted Groups

government. The rest remained with the provincial government. Each provincial government, within its own sphere, retained its independence and autonomy directly under the Crown. The Crown is sovereign in New Brunswick for provincial matters, just as it is sovereign in Canada for dominion powers. ... It follows that the Province of New Brunswick is a sovereign state in its own right, and entitled, if it so wishes, to claim sovereign immunity.' (at p 608G–H).

See further *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Price Waterhouse (a firm) (Abu Dhabi, third party)* [1997] 4 All ER 108, which held that Abu Dhabi is a constituent territory of the United Arab Emirates for the purpose of the 1978 Act but the ruler obtained immunity because he was also the President of the UAE as well, as certified to that effect by the Secretary of State; *Swiss Israel Trade Bank v Government of Salta and Banco Provincial de Salta* [1972] 1 Lloyd's Rep 497, where the High Court took a different route and held that the government of Salta, which was one of several Spanish provinces of South America which in 1816 proclaimed their independence, and in 1853 had combined to form the Argentine Republic, was in effect either the government of the Argentine Republic, which was admittedly a sovereign state, or at least a department of the government and, therefore, entitled to immunity.

Chapter 7

EUROPEAN COMMUNITY LAW AND RELATED OBLIGATIONS

ACCESSION OF NEW MEMBER STATES

Free movement of persons under the 2003 Accession Treaty

7.7 What then is the position under the Accession Treaty of 2003 as regards free movement? First, it grants nationals of Cyprus and Malta the same rights to work in another Member State as are currently enjoyed by nationals of the existing Member States. Secondly, however, nationals of the other eight relevant States are subject to transitional provisions.¹ Thirdly, nationals of the eight new relevant Member States enjoy free movement rights as regards each other, although these may be suspended at the Commission's discretion during the first seven years of membership (until 1 May 2011).² Fourthly, where the free movement of nationals of one of the relevant new Member States is restricted during any part of the transitional period by any of the existing States, the new Member State can take equivalent measures against the nationals of the Member State or States in question.³ Fifthly, existing Member States applying national law during the derogation period, cannot make their national rules more restrictive than they were on 1 May 2004,⁴ but they may introduce, under national law, more liberal rules if they wish, 'including full labour market access'.⁵ This is what has happened in the UK (see below). From 1 May 2006 such a State can at any time decide to stop relying on national law and apply the full EC rules.⁶ It is important to keep in mind that if a Member State only applies national rules which are more liberal, rather than the EC rules, the interpretation of those rules is presumably outside the jurisdiction of the EU courts, unless they allegedly infringe the accession treaty.⁷ Even those Member States which apply full free movement of workers have a special safeguard for seven years (until 1 May 2011), if there are serious threats to the standard of living or the level of employment due to disturbances in its labour market.⁸

¹ These are set out in Annexes V, VI, VIII, IX, X, XII, XIII and XIV of the Act of Accession. Chapter 2 of each Annex contains the relevant material on each Member State. Their effect can be demonstrated by examining the agreement with Slovakia in Annex XIV. These are standard rules which apply to each of the eight relevant new Member States, although in fact all the Annex XIV references below are taken from the rules for Slovakia. See further Professor Steve Peers of the University of Essex, who prepared the Statewatch comments on the EU Accession Treaty.

² Annex XIV, para 11.

³ Annex XIV, para 10.

⁴ Annex XIV, para 14. This paragraph also obliges existing Member States to give preference to workers from the accession States over third country nationals as regards access to their labour market, and they may not treat non-EU nationals more favourably than workers and their families from the accession States. Equally new Member States cannot treat nationals from existing Member States and their families, who are in the new Member State, less favourably than third country nationals.

⁵ Annex XIV, para 12.

7.7 European community law and related obligations

- ⁶ Annex XIV, para 12. In fact the Worker's Registration Scheme is to continue until 2009: see written ministerial statement to Parliament, 25 April 2006, by the Home Office Minister, Tony McNulty.
- ⁷ Statewatch Comments, above.
- ⁸ Annex XIV, para 7. However, any decision to suspend free movement rights will be at the discretion of the Commission, whose decision can be overturned by the Council. It is also possible for Member States to apply the safeguard unilaterally 'in urgent and exceptional cases'.

Registration scheme for workers in accession period

7.13 *Regulation 4* gives effect to the derogation provided for in the Accession Treaty to regulate access to the UK labour market by accession State nationals. Under regulation 4(2), nationals from the relevant accession States who come to the UK to seek work during the transitional period, will not have a right to reside in the UK by virtue of their work seeker status, but will only be able to do so if they are self-sufficient.¹ The idea of this provision is to deter so called 'benefit scroungers'.²

¹ Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219, reg 4(3). 'Self-sufficient person' is defined in the Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 4(1)(c).

² For EEA workers and benefits see chapter 13 below. However, the detailed implications of the accession regime for social security law are beyond the scope of this work, and for a fuller discussion on access to welfare benefits for nationals of accession States see Nicola Rogers and Rick Scannell *Free Movement of Persons in the Enlarged European Union* (Sweet & Maxwell, 2004), ch 28. In *Sylvia Kaczmarek v Secretary of State for the Home Department and Secretary of State for Work and Pensions* (2008) LTL 27/11/2008, where the Court of Appeal held that a Polish national who had been lawfully resident in the United Kingdom for three years and active as a student or an employee for most of that time did not have an entitlement to income support under the EC Treaty (Nice) art 12 or art 18.

ACCESSION OF BULGARIA AND ROMANIA

7.18 According to the 2001 census, there were 7,500 Romanian-born people and 5,350 Bulgarians living in the UK. It was predicted in Spring 2006 that following Accession around 56,000 Romanian and Bulgarian workers were likely to migrate to Britain following Accession (IPPR).¹ We are indebted to this paper for some of the text which follows. In 2006 the UK government announced it would limit the rights of nationals of Bulgaria and Romania, to work in the UK. In November 2006 the Accession (Immigration and Worker Authorisation) Regulations 2006 were laid before Parliament and came into force on 1 January 2007.² The 2006 Accession Regulations make provision in relation to the entitlement of nationals of Bulgaria and Romania to reside and work in the UK on the accession of those States to the European Union. In particular, the Regulations restrict access to the UK labour market by Bulgarian and Romanian nationals. The Accession Treaty for Bulgaria and Romania (signed in Luxembourg on 25 April 2005) provides that existing Member States can, as a derogation from the usual position under European Community law, regulate access to their labour markets by Bulgarian and Romanian nationals. The position is not dissimilar to that which operates for the eight east European members under the 2003 Treaty. In this case, Annexes

VI and VII to the Act of Accession provide that during a transitional period of five years (that is from 1 January 2007 to 31 December 2011) the existing Member States can regulate access to their labour markets by Bulgarian and Romanian workers and restrict their accompanying rights of residence, with provision for a Member State to continue to maintain restrictions for a further two years in the case of disturbances to its labour market. However, one of the terms of the derogation is that the restrictions imposed on access to the labour market must not be more restrictive than those prevailing on the date of signature of the Accession Treaty.³ The restrictions on access to the UK labour market in the 2006 Accession Regulations purported to have been imposed on the basis of that derogation. This has meant that skilled and highly skilled workers have been able to come to the UK to work but access to low-skilled jobs has been restricted to the Seasonal Agricultural Workers Scheme (SAWS) and the Sector Based Scheme (SBS) for food processing. On 18 December 2008, the UKBA website announced that these restrictions on Bulgarians and Romanians will remain.

¹ JCWI 'The Accession (Immigration and Worker Authorisation) Regulations 2006: Implications for UK employers and Bulgarian and Romanian ("A2") nationals in the UK,' para 3. In fact, the number of Bulgarians and Romanians applying to work in the UK was 10,420 in May 2007 and had dropped to only 8,205 applications from A2 nationals in the first three months of 2008: UKBA website, 20 May 2008.

² SI 2006/3317, since amended by the Accession (Immigration and Worker Authorisation) (Amendment) Regulations 2007, SI 2007/ 475 and the Accession (Worker Authorisation and Worker Registration) (Amendment) Regulations 2007, SI 2007/3012.

³ See Explanatory Memorandum to Accession (Immigration and Worker Authorisation) (Amendment) Regulations 2007, SI 2007/ 475, at para 4. These amendments made changes to the permitted hours students could work, precisely because the 2006 Accession Regulations made greater restrictions than those prevailing before the Accession Treaty.

7.19 The derogation only affects the right to access to the labour market. It does not otherwise affect the rights of Bulgarian and Romanian nationals to all the other benefits of EU membership on the same basis as the French or Germans. Thus they have a right of residence for a period of up to three months under Article 6 of the Citizens' Directive without any formalities other than the requirement to hold a valid identity card or passport.¹ Secondly, although employment might be restricted, self employment and establishing a business are not. After the initial three-month period, such persons may stay on and become entitled to a registration certificate, as may the self sufficient and students within the terms of Article 7 of the Citizens' Directive. The family members of those Bulgarians and Romanians who have an extended right of residence may also benefit from the normal community free movement and residence rights which apply to other EU nationals.² Because Bulgarian and Romanian nationals do not require leave to enter they cannot be classified as overstayers or illegal entrants nationals and are not after 1 January 2007 unlawfully present in the UK.³ By opting for self employment, whether as a cleaner or a plumber, they can escape the complications and sheer bureaucracy of the worker registration scheme. Bulgarians and Romanians may also come to the UK as posted workers sent to work here by their employers back home, but stay would only be on a temporary basis during the period their employer was performing services in the UK.⁴ Bulgaria and Romania have both signed up to an Agreement on the Participation of the Republic of Bulgaria and Romania in the European Economic Area, signed on 25 July 2007.⁵

7.19 *European community law and related obligations*

- ¹ Council Directive 2004/38/EC; Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 11.
- ² See Council Directive 2004/38/EC, paras 6(2), 7(2) and 16(2).
- ³ Accession (Immigration and Worker Authorisation) Regulations 2006, SI 2006/3317, reg 8 provided that any directions for removal given before 1 January 2007 shall cease to have effect after that date and any deportation decision shall be treated as a decision which is subject to justification on public policy, public security or public health grounds under regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006, SI 2006/1003.
- ⁴ For posted workers see 7.78, below.
- ⁵ This has been declared to be a Community Treaty as defined in s 1(2) of the European Communities Act 1972 and is, therefore, part of UK national law: the European Communities (Definition of Treaties) (Agreement on Enlargement of the European Economic Area) Order 2008, SI 2008/297.

7.20 Part 1 of the Accession (Immigration and Worker Authorisation) Regulations 2006 contains the general provisions of the Regulations. Regulation 2 defines ‘accession State national subject to worker authorisation’ – Bulgarian and Romanian nationals falling within this definition, unless exempted, will be required to obtain permission to work in the UK. Regulations 2(2) to 2(13) define those that will be exempt from the requirement to obtain such permission. It is a long list. Nationals of Bulgaria or Romania are not (or cease to be) ‘accession State nationals subject to worker authorisation’:

- if on accession they had leave to enter or remain in the UK under the Immigration Act 1971 without any condition restricting employment or were given such leave subsequent to accession on 1 January 2007;¹
- if they were legally working in the UK on 31 December 2006 and had been legally working in the UK without interruption throughout the period of 12 months ending on that date;²
- If they have legally worked in the UK without interruption for a period of 12 months falling partly or wholly after 31 December 2006;³
- during any period in which they are also nationals of the UK; or an EEA State, other than Bulgaria or Romania;⁴
- during any period in which they are the spouse or civil partner of a national of the UK or of a person settled in the UK;⁵
- during any period when they are members of a diplomatic mission, the family members of such a person or who are otherwise entitled to diplomatic immunity;⁶
- during any period in which they have a permanent right of residence under regulation 15 of the 2006 EEA Regulations;⁷
- during any period in which they are the Bulgarian and Romanian nationals who are family members of Bulgarian and Romanian who are ‘qualified persons’⁸ either as self employed, self sufficient persons or students⁹ or family members of an EEA national who has a right to reside in the UK under the 2006 EEA Regulations, unless that EEA national is—
 - (i) a Bulgarian or Romanian national subject to worker authorisation; or
 - (ii) a student who is a Bulgarian or Romanian national who is not an accession State national subject to worker authorisation solely by virtue of falling within the student exemptions contained in the Accession Regulations 2006, reg 2(10) or (10B);¹⁰

- during any period in which he or she is a highly skilled person and holds a registration certificate that includes a statement that he or she has unconditional access to the UK labour market;¹¹
- during any period in which they are in the UK as a student, who does not work for more than 20 hours a week during term time, but may engage in full-time employment (i) during their vacation, (ii) for a period of 4 months on completion of their studies, or (iii) they are in a work placement directly related to a course of vocational training (for example, a sandwich course of study for a nursing qualification), and hold a registration certificate stating that they have access to the UK labour market as set out above;¹²
- during any period in which he or she is a posted worker.¹³

Regulation 12 of the Accession Regulations 2006 defines what is meant by working legally in reg 2(3) and (4) at a time before 1 January 2007 and at a time after that date.

¹ Accession (Immigration and Worker Authorisation) Regulations 2006, SI 2006/3317, reg 2(2), as amended by the Accession (Immigration and Worker Authorisation) (Amendment) Regulations 2007, SI 2007/475, reg 2(1)(a).

² Accession Regulations 2006, reg 2(3). In *EA (EEA: 3 months residence) Bulgaria* [2008] UKAIT 00017, a Bulgarian worker in the UK on a work permit before the accession of Bulgaria, whose leave to enter expired two days before his 12 months were reached, could only count the right to 3 months' residence under Article 6 of the Citizens' Directive (reg 13(1) of EEA Regulations 2006, SI 2006/1003) as from the date of Bulgaria's accession and not from the date when his leave to enter expired.

³ Accession Regulations 2006, reg 2(4).

⁴ Accession Regulations 2006, reg 2(5).

⁵ Accession Regulations 2006, reg 2(6).

⁶ Accession Regulations 2006, reg 6A, inserted by the Accession (Worker Authorisation and Worker Registration) (Amendment) Regulations 2007, SI 2007/3012, reg 2(2).

⁷ Accession Regulations 2006, reg 2(7).

⁸ Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 6(1)(c), (d), or (e).

⁹ Accession Regulations 2006, reg 2(8), as amended by the Accession (Worker Authorisation and Worker Registration) (Amendment) Regulations 2007, SI 2007/3012, reg 2(2)(b).

¹⁰ Accession Regulations 2006, reg 10, as amended by the Accession (Immigration and Worker Authorisation) (Amendment) Regulations 2007, SI 2007/475, reg 2(2)(c).

¹¹ Accession Regulations 2006, reg 2(9). 'Highly skilled person' is defined by the Accession Regulations 2006, reg 4, as amended by the Accession (Worker Authorisation and Worker Registration) (Amendment) Regulations 2007, SI 2007/3012, para 2(4).

¹² Accession Regulations 2006, reg 2(10), as amended by the Accession (Immigration and Worker Authorisation) (Amendment) Regulations 2007, SI 2007/475, reg 2(2). These amendments were necessary to make the Regulations compatible with the Accession Treaty.

¹³ Accession Regulations 2006, reg 2(11). 'Posted worker' means a worker who is posted to the UK, within the meaning of Article 1(3) of Directive 96/71/EC concerning the posting of workers, by an undertaking established in an EEA State.

THE APPLICATION OF EC FREE MOVEMENT LAW

Transposing directives into domestic law

7.48A In dealing with the transposition of the Citizens' Directive¹ into UK national law,² the AIT has given useful general guidance on the proper approach of decision-makers and tribunals to EC law, which has been

7.48A European community law and related obligations

transposed into domestic regulations.³ Decision-makers have first to apply the relevant national law implementing the particular directive. That is because, whilst a directive is binding as to the result to be achieved, the Treaty leaves to the national authorities the choice of form and methods.⁴ Only the failure on the part of a Member State to implement a directive correctly or within the timeframe required by the directive will result in an individual being able to rely for direct effect on the provisions of the directive.⁵ Otherwise it will only be where there is ambiguity in the meaning of a particular provision in the national implementing measure, that recourse can be had to EU or community law.⁶ That is to say, the domestic regulations have to be applied, subject only to the doctrines of direct effect and indirect effect. Secondly, although domestic regulations are part of national law they have been enacted in order to implement an EC directive and as such, UK tribunals and courts must adopt a Community law approach to their construction, ie that they must be construed as far as possible, in the light of the wording, context and purpose of the Citizens' Directive, paying particular regard to that directive's purpose, in order to achieve the result pursued.⁷ If that is not possible then the directive will override domestic law, as set out above.

¹ Directive 2004/38/EC.

² Immigration (European Economic Area) Regulations 2006, SI 2006/1003.

³ *HB (EEA right to reside – Metock) Algeria* [2008] UKAIT 00069.

⁴ Article 288 TEU.

⁵ Case 152/84 *Marshall v South-West Hampshire Area Health Authority* [1986] ECR 723.

⁶ *Webb v Emo Air Cargo (UK) Ltd* [1993] 1 WLR 49 (the doctrine of indirect effect).

⁷ Case C-106/89 *Marleasing* [1990] ECR I-4135, para 8.

PERSONAL SCOPE (1) NATIONALS

Dual nationals

7.63 Some people may have the nationality of more than one State. Dual nationality does not hinder the enjoyment of fundamental freedoms under Community law where this applies. This will be the case where the person is both a national of a Member State and of a third State or is a national of two Member States at the same time. In *Micheletti* the ECJ held that a Member State may not restrict the effects of the grant of nationality of another Member State by imposing conditions (such as a habitual residence requirement on the territory of the Member State in question) for recognition of that nationality with a view to the exercise of one of the Treaty's fundamental freedoms. Effectively the Member State is precluded from treating a person who is both an EU national and a national of a non-Member State as if he or she were not such an EU national.¹ In the UK this issue has arisen most frequently with respect to Irish nationals.² In *McCarthy v Secretary of State for the Home Department*³ the appellant was a dual national (British and Irish), and although it was common ground that her Irish nationality conferred on her the status of an EEA national within the meaning of the 2006 Regulations (reg 2), it did not help her qualify for a right to permanent residence under Article 16 of the Citizens' Directive, because that required lawful residence which complies with community law requirements specified in the Citizens' Directive. In *Avello*,⁴ two dual Belgian and Spanish national children who had

lived all their lives in Belgium were found by the ECJ to enjoy the status of citizen of the Union conferred by Article 17 EC. The court recalled that the scope of the Treaty is not extended to purely internal situations which have no link with Community law. However it considered that as they were nationals of one Member State lawfully resident in the territory of another Member State a link with Community law had been established. The fact that people may not need to rely on their EC nationality to gain admission does not mean that rights incidental to such a claim are ineffective.⁵ Where an applicant claims that he or she is a citizen of a particular Member State, the burden of proof is on the applicant and no different principle is imported because of the implications of Community law.⁶

¹ Case C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239; see also *Jauler Carrescosa* in (1994) 8 INLP 1. This principle was applied in *Chen and Zhu v Secretary of State for the Home Department* C-200/02 (19 October 2004, unreported) to the situation of an infant whose mother went to Ireland to give birth to her child to enable the child to obtain Irish nationality; the child's Irish nationality conferred free movement rights under Art 18 EC and Directive 90/364 and it would be contrary to EU law to impose further conditions over and above possession of that nationality.

² Thus in *R v Immigration Appeal Tribunal, ex p Aradi* [1987] Imm AR 359, QBD, a dual Irish and British citizen had never been out of the UK in her whole life. Her possession of dual nationality was held, therefore, not to bring into play the more beneficial provisions of EEC law on family reunion in what would otherwise be a purely internal British situation. This authority is not compatible with more recent decisions of the ECJ. More recently in *EN and AN (EEA regulation 12: British Citizens) Kenya* [2008] UKAIT 00028 the AIT held that a dual national (British and Irish) could not benefit from the application of community law either to himself or his third country national spouse, because as a British citizen he was not subject to any of the restrictions on residence in the EEA regulations 2006 and could not, therefore, be regarded as 'residing in the UK in accordance with regulation 12 of these regulations'. This decision is of very dubious authority because: (i) the Tribunal treated reg 12 as a matter of pure UK law, outside the requirements of European Law, which in the light of subsequent case law is clearly erroneous; and (ii) none of the European Court cases on dual nationality, referred to in this paragraph, were cited to or referred to by the AIT.

³ [2008] EWCA Civ 641, [2008] 3 CMLR 174. See 7.127, below.

⁴ Case C-148/02 *Avello (Carlos Garcia) v Etat Belge* [2003] ECR I-11613. The Court held that in the particular circumstances of the case Articles 12 of and 17 of the EC Treaty precluded the administrative authority of the Member State in which the children resided from refusing to grant an application for a change of surname made on their behalf, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State.

⁵ Cases C-389 and 390/87 *Echternach v Minister van Onderwijs en Wetenschappen* [1989] ECR 723, [1990] 2 CMLR 305, ECJ; Case C-370/90 *R v Immigration Appeal Tribunal and Surinder Singh, ex p Secretary of State for the Home Department* [1992] 3 All ER 798, [1992] Imm AR 565, ECJ.

⁶ *Surinder Singh* above.

Internal situations

7.67 On the other hand, where there is a sufficient link to a situation envisaged by EC law, the matter is no longer purely internal and EC law can be invoked. Some examples might be a travel agent with offices in London and Brussels, or a restaurant owner with restaurants in Dublin and Paris. So where a broadcasting body establishes itself in another Member State in order to avoid the legislation applicable in the receiving State to domestic broadcasters, its broadcasts were regarded as services within the meaning of Article 49,

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irrespective of its motive for relocating.¹ Where a national of a Member State has entered into a contract of employment with an employee in another Member State with a view to exercising gainful employment, the situation cannot be called a purely internal one, even if the offer of employment is never taken up. This is what happened in the case of *Bosman*,² a Belgian footballer who was prevented by the Belgian FA's transfer rules from moving to a French club. The ECJ held that this was not an internal situation. Where a worker has exercised the right of free movement within the Community by taking employment in another Member State, he or she is entitled to rely upon Community law on returning to his or her own State. The decision of the ECJ in *Surinder Singh*³ upheld the conclusion of the Immigration Appeal Tribunal, that where there has been a genuine exercise of Community rights, the returning national and the non-national spouse or relative are entitled to any more favourable treatment provided by Community law, despite the fact that there is also a right of entry under national law. This case was followed in *Kraus v Land Baden-Württemberg*,⁴ where a German national wished to use a university title received following study in the UK on return to his native Germany. In *Carpenter* the ECJ considered that a national residing in his own Member State could benefit from free movement rights in his own Member State, in that case the right to family reunion, if he was providing services in another Member State, even where that provision of services was on a very temporary and infrequent basis.⁵ In *Jipa*⁶ the Court held that a national of a Member State who has been repatriated from another Member State enjoys the status of a citizen of the Union under Article 17(1) EC and may therefore rely on the right pertaining to that status, including against his Member State of origin, and in particular the right conferred by Article 18 EC to move and reside freely within the territory of the Member States.

¹ Case C-23/93 *SA v Commissariaat voor de Media* [1994] ECR I-4795, [1995] 3 CMLR 284, ECJ.

² Case C-415/93 *Union Royal Belge des Societies de Football Association ASBL v Bosman* [1995] ECR I-4921, [1996] 1 CMLR 645, paras 88–91, ECJ.

³ Case C-370/90 *R v Immigration Appeal Tribunal and Surinder Singh, ex p Secretary of State for the Home Department* [1992] ECR I-4265, ECJ, [1992] Imm AR 565.

⁴ Case C-19/92 [1993] ECR I-1663.

⁵ Case C-60/00 *Carpenter (Mary) v Secretary of State for the Home Department* [2002] ECR I-6279, [2002] INLR 439, ECJ.

⁶ Case C-33/07 *Ministerul Administrației și Internelor – Direcția Generală de Pașapoarte București v Jipa* [2008] 3 CMLR 715. See further 7.120, below.

PERSONAL SCOPE (4) PROVISION AND RECEIPT OF SERVICES

7.70 Early decisions of national courts and tribunals gave a narrow and restrictive definition to 'workers' and suggested that the term excluded casual, intermittent and part-time employment.¹ The ECJ, however, has made it clear that, since the terms 'worker' and 'activity as an employed person' define the spheres of application of one of the fundamental freedoms guaranteed by the Treaty, they may not be interpreted restrictively.² In *Levin*³ a woman with a part-time job as a hotel chambermaid was a worker. The court held that an income less than the minimum required for subsistence is enough, provided only that the person pursues an activity as an employed person which is effective and genuine, and it does not matter what the motive was for taking

it. Thus, contrary to what reg 11(2)(b) of the 2000 Regulations⁴ said, an EEA national wife may take part-time employment for the purpose of giving her non-EEA national husband rights under Community law. In *Lawrie-Blum v Land Baden-Württemberg*⁵ the ECJ stated that the essential characteristic of the employment relationship is the fact that during a given time one person provides services for and under the direction of another in return for remuneration. This applies to trainees and apprentices if they do work for an employer for pay, however low, even though they are under supervision and the work is preparation for a qualifying exam or to qualify the employee for work elsewhere.⁶ Remuneration appears to be the key. However, payment need not be enough to live on or it may be in kind, rather than a formal wage. In *Kempf v Staatssecretaris van Justitie*⁷ the court went further. A person may still be a worker even if the pay is so low that he or she needs to supplement it with unemployment benefit or has to apply for sickness benefit during a period of illness, provided that the effectiveness and genuineness of the activities as an employed person are established. In *Steymann v Staatssecretaris van Justitie*⁸ a German plumber went to Holland and joined a religious community, which secured its economic independence by commercial activities, such as the operation of a bar, discotheque and launderette. The claimant worked for them and in return was provided with his material needs, including pocket money. The court held that where commercial activity was an inherent part of membership of the community, the upkeep of the member of the community could be regarded as an indirect countervailing charge for their work, even though it was not a formal wage. Provided the work is genuine and effective (which is a question for the national courts) and not purely marginal and incidental, it can be considered an economic activity. The purpose of the work is irrelevant, whether it be of a non-commercial nature, such as State education, or part of the public service.⁹ In *R (on the application of Payir) v Secretary of State for the Home Department*; *R (on the application of Ozturk) v Secretary of State for the Home Department*; *R (on the application of Akyuz) v Secretary of State for the Home Department*,¹⁰ the Court of Appeal found that students and au pairs were workers within the meaning of European law, and on a reference the European Court upheld this finding and also held that they were in legal employment and eligible to benefit from the Turkish Association Agreement. Playing sport is not usually regarded as an economic activity, but it is in the case of professional or semi-professional sports players, who thereby become workers.¹¹ The employer need not be an undertaking; all that is required is the existence of or the intention to create an employment relationship.¹²

¹ *Re Expulsion of an Italian National* [1965] CMLR 285; *R v Secchi* [1975] 1 CMLR 383 at 393; *City of Wiesbaden v Barulli* [1968] CMLR 239; *Nijssen v Immigration Officer, London (Heathrow) Airport and Immigration Officer, Sheerness* [1978] Imm AR 226.

² Case 53/81 *Levin v Secretary of State for Justice* [1982] ECR 1035 at 1052, ECJ; but see Case C-171/91 *Tsotras v Landeshauptstadt Stuttgart* [1993] ECR I-2925, ECJ.

³ See *Levin* above.

⁴ SI 2000/2326.

⁵ Case 66/85 [1986] ECR 2121, [1987] 3 CMLR 389. Followed in respect of Turkish 'workers' in Case C-36/96 *Günaydin v Freistaat Bayern* [1997] ECR I-5143. Employment from 10 up to 18 hours a week has been acceptable in *Kempf* fn 7 below; Case C-171/88, *Rinner-Kühn v FWW Spezial-Gebäudereinigung* [1993] 2 CMLR 932; Case C-102/88; *Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten* [1991]

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- 2 CMLR 202, ECJ; Case C-444/93 *Megner and Scheffell v Innungskrankenkasse Vorderpfalz* [1996] All ER (EC) 212, [1996] IRLR 236, ECJ. Low productivity does not prevent a person from being a worker: Case 344/87 *Bettray v Staatsecretaris van Justitie* [1989] ECR 1621, [1991] 1 CMLR 459, ECJ.
- ⁶ *Gunaydin* above; Case C-27/91 *Union de Recouvrement des Cotisations de Securite Sociale et d'Allocations familiales de la Savoie (URSSAF) v Hostellerie le Manoir Sarl* [1991] ECR I-5531, ECJ (trainee employed over the summer months in a hotel school).
- ⁷ Case 139/85 [1986] ECR 1741, [1987] 1 CMLR 764, ECJ.
- ⁸ Case 196/87 [1988] ECR 6159, [1989] 1 CMLR 449, ECJ.
- ⁹ Work which merely constitutes a means of rehabilitation or re-integration of a person into the workforce may not be regarded as effective and genuine: *Bettray* above. The issue of rehabilitative employment will be considered shortly by the ECJ again in *Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* Case C-456/02 in which a French national carried out chores for some 30 hours a week in a Salvation Army hostel in Brussels where he lived as part of a rehabilitation project.
- ¹⁰ *R (on the application of Payir) v Secretary of State for the Home Department*; *R (on the application of Ozturk) v Same*; *R (on the application of Akyuz) v Same* [2006] EWCA Civ 541, [2006] ICR 1314. See 7.157 below.
- ¹¹ Case C-415/93 *Union Royale Belge des Societas de Football Association ASBL v Bosman* [1996] 1 CMLR 645, ECJ; Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405, [1974] 1 CMLR 320, ECJ; Case 13/76 *Donà v Mantero* [1976] ECR 1333 at 1340, ECJ; see also C-438/00 *Deutsch Handballbund ev Kolpak* 8 May 2003.
- ¹² *Bosman* above, para 74. In *Mohammed Barry v Southwark LBC* (2008) LTL 19/12/2008, the Court of Appeal held that although a Dutch citizen had only been employed as a steward at a tennis tournament in the UK for two weeks within a six-month period it was enough to qualify him as a 'worker' under the Immigration (European Economic Area) Regulations 2006, reg 6(2)(b)(ii) and he was, therefore, eligible for housing assistance pursuant to the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, reg 6(2)(a).

Posted workers

7.79 The Posted Workers Directive intends to ensure the trans-national provision of services under conditions of fair competition and of guaranteed workers' rights.¹ The directive obliges EEA States to ensure that, whatever the law applicable to the employment relationship may be, the undertakings guarantee workers posted to their territory the terms and conditions of their employment. Thus it regulates the legal framework of working conditions and applicable employment legislation, so as to alleviate concerns that posted workers would not access the same protection as other employees. It applies to both nationals of Member States and third country nationals. In addition to the Directive the EC principles of non-discrimination and not placing obstacles in the way of free movement also apply.² Where the requirements of the host State create obstacles to free movement rights, a breach of Article 39 EC may occur without any need to consider whether there has been indirect discrimination on nationality grounds under Article 39(2) EC.³ A related problem arose in Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*⁴ where a Latvian construction company wished to exercise its freedom to provide services in Sweden, in particular by the posting of Latvian workers to one of its Swedish subsidiaries. The Swedish trade union wanted to prevent wage cutting and demanded that the Latvian company should, by way of guarantee, sign the Swedish collective agreement and apply it to its posted workers. Following unsuccessful negotiations and strike action the case was eventually referred to the ECJ, essentially asking the Court

whether collective action constitutes a restriction within the meaning of Articles 43 and 49 EC. The Court held that a failure under Swedish national rules to take into account, irrespective of their content, collective agreements to which companies that post workers to the host Member State are already bound in the Member State in which they are established, gives rise to discrimination against such companies, if they are then treated as if they are the same as national companies which have not concluded a collective agreement. Effectively this is giving the green light to companies which use posted workers as cheap labour, provided they have entered into collective agreements with those workers in the home Member State.

- ¹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, (OJ L 018, 21/01/1997 p 0001-0006).
- ² See Case C-369/96 *Criminal Proceedings against Arblade* [1999] ECR I-8453.
- ³ Case C-18/95 *Terhoeve (FC) v Inspecteur van de Belastingdienst Particulieren Ondernemingen Buitenland* [1999] ECR I-345.
- ⁴ C-341/05 [2008] All ER (EC) 166. See also Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2008] All ER (EC) 127.

MEMBERS OF THE FAMILY

7.88 In addition to workers, the self-employed, the self sufficient and those providing or receiving services, the right of free movement is also given to the spouse, civil partner and other family members of such persons. This is principally done through the Citizens' Directive.¹ Although the exercise of family rights depends on the exercise of Community rights by the principal, in content they are virtually the same as the principal's right to enter, reside in and remain in another EEA country.² They are given irrespective of the sex or nationality of the family members. Thus the Pakistani or American husband of a woman who is an EU national is entitled to accompany his wife when she exercises her right, for example, to set up in business, to seek work or to receive or provide services. The provisions in Community law relating to family members are designed to give effect to the free movement rights of the EU national, and are based upon the notion that obstacles to workers being joined by their families and integrated into the host State are obstacles to free movement within the EU.³ The ECJ has stressed that the integration of EEA nationals and their family members into the host State is a fundamental objective required to ensure that workers and their families resident in a host State enjoy no disadvantage with respect to those who are nationals of the host State.⁴ In Case C-308/89 *Di Leo v Land Berlin*⁵ (a case involving the right to education for children of EU workers) the court stated:

'... the aim of Regulation 1612/68, namely freedom of movement for workers, requires for such freedom to be guaranteed in compliance with the principles of liberty and dignity, the best possible conditions for the integration of the Community worker's family in the society of the host country.'

The ECJ has emphasised the need to give effect to fundamental rights and in particular the right to respect for family life protected by Article 8 of the European Convention on Human Rights:⁶

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‘Moreover, in accordance with the case-law of the Court, Regulation No 1612/68 must be interpreted in the light of the requirement of respect for family life laid down in Article 8 of the European Convention. That requirement is one of the fundamental rights which, according to settled case-law, are recognised by Community law.’

It is notable that the ECJ fully endorses the approach to Article 8 ECHR taken by the European Court of Human Rights in the case of *Boutlif*,⁷ and the application of Article 8 by the ECJ has been favourable to applicants.⁸

¹ Council Directive 2004/38/EC, which has repealed Articles 10 and 11 of Council Regulation (EEC) 1612/68; Directive 72/194; Art 1 of Council Directive (EEC) 73/148; Council Directives (EEC) 75/34 and 75/35; Council Directives (EEC) 90/364 and 90/365 and 93/96. For a full discussion of EC rights of family reunion, see Prof Steve Peers ‘Family reunion in Community law’, in Walker (ed) *Europe’s Area of Freedom, Security and Justice* (2004) OUP.

² Case 131/85 *Gül v Regierungspräsident Düsseldorf* [1986] ECR 1573, [1987] 1 CMLR 501, ECJ.

³ The recital of the third Preamble to Council Regulation (EEC) 1612/68 recognises that ‘freedom of movement constitutes a fundamental right of workers and their families’ and the fifth recital affirms that in order for the right to be exercised with freedom and dignity ‘equality of treatment shall be secured in fact and in law’. In the Citizens’ Directive 2004/38/EC, Recital (2) states that ‘The free movement of persons constitutes one of the fundamental freedoms of the internal market’; Recital (5) that ‘The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members’, including ‘the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage’; and Recital (20) that ‘In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.’

⁴ Case 249/86 *EC Commission v Germany* [1989] ECR 1263, paras 11–12; [1990] 3 CMLR 540; see also Case 267/83 *Diatta v Land Berlin* [1985] ECR 567, [1986] 2 CMLR 164, paras 14–18 and 20, ECJ. In the context of pre-existing Association Agreements see Case C-351/95 *Kadiman v Freistaat Bayern* [1997] ECR I-2133, para 30.

⁵ [1990] ECR I-4185, para 13. See more recently Case C-459/99 *Mouvement Contre Le Racisme, L’Antisemitisme et la Xenophobie ASBL v Belgium* [2002] ECR I-6591, [2003] 1 WLR 1073.

⁶ Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, [2003] INLR 1, para 77.

⁷ *Boutlif v Switzerland* (2001) 33 EHRR 50, [2001] 2 FLR 1228.

⁸ Case C-60/00 *Carpenter (Mary) v Secretary of State for the Home Department* [2002] ECR I-6279, [2002] INLR 439.

Overview of family groups under the Citizens’ Directive

7.90 The second list, referred to as ‘other family members’ in the Directive and as ‘extended family members’ in the 2006 Regulations,¹ is catered for in Article 3(2)(a) and (b) of the Directive. These are: (i) family members not falling under the definition in Article 2(2) (the first list) who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence; (ii) family members, who have serious health problems which strictly require the personal care of the Union citizen; and (iii) a partner, who is neither spouse nor civil partner, with whom the Union citizen has a durable relationship, duly attested. Under

the Directive the host Member State shall facilitate their entry and residence 'in accordance with its own national legislation'.²

¹ Directive 2004/38/EC, Art 3(2); Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 8.

² Directive 2004/38/EC, Art 3(2). In *KG (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 13 [2008] All ER (D) 187 (Jan), the Court of Appeal held that the 'other family members' who were dependants or members of the household of the Union citizen 'in the country from which they had come' meant the EEA country in which the principal Union State national also resided and not from some third country.

Third country national family members

7.95 Non-nationals are subjected to a different regime. Non-national family members coming to the UK and/or the EEA for the first time are only admitted under reg 11(2) if they have a passport and an 'EEA family permit' issued in accordance with reg 12. This is where the controversy arises. Under reg 12(1)(b) the family member who is accompanying the EEA national to the UK or joining him or her there must either:

- (i) be lawfully resident in an EEA State; or
- (ii) would meet the requirements in the Immigration Rules (other than those relating to entry clearance) for leave to enter the UK as the family member of the EEA national; or
- (iii) in the case of direct descendants or dependant direct relatives in the ascending line of his spouse or his civil partner, would meet the requirements of the Immigration Rules (other than those relating to entry clearance) as the family member of his spouse or his civil partner, were the EEA national or the spouse or civil partner a person present and settled in the UK.

What this Regulation is seeking to do is:

- (a) to impose a condition of prior lawful residence in the EEA – a matter of doubt and controversy under community law, with some support from the ECJ decision in *Akrich*¹ and the opinion of the A-G in *Jia*;²
- (b) to apply UK domestic law to all non-national family members making their first visit to the territory of the EEA – also a matter of doubt and controversy under community law; and
- (c) by applying UK immigration law parents and grandparents under 65, for example, will need to show that the most exceptional circumstances apply to their situation and children of single parents will have to show that their parent in the UK has sole responsibility.³

¹ Case C-109/01 *Secretary of State for the Home Department v Akrich* [2004] QB 756, [2004] All ER (EC) 687, (2003) Times, 26 September, ECJ.

² This is discussed at 7.97.

³ See HC 395, paras 317(e) and 297(1)(e). The extent of the discretion under the previous Regulations (SI 2000/2326), reg 10(2) was very wide as can be seen from the recent decision of AIT: SY (*EEA Regulation 10(1) – Dependency Alone Sufficient*) *Sri Lanka* [2006] UKAIT 00024, but kept closely to the text of the now repealed Article 10(2) of Regulation 1612/68.

7.97A *European community law and related obligations*

Metock

7.97A Much of the controversy, that has occurred over whether the UK position set out in the 2006 Regulations is compatible with the Citizens' Directive as regards the position of spouses and other close family members of an EU national living and/or exercising economic activities in the host state under Treaty rights, has now been settled by the ECJ's decision in Case C-127/08 *Metock v Minister of Justice, Equality and Law Reform*.¹ Put simply the UK government got it wrong on foreign spouses. The case has also had some impact on those referred to in the Directive as 'other family members' and in the 2006 Regulations as 'extended family members', but the impact is not so clear cut and a fierce rearguard action is being fought to maintain the highly controversial discretionary position advocated by the government and set out in the 2006 Regulations. In this area *Metock* is certainly not the last word nor are the AIT and Court of Appeal cases attempting to make sense of the new landscape. In the following paragraphs we outline these latest developments.

¹ C-127/08 [2009] All ER (EC) 40. See also Case 291/05 *Minister voor Vreemdelingenzaken en Integratie v Eind* [2008] All ER (EC) 371 at para 44 on the importance of ensuring the protection of family life.

7.97B *Metock* was a reference from the Irish High Court in a case involving four applicants. They were making applications under Irish regulations which were drafted in very similar terms to the UK regulations. Mr Metock is a Cameroonian national married to a British national working in Ireland. He had sought, and been refused, asylum in Ireland. He and his wife had formed a family in Cameroon long before Mr Metock's arrival in Ireland and they have two children, one born before Mr Metock's arrival in Ireland, the other born the same year as his arrival. Secondly, Mr Ikogho of unspecified nationality arrived in Ireland in 2004 and applied for, and was refused, asylum and then married a British citizen working in Ireland since 1996. Thirdly, Mr Chinedu, a Nigerian national, arrived in Ireland in 2005, applied for, and was refused, asylum but before the refusal married a German national working in Ireland. Finally, Mr Igboanusi, a Nigerian national, applied for asylum in Ireland which was refused in 2005. He married a Polish national working in Ireland in 2006 and he was deported to Nigeria in December 2007. They each applied for residence cards, but all were refused on the basis of national law. The provision under challenge has its counterpart in reg 12(1)(b)(i) of the Immigration (European Economic Area) Regulations 2006, which requires third country national family members to have resided lawfully in another Member State with the EU national or to comply with the UK Immigration Rules on family reunification before getting an EEA family permit.

7.97C The ruling of the European Court establishes that a third country national who is a family member of an EEA national (Union citizen) exercising Treaty rights in another EEA state, is entitled to a right of residence in that other Member State on the basis of the family relationship alone. That right is not subject to a requirement of prior lawful residence. It means that

the precondition to the mandatory issue of an 'EEA family permit' under reg 12(1)(b)(i) of the 2006 Regulations, that the third country national family member must be lawfully resident in an EEA State, must go, as it is incompatible with Community law. The upshot is that neither the first nor any subsequent entry into Community territory of spouses, civil partners, parents, children and those other family members included in what we have called list 1 family members¹ is regulated by the UK Immigration Rules, requiring those family members to satisfy the onerous requirements of these domestic rules on family reunion. The ECJ stated:

- The Citizens' Directive does not permit any condition to be placed on family reunification for third country nationals with their EU national principal regarding where they have previously been resident. It can be in another Member State or elsewhere (paras 49 and 50);
- The fact that there is provision for a visa requirement in the Directive shows that it is intended to apply to third country national family members who are not residing in a Member State (paras 52 and 53);
- The Directive, correctly interpreted does not permit a reduction of the rights of citizens of the Union when they move to and reside in a host Member State. On the contrary the purpose of the Directive as set out in para 3 of the Preamble is to strengthen those rights (para 59);
- Member States have not retained competence to determine the conditions under which third country national family members can be issued visas (EEA family permits) abroad (paras 66 and 67); this would defeat the purpose of EU law because the conditions for admission would vary depending on which Member State was considering the application (para 69);
- Third country nationals have the right to join their EU national principal whether or not family life was established before or after the EU national moved (paras 90 and 92);
- Member States can only control or exclude third country family members of EU nationals on two grounds: public policy, public security or public health under Article 27 and as measures to combat abuse of rights or fraud such as marriages of convenience under Article 35.

¹ List 1 are those family members set out in Art 2(2) of the Citizens' Directive and reg 7(1) of the 2006 Regulations.

7.97D The judgment was dealing with spouses who fall within the definition in Article 2(2) of the Directive and does not mention other family members who are referred to in Article 3(2). Nor does the judgment discuss the *Surrinder Singh* principle where EU nationals who cannot enjoy family reunification under the national immigration rules go to another Member State to live/work/be self employed, and then return to their Member State of nationality and effect family reunification under the more generous EU rules. The *Metock* ruling has now been applied to a *Surinder Singh*¹ situation by the AIT in *HB (EEA right to reside – Metock) Algeria*.² The more difficult issue is how *Metock* affects the position of Article 3(2) family members. We deal with this at 7.110A below.

¹ Case C-370/90 *Surrinder Singh, ex p Secretary of State for the Home Department* [1992] ECR I-4265.

7.97D European community law and related obligations

- ² [2008] UKAIT 00069. On 3 June 2003, HB married his wife, SH, a British citizen. On 31 March 2005 he and his wife went to the Republic of Ireland. She found work there between May and November 2005. Then they returned to the United Kingdom and HB applied for a residence permit under the 'Surinder Singh' principle, now transposed into UK domestic law by reg 9 of the 2006 Regulations. The AIT held that reg 9 applied and that meant that the appellants were entitled to have their appeals considered on the same basis as family members of nationals of other Member States.

Descendants: children

7.106 Children of migrant workers, therefore, have rights of residence derived from their EEA national parent under Article 3 of the Citizens' Directive. They also have a right under Article 12 of Council Regulation (EEC) 1612/68 to be admitted to the host State's general educational and other training and vocational courses under the same conditions as nationals of the host State, if such children are residing in its territory.¹ The Member States also have an obligation 'to encourage all efforts to enable such children to attend these courses under the best possible conditions'.² Interpretation of Article 12 by the ECJ means that children of migrant workers retain rights of their own under Community law, notwithstanding the departure of their EEA national parent, where they have entered the educational system of the host State at a time when the parent was exercising Treaty rights. In the case of *Echternach and Moritz*³ a student had entered the general educational system of a host State while his father was working there. The employment of the father in that State ceased and the family left the territory. The student discovered that there were difficulties in proceeding to further education in the country of origin in the light of the qualifications received in the host State. He therefore returned there and entered further education. The court held that he was entitled to a grant under Article 12 of Regulation 1612/68 notwithstanding the departure of the father. The Article 12 right is not, however, freestanding, and the position is different if the child was not installed with his or her parents when they exercised their free movement rights.⁴ However the right to remain in education continues even if the EU worker leaves the host Member State and the children remain behind.⁵

¹ Council Regulation (EEC) 1612/68, Art 12 covers general measures intended to facilitate educational attendance and not just rules of admission: Case 9/74 *Casagrande v Landeshauptstadt München* [1974] ECR 773, [1974] 2 CMLR 423, ECJ; Case 68/74 *Alamio v Préfet du Rhône* Case [1975] ECR 109, [1975] 1 CMLR 262, ECJ Case C-389, 390/87 *Echternach* fn 3 below; Case C-308/89 *Di Leo Land Berlin* [1990] ECR I-4185. This, coupled with Art 7(2) non-discrimination, has resulted in broad application of this measure to ensure State assistance for educational purposes, especially the funding of grants: *EC Commission v Belgium* [1988] ECR 5445, including for non-dependent children over the age of 21 as in Case C-7/92 *Landsamt für Ausbildungsförderung Nordrhein-Westfalen v Gaal* [1995] ECR I-1031, ECJ.

² Council Regulation (EEC) 1612/68, Art 12. Case 42/87 *EC Commission v Belgium: Re Higher Education Funding*, Re [1989] 1 CMLR 457, ECJ. These rights continue after the child is 21 and/or no longer dependent.

³ Case C-389, 390/87 *Echternach and Moritz v Minister van Onderwijs* [1989] ECR 723, [1990] 2 CMLR 305, ECJ.

⁴ Thus, a child of a migrant worker was not entitled to an educational grant, although residing in a host Member State where his parents had exercised Community rights before the child's birth: *Brown* [1988] 3205; Case C-7/92 *Gaal* [1995] ECR I-1031. If the child is an EEA national, however, different considerations may apply, in the light of *Chen and Zhu v Secretary of State for the Home Department* C-200/02 (19 October 2004,

unreported) and *R (on the application of Bidar) v London Borough of Ealing v Secretary of State for Education and Skills* Case C-209/03 (15 March 2005, unreported), ECJ.

⁵ Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

7.107 In the case of *Gal*¹ the Immigration Appeal Tribunal followed *Echter-nach and Moritz*² in holding that children who had entered primary school before the departure of their father had a right to continue their education, notwithstanding the permanent departure of the EEA worker. The right to admission to the educational system implies a right to remain in the UK for this purpose.³ In *Teixeira v London Borough of Lambeth and Secretary of State for the Home Department*⁴ a Portuguese woman had been, but no longer was, a worker in the UK and her daughter had entered primary education here at a time when her mother was not a worker and they were not self-sufficient. The Court of Appeal has referred questions to the ECJ concerning the interpretation of Council Directive 2004/38/EC ('Citizens' Directive') and of Article 12 of Regulation (EEC) No 1612/68. The case of *Baumbast* confirms the right of children exercising their right to be admitted to the general education system to have installed with them their non-EU national parent who is their primary carer:⁵

'where the children enjoy, under Article 12 of Regulation 1612/68, the right to continue their education in the host Member State although the parents who are their carers are at risk of losing their rights of residence as result, in one case, of a divorce from the migrant worker and, in the other case, of the fact that the parent who pursued the activity of an employed person in the host Member State as a migrant worker has ceased to work there, it is clear that if those parents were refused the right to remain in the host Member State during the period of their children's education that might deprive those children of a right which is granted to them by the Community legislature'.

The decision is consistent with the European Court's well-established position that Council Regulation (EEC) 1612/68 should be interpreted consistently with the rights under Article 8 of the ECHR,⁶ and that measures incompatible with the observance of human rights would not be acceptable under Community law.⁷ In Case 7/75 *F v Belgium*⁸ a handicapped child who is prevented from acquiring the status of a worker because of the handicap and qualifies during minority for benefits for the handicapped, remains entitled to equality of treatment even after attaining the age of 21.

¹ *Gal* (10620) INLP vol 8(2) 1994 p 69.

² Case C-389, 390/87 *Echter-nach and Moritz v Minister van Onderwijs* [1990] 2 CMLR 305, ECJ.

³ For another instance of such an implication see Case C-237/91 *Kus v Landshasplstadt Wiesbaden* [1993] 2 CMLR 887, ECJ where a right to a renewal of a work permit for a Turkish national imported a right to renewal of a residence permit.

⁴ [2008] EWCA Civ 1088, [2008] All ER (D) 91 (Oct).

⁵ *Baumbast v Secretary of State for the Home Department*, Case C-413/99 [2003] INLR 1, para 71. These rights are now reflected in the EEA Regulations, which enable primary carers of dependent children under 19 in full-time education to remain as 'family members' despite divorce or the departure of the EEA spouse: see 7.93 above.

⁶ Case 4/73 *Nold v Commission* [1974] ECR 491, para 13.

⁷ Case C-260/89 *Elliniki Radiophonia Tileorassi AE v Pliroforissis (ERT)* [1991] ECR I-2925. See for further examples Case 44/79 *Hauer v Rheinland Pfalz* [1979] ECR 3727, para 17; Case 63/83 *R v Kirk* [1984] ECR 2689, para 22; Case C-404/92P *X v EC*

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Commission [1994] ECR I-4737, para 17; *Case C-415/93 93 Union Royale Belge des Sociétés de Football Association ASBL v Bosman* [1995] ECR I-4921, para 79; *Case C-199/92P Hüls v Commission* [1999] ECR I-1000, paras 149–150; *Case C-235/92P Montecatini v European Commission* [1999] ECR I-4539, para 37.

⁸ *Case 7/75 F v Belgium* [1975] ECR 679, [1975] 2 CMLR 442, ECJ. See also *Case C-7/92 Gaal* [1995] ECR I-1031, [1995] 3 CMLR 17.

Other family members after *Metock*

7.110A *KG (Sri Lanka) v Secretary of State for the Home Department*¹ was decided before the ECJ decision in *Metock* and clearly did not anticipate what was to come. In *Bigea v Entry Clearance Officer*² the Court of Appeal ruled on the extent to which the decision in *Metock* had affected domestic law on the rights of persons falling within Directive 2004/38, Article 3.2(a), namely ‘other family members’ of a ‘Union citizen’. The main issue in the appeals was the extent to which the propositions set out by Buxton LJ in *KG (Sri Lanka)* were affected. The Court held:

- (1) The reasoning in *Metock* which underlay the conclusion that, in relation to Article 2.2 ‘family members’, there was no need for prior lawful residence in another Member State had also to apply to ‘other family members’. This was accepted by the Secretary of State. To that extent, the fourth and sixth propositions expounded by Buxton LJ in *KG* required modification. It followed that the provisions in the Immigration (European Economic Area) Regulations 2006, regs 8 and 12 to the extent that they required an ‘other family member’ to establish prior lawful residence in another Member State, did not accord with the Directive.
- (2) However, Buxton LJ’s propositions that the ‘other family member’ should have been a dependant of the Union citizen or a member of that person’s household in the country from which the Union citizen had come and should have met that requirement shortly before he or she joined or accompanied the Union citizen were unaffected by *Metock*. It was only those ‘other family members’ who had been present with the Union citizen in the country from which he or she had most recently come whose ability or inability to move with him or her could affect the exercise of the EU national’s primary right under the Directive.
- (3) Historic but lapsed dependency or membership of a household was irrelevant to the Directive policy of removing obstacles to the Union citizen’s freedom of movement and residence rights.

¹ [2008] EWCA Civ 13, (2008) Times, 7 February.

² [2009] EWCA Civ 79, [2009] All ER (D) 219 (Feb). See also *SM (Metock; extended family members) Sri Lanka* [2008] UKAIT 00075 (30 September 2008), where the Tribunal considered the phrase ‘in the country from which they have come’ in Article 3(2)(a) of the Citizens’ Directive, holding that it is to be interpreted in such a way as to limit the Directive’s application to those who have come from other member states. This decision must now be read in the light of *Bigea*.

7.110B This decision still leaves a trail of uncertainty. Part of the underlying rationale of the *Metock* decision in ruling that prior lawful residence in an EEA country was an unlawful precondition of entry and residence was to

ensure that Member States did not have exclusive competence to control the first entry of a non-EEA family member into community territory (para 66). The Court of Appeal rightly says that the outlawing of the prior lawful residence requirement applies to 'other' family members. The clear implication of this is that community law governs a very important part of the entry and residence of 'other' family members. Then why, and how far, should other family members coming to Europe for the first time to join a Union citizen have to go through the hoops of domestic Immigration Rules? Why also should someone coming to Europe from a non-EU Member State not need to go through these hoops if the principal Union member is also coming from that country? A major issue in *Metock* was the dividing line between national and Community competence. If imposing a condition of prior lawful residence in an EU Member State is unlawful, where is the dividing line to be drawn for 'other' family members, given the express grant of national legislative competence in respect of other family members in Article 3(2)? Where does the dividing line fall? These are not easy questions. The 2006 Regulations treat the entry and residence of other family members, wherever they are coming from, as matters of discretion within the competence of national law.¹ A sharp distinction is at all times kept between what I have called list 1 family members and list 2 ones. The Citizens' Directive is different. There is not such a sharp distinction. When the reference is made to 'family member' as defined in Article 2(2), the phrase 'as defined in Article 2(2)' is used. When 'family members' is used without this qualification the reference is to the wider meaning of 'family members' and includes 'other family members' referred to in Article 3(2)(a) and an unmarried 'partner' referred to in Article 3(2)(b). For example Article 8.5 deals with the issue of a registration certificate to 'family members' who are themselves Union citizens and covers not only family members under Article 2(2), but also those under Article 3(2). Article 10 deals with the issue of residence cards to family members who are not Union citizens and covers family members under Article 2(2) as well as under Article 3(2). If 'family members' bears the wider meaning in the context of residence cards and registration certificates, then it is quite clear from Article 9 that the issue of residence cards is mandatory and not discretionary.² Thus under the Directive the dividing line between national and Community competence would seem to fall in a quite different place from that fixed by the 2006 Regulations. Under the 2006 Regulations is the area of national competence as wide and all embracing as it has been expressed by the AIT in *AP and FP (Citizens' Directive Article 3(2); discretion; dependence) India*,² namely, that the only rights given by Community law to the extended family member are procedural and not in any way substantive? We have criticised this conclusion as 'a very odd categorisation'. It may represent the extremism of the Home Office, but it does not seem to us to be in keeping with the Directive at all. We would suggest that under the Directive national competence extends only as far as settling the questions of the genuineness of the relationship, dependency and membership of the household in the country from which the 'other' family member has come (not in the same country as that from which the Union citizen is moving, as the CA would hold), and the degree of bad health and so forth. Once entry has been facilitated other family members come fully under the competence of community law as regards the issue of registration certificates and residence cards in accordance with

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Articles 8 and 10 of the Citizens' Directive. However, none of this is clear cut and these issues are in dire need of guidance from the ECJ.

- ¹ See reg 12(2) (issue of EEA family permits); reg 16 (5) (issue of registration certificate to EEA nationals); and reg 17(4) (issue of a residence document).
- ² However, see YB (EEA reg 17(4), *proper approach*) *Ivory Coast* [2008] UKAIT 00062 which held that neither the Citizens' Directive (2004/38/EC) nor reg 17(4) of the Immigration (European Economic Area) Regulations 2006 confers on an 'extended family member' of an EEA national exercising Treaty rights a right to a residence card.
- ³ [2007] UKAIT 00048 (13 June 2007).

MATERIAL SCOPE (2) RIGHT TO LEAVE, ENTER AND RESIDE

Right to leave own country

7.120 In EC law the right to depart is expressly given to workers and the self-employed and those providing or receiving services. Article 4 of the Citizens' Directive requires Member States to grant all Union citizens and their families the right to leave their territory to travel to another Member State.¹ What this means is that Member States must be prepared to let any EU citizen leave their territory on production of a valid identity card or passport, and on the production of a passport in the case of family members, who are non-EEA nationals. No exit visa or equivalent formality may be imposed on those wishing to leave as set out above.² In *Jipa*³ the Court held that a national of a Member State who has been repatriated from another Member State enjoys the status of a citizen of the Union under Article 17(1) EC and may therefore rely on any right pertaining to that status, including against his Member state of origin, and in particular the right conferred by Article 18 EC to move and reside freely within the territory of the Member States rights. This right can only be restricted on grounds of 'public policy' or 'public security' as provided by Article 27 of the Citizens' Directive. A failure by a Member State or its national courts to examine the personal conduct of a person when restricting, on grounds of public policy or public security, his right to move and reside freely in the territory of the Member States will invalidate any justification of the restriction in question. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.⁴ The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States.⁵ Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.⁶

¹ Council Directive 2004/38/EC Art 4(1).

² Council Directive 2004/38/EC Art 4(2).

³ Case C-33/07 *Ministerul Administrației și Internelor – Direcția Generală de Pașapoarte București v Jipa* [2008] 3 CMLR 715, at paras 17, 18, 25, 28 and 30.

⁴ Council Directive 2004/38/EC Art 4(3).

⁵ Council Directive 2004/38/EC Art 4(4).

⁶ Council Directive 2004/38/EC Art 4(4).

Right to enter and reside

7.122 The 2006 Regulations¹ now include Switzerland. All the rights to enter in the main text are now covered by the Citizens' Directive and the

implementing 2006 Regulations.² Under Article 5 of the Citizens' Directive, all Union citizens have the right to enter another Member State by virtue of having an identity card or valid passport. For stays of up to three months, that is the only requirement.³ Under no circumstances can an entry or exit visa be required. Where the citizens concerned do not have travel documents, the host Member State must afford them every facility in obtaining the requisite documents or having them sent. Family members who do not have the nationality of a Member State enjoy the same rights as the citizen who they have accompanied. They may be subject to a short-stay visa requirement.⁴ Although there is no specific mention of entering to provide or receive services, they are covered by the new right given to all union nationals to enter and remain for three months whatever the purpose of their visit upon production of a passport and identity card. Under the 2006 Regulations, the transposed requirements are contained in regulations 11 (entry) and 12 (the short stay visa requirement for non-EEA nationals called an 'EEA family permit'). Although it is not referred to in the 2006 Regulations, regulation 12 is subject to the important requirement in Article 5(2) that 'Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure'. Notwithstanding the progressive regime of entry contained in the Citizens' Directive, the 2006 Regulations impose quite difficult requirements on the entry of all foreign family members. The short-term visa requirement which under Regulation (EC) No 539/2001 applies only to nationals who require visas to enter EU territory, but under the 2006 Regulations it applies to everyone, even if they come from a non-visa country. In *KA (EEA: family permit; admission) Sudan*⁵ it was held that Article 5 of the Citizens' Directive,⁶ does not confer an unqualified right of pre-entry, entry or residence on family members of a Union citizen exercising Treaty rights. Family members are required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. The Tribunal pointed out that the UK has chosen to impose a visa requirement in the form of an EEA family permit regime, and hence if a family member arrives at a UK border without an EEA family permit and seeks admission, he or she must satisfy the entry documents requirement of reg 11 of the 2006 Regulations. Whether entrants are entitled to a right of admission under reg 11 depends on their being able to produce relevant documentation on that occasion (or within a reasonable period of time thereafter).

¹ SI 2006/1003, reg 2(1).

² SI 2006/1003.

³ The host Member State may in addition require the persons concerned to register their presence in the country within a reasonable and non-discriminatory period of time.

⁴ Under Regulation (EC) No 539/2001, which the UK does not subscribe to, or under national law. Residence permits will be deemed equivalent to short-stay visas.

⁵ [2008] UKAIT 00052.

⁶ Council Directive 2004/38/EC.

Right of residence

7.124 We have referred in the previous paragraph to documentation connected to the right of residence given to Union citizens and members of their

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families who exercise their free movement rights under the Directive. With the coming into force of the Citizens' Directive there has been a change in the documentation needed. First, EEA nationals no longer get a residence permit as confirmation of their right of residence. Under the new regime there are registration certificates (reg 16) and a document certifying permanent residence (reg 18) for EEA nationals, and an EEA family permit and a residence card for family and extended family members (reg 17) and a permanent residence card (reg 18). These requirements of the 2006 Regulations match those of the Citizens' Directive. It is important to note that the residence permit is not the source of rights or a permission to remain, and no-one exercising free movement rights under the Directive or the 2006 Regulations will lose rights through the absence of a residence card or similar document, as their possession is not a precondition for the exercise of the holder's rights or the completion of administrative formalities.¹ The issue of various residence cards is to be completed not later than six months from the date of application.² During this period the applicant is allowed to remain in the country concerned. In *YB (EEA reg 17(4), proper approach) Ivory Coast*³ the AIT held that neither the Citizens' Directive nor reg 17(4) of the 2006 Regulations confers on an 'extended family member' of an EEA national exercising Treaty rights a right to a residence card. Regulation 17(4) makes it discretionary: first, determine whether the person concerned qualifies as an extended family member under reg 8. Next have regard, as rules of thumb only, to the criteria set out in comparable provisions of the Immigration Rules. In contrast to this absurd litany, our position is that in Articles 8 and 10 of the Directive 'family members' include 'other' family members. Article 10 offers a relatively simple requirement. First, (Article 10(1)) the right of residence 'shall' be evidenced by the issue of a residence document. Secondly, (Article 10(2)(e)) for the card to be issued the following documents must be presented a document issued by the relevant authority in the country of origin or the country from which they are arriving certifying that they are dependants or members of the household of the Union citizen. See also Article 8(5)(e) for a registration certificate where the 'other' family member is an EU citizen. It is also arguable, though not clear that 'family member' referred to in Article 9 also includes other family members, referred to in Article 3(2). See further 7.110B above.

¹ Council Directive 2004/38/EC Art 25(1). See further Case 48/75 *Royer, Re* [1976] ECR 497, [1976] 2 CMLR 619; Case 8/77 *Sagulo, Brenca and Bakhouché, Re* [1977] ECR 1495, [1977] 2 CMLR 585; *R v Pieck* [1981] QB 571; Case 59/85 *Netherlands v Reed* [1986] ECR 1283, [1987] 2 CMLR 448; Case C-363/89 *Roux v Belgium* [1991] ECR I-273, at para 9; Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL v Belgium* [2002] ECR I-6591, at para 74; Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2005] QB 145, para 40. It follows from this that that if a person fails or ceases to exercise community rights that carries no obligation to make a formal revocation of their residence permit – though the family member's right is derived from their spouse, as will be the case for a family member of a qualified person, it does not follow that there must be revocation of their documentation in order for his rights to be revoked: *DA (EEA, revocation of residence document) Algeria* [2006] UKAIT 00027 (9 March 2006).

² In the Citizens' Directive the six-month time limit is expressly retained for the obtaining of first residence cards (Article 10) and permanent residence cards (Art 20) for family members and for revocation of an expulsion decision (Article 32) (Council Directive 2004/38/EC). As regards a similar provision in Council Directive 2004/38/EC the Commission successfully brought infringement proceedings against Spain for the failure by the

Spanish authorities to make decisions on residence permit applications expeditiously and in any event within six months (see Case C-157/03 *Commission v Spain* (14 April 2005)).

³ [2008] UKAIT 00062.

7.125 Where registration is required, the deadline may not be less than three months from the date of arrival. A registration certificate must be issued immediately and should contain the name and address of the person registering (Article 8(2)). Under the Directive the documentation needed to obtain a registration certificate will vary depending on the particular free movement right being exercised. Member States may only require that:

- *workers and the self employed* present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons;
- *the self-sufficient* present a valid identity card or passport and provide proof that they satisfy the conditions laid down for self sufficiency;
- *students* present a valid identity card or passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means to show they have sufficient funds. Member States may not require this declaration to refer to any specific amount of resources.

In determining what are 'sufficient resources', Member States must not lay down a fixed amount, but must take into account the personal situation of the person concerned. In all cases the funds needed should be no higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, no higher than the minimum social security pension paid by the host Member State (Article 8(4)).

Family members of Union citizens, who are themselves Union citizens, may also be issued a registration certificate and will be required to produce the following documents:

- (a) a valid identity card or passport;
- (b) a document attesting to the existence of a family relationship or of a registered partnership;
- (c) where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining;
- (d) in cases of direct descendants or ascendants, documentary evidence that they meet conditions laid down for their qualifying as 'family members';
- (e) in cases of extended family members falling under Article 3(2)(a) of the Directive, a document issued by the relevant authority in the country of origin or country from which they are arriving, certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
- (f) in cases of partners who have not married or entered into a civil partnership (Article 3(2)(b)), proof of the existence of a durable relationship with the Union citizen.

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These provisions have been transposed into UK domestic law by reg 16 of the 2006 Regulations.¹ In the case of extended family members who are EEA nationals, the Secretary of State uses the registration process as the means of exercising the discretion given to Member States under Article 3(2)(b) and (c) of the Directive to facilitate the entry of extended family members in accordance with its national legislation.² Under the 2006 Regulations, the broad rule is that a qualified person is entitled to reside in the UK for so long as he or she remains a qualified person (reg 14(1)) and family members of a qualified person are entitled to reside for so long as they remain family members of the person through whom they qualify for a residence card (see reg 14(2)). Both the Directive³ and the 2006 Regulations⁴ make detailed provision to ensure that a worker or self employed person remains qualified despite periods of sickness or unemployment.

¹ SI 2006/1003.

² SI 2006/1003, reg 16(5) and (6). For further discussion see 7.110B above.

³ Directive 2004/38/EC.

⁴ SI 2006/1003, reg 6(2).

Permanent residence in the UK

7.127A In *McCarthy v Secretary of State for the Home Department*¹ the Appellant was a dual national (British and Irish), who had lived in the UK all her life, had three children and was the full-time carer of her disabled son. It was common ground that her Irish nationality confers on her the status of an EEA national within the meaning of the 2006 Regulations (reg 2). But it was held that this did not help her qualify for a right to permanent residence under Article 16 of the Citizens' Directive, because lawful residence contemplated in that Article is residence which complies with Community law requirements specified in the Directive and does not cover residence lawful under domestic law by reason of her UK nationality. However, the Court rejected a finding of the AIT that the Directive invariably imposes a requirement that there is movement from one country to another before the Directive is engaged. The issue which causes difficulty is, first, whether the approach to lawful residence adopted in other contexts, and for other purposes under Community law, assists with the construction of the expression 'resided legally' in the Directive.² Secondly, there is the problem of A8 and A2 accession nationals who have completed 5 years' lawful residence, part before accession and part after. The UK view is that they do not qualify for permanent residence, because they have not resided for 5 years in accordance with these regulations.² The Commission view is that the right to permanent residence under Article 16 is subject to two conditions: 5 years' lawful residence and being a EU national or the family member of one, and that the two conditions (*condition of residence and condition of citizenship*) do not have to exist at the same time.³ This means that there would be a period where lawful residence arises purely from the provisions of national law – a position quite contrary to the 2006 Regulations and the Court of Appeal in *McCarthy*. A reference to the ECJ is clearly necessary.

- ¹ [2008] EWCA Civ 641, [2008] 3 CMLR 174. See also *OP (EEA; permanent right of residence) Colombia* [2008] UKAIT 00074 (23 September 2008) where the Tribunal held that the EEA Regulations are intended to recognise the 'permanent right of residence' of individuals who 'clock up' the relevant five years' continuous residence on or after the date they came into effect.
- ² See C-85/96 *Sala v Freistaat Bayern* [1998] ECR I-2691, where a question arose as to the status and rights of a Spanish national living in Germany, including whether she was entitled to receive a child-raising allowance. It was held that the allowance fell within the scope *ratione materiae* of Community law and this meant that she could rely on the right, provided in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty (para 62). In *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657, [2007] 4 All ER 882 the Court of Appeal held that 'the scope of application of the Treaty, for the purposes of Article 12 (formerly Article 6) [discrimination on grounds of nationality], includes both cases where a right of residence arises [for an EEA national] directly under the Treaty and those where it arises separately under the law of the Member State' (Lloyd LJ at para 44).
- ³ Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 15(1)(a) and (e).

7.127B Under Article 12 family Members retain their right of residence in the event of the death or departure from the host Member State of the Union citizen if they meet certain conditions contained in the Article and the same applies under Article 13 in the event of divorce, annulment of marriage or termination of registered partnership. Nationals of member States acquire permanent residence if they become entitled to any of the free movement rights set out in Article 7. Different conditions apply to non-nationals. If they manage to keep their right of residence by meeting these conditions for a period of five years they will acquire permanent residence under Article 18. These provisions have been transposed into the 2006 Regulations.¹ There is a difference between the right of permanent residence under Community law and the grant of indefinite or permanent leave to remain under UK domestic immigration law, which led to litigation, but this is now history, given the new right of permanent residence given by Community law (see 6th edition at 7.121).²

¹ Immigration (European Economic Area) Regulations 2006, SI 2006/1003, regs 15 and 18.

² HC 395, paras 255–257 have been deleted subject to the transitional provisions in paragraphs 5 and 8 which continue to apply for the purpose of determining an application made before 30 April 2006 for an endorsement under either paras 255 or 257A or 257B.

TERMINATION OF THE RIGHT TO RESIDE: CESSATION OF ENTITLEMENT AND EXCLUSION

Implementation of the public policy proviso

7.134 The public policy proviso is implemented by the Citizens' Directive, which applies the provisions of Directive 64/221, but also incorporates some of the case law clarifications and developments. It applies to nationals of a Member State who are workers, self-employed persons or providers or recipients of services, and their families. Its provisions are also expressly made to cover those who have ceased to be economically active as a result of retirement or incapacity, to the economically self-sufficient, and to students. The Directive applies to all measures on grounds of public policy, public

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security or public health concerning entry into, the issue or renewal of residence permits in and expulsion from an EU country.¹ It also applies to restrictions on the right to leave imposed by the country of nationality on nationals who have been repatriated from another Member State.² It does not apply to the application of Article 35 of the Citizens' Directive (dealing with marriages of convenience) which has its own safeguards as set out in the Article.³ In the UK the provisions of the Directive are reflected in the 2006 Regulations, Pt 4, regs 19–21.⁴ A Member State cannot invoke the public policy proviso to serve economic ends, such as protecting the employment prospects of its own nationals as against other EEA nationals.⁵ The ECJ has also held that the public policy proviso applies to Turkish nationals benefiting from free movement rights under the Ankara agreement.⁶

¹ Council Directive 2004/38/EC, Arts 7(1), 15(1), and 27(1).

² Case C-33/07 *Ministerul Administrației și Internelor – Direcția Generală de Pașapoarte București v Jipa* [2008] 3 CMLR 715. See 7.120, above.

³ *TC (Kenya) v Secretary of State for the Home Department* [2008] EWCA Civ 543, [2008] All ER (D) 77 (Jun).

⁴ Regulation 21 of the 2006 Regulations deals with decisions taken on the grounds of public policy, public security and public health and keeps close to the language of the Directive.

⁵ Council Directive 2004/38/EC Art 27(1).

⁶ By Article 14 of Commission Decision (ECSC) 1/80 under the Ankara Agreement: see C-340/97 *Nazli v Stadt Nürnberg* [2000] ECR I-957, para 63.

7.135 The Directive does not simply reproduce the text of Directive 64/221; it also incorporates changes and clarifications of community law by the case law of the European Court. This is most clear from the text of Article 27 which sets out the general principles of the old Directive. It enables Member States to restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health, but they can only do these things 'subject to the provisions of this Chapter'. These powers are not absolute. First, these grounds shall not be invoked to serve economic ends. Secondly, measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. Moreover, the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted. Thirdly, careful provision is made for inquiries of other Member States in order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing a registration certificate or a residence card. Fourthly, when someone has been expelled on grounds of public policy, public security, or public health from one Member State provision, the Member State which issued the passport or identity card to the person expelled must allow the holder of the document who to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute. Article 28 deals with protection against expulsion. First, in a paragraph which is reminiscent of the ECHR decision in *Boultif*,¹ it is incumbent upon a Member State, which is considering making

an expulsion decision on grounds of public policy or public security, to take into account such factors as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his or her links with the country of origin.² Secondly, the host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.³ Thirdly, an expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security,⁴ as defined by Member States, if they:

- (a) have resided in the host Member State for the previous 10 years; or
- (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Articles 30 and 31 contain important provisions about notification of decisions and procedural safeguards. Article 32 deals with revocation of expulsion or exclusion orders. Article 33 makes important provision about deportation orders against union citizens. First it makes it clear that expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29. Secondly, if an expulsion order is enforced more than two years after it was issued, the Member State is required to check that the individual concerned is currently and genuinely a threat to public policy or public security and must assess whether there has been any material change in the circumstances since the expulsion order was issued. These are very clear indications and are in marked contrast to the deportation policy recently outlined under UK domestic law. See Chapter 15 below.

¹ *Boultif v Switzerland* (Application 54273/00) [2001] 2 FLR 1228, [2001] ECHR 54273/00, ECtHR.

² Reproduced in the 2006 Regulations, reg 21(6).

³ In *Bulale v Secretary of State for the Home Department* [2008] EWCA Civ 806, [2008] 3 CMLR 738 the Court of Appeal said that there was no need to refer questions going to the meaning or effect of the word 'serious', as that would be to invite an attempt at definition of a concept that the legislation treats either as undefinable or as sufficient in itself to guide the decisions of Member States.

⁴ In *LG (Italy) v Secretary of State for the Home Department* [2008] EWCA Civ 190, [2008] All ER (D) 262 (Mar), the Court of Appeal held that the words 'imperative grounds of public security' in the Citizens' Directive (ie those grounds that permit expulsion of an individual who has been resident in an EEA state for ten years) clearly mandated a very high standard before an EEA national could be deported. They remitted the matter back to the AIT for further legal argument having noted that the Operational Enforcement Manual could not be the last word on the subject and in any event was unclear.

Marriages of convenience and fraud

7.144A Article 35 of the Citizens' Directive incorporates into the Directive the position previously taken by Member States on the basis of Council Resolution of 4 December 1997. On Measures to be Adopted on the

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Combating of Marriages of Convenience.¹ But Article 35 has a wider ambit. It is headed 'Abuse of rights' and provides:

'Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.'

Article 35 appears in a separate chapter of the Directive from the public policy provisions in Articles 27 to 31. In *TC (Kenya) v Secretary of State for the Home Department*² the Court of Appeal rejected the appellant's argument that the reference in Article 35 to proportionality and the procedural safeguards in Articles 30 and 31 incorporates the protections included in Articles 27 and 28 and upheld the definitional approach in the EEA Regulations 2006, which simply says that a civil partner and spouse do not include a party to a civil partnership or marriage of convenience.³

¹ OJ 16.12.1997 C 382/1.

² [2008] EWCA Civ 543, [2008] All ER (D) 77 (Jun).

³ Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 2(1).

RIGHTS UNDER ASSOCIATION AGREEMENTS

Turkish Association Agreement

7.157 In *R (on the application of Payir) v Secretary of State for the Home Department*,¹ the European Court dealt with a reference from the English Court of Appeal about whether Turkish students, who are working to pay their fees, and a Turkish au pair are by law entitled to the benefit of Article 6(1) of Decision No 1/80 of the Association Council, which provides that a Turkish worker duly registered as belonging to the labour force of a Member State is entitled to increasing access to the Member State's labour market after one, three and four years of legal employment. In *Birden*² the ECJ said that 'the legality of the employment presupposes a stable and secure situation as a member of the labour force of a Member State and, by virtue of this, implies the existence of an undisputed right of residence (paragraph 55).' In court it was conceded that the students, who each had part time jobs, and the au pair were workers. They were also quite lawfully in the UK and there was nothing illegal about the work they were doing. But the UK government, taking a lead from Laws LJ in the Court of Appeal (paragraphs 27 and 28), queried whether they were engaged in an effective and genuine economic activity which could be classed as 'legal employment' within the meaning of Article 6(1). The European Court gave these arguments short shrift, holding that it must be determined whether the Turkish national meets the objective conditions laid down in Article 6(1), without it being necessary to take into account the reasons for which he or she was first granted the right to enter that territory or any temporal limitations attached to their right to work.³ The Court held that the reasons for which leave to enter was granted to the Turkish nationals concerned – to enable them to pursue studies or gain experience as an au pair – cannot in themselves prevent the persons concerned from being able to rely on Article 6(1) of Decision No 1/80. The same applies

to statements of intention made by those nationals to the effect that they do not wish to remain in the host Member State for more than two years or that they intend to leave it on completion of their studies, and to temporal limitations attaching to their leave to remain.

¹ Case C 294/06 R (*on the application of Payir*) v Secretary of State for the Home Department; R (*on the application of Ozturk*) v Same; R (*on the application of Akyuz*) v Same (see paragraphs 27–30 and 33, 35, 37 and 40–44). The neutral citation in the CA was [2006] EWCA Civ 541, reported at [2006] ICR 1314.

² *Birden v Stadtgemeinde Bremen*: C-1/97 [1998] ECR I-7747, [1999] 1 CMLR 420, ECJ. In R (*on the application of Ali Oczelik*) v Secretary of State for the Home Department (2009) LTL 29/1/2009, the Court of Appeal held that the time taken to process an application of a Turkish immigrant for indefinite leave to remain in the United Kingdom did not count towards the one-year period of legal employment that would entitle him to remain in the UK under the Association Agreement 1963, art 6(1). Although he was lawfully in the UK, his position was precarious and he did not meet the requirements of community law to be in a stable and secure situation as a member of the UK labour force.

³ According to settled case law, it is not open to the national authorities to attach conditions to such rights or to restrict their application, as they would otherwise undermine the effect of Decision No 1/80 (see *Günaydin*, paras 37 to 40, and 50; *Birden*, para 19; *Kurz*, para 26; Joined Cases C-317/01 and C-369/01 *Abatay* [2003] ECR I 12301, para 78; and *Sedef*, para 34).

7.158 In a series of cases on the application of Article 6 of Decision 1/80, the ECJ has established the following guidelines for Turkish nationals:

- (1) he or she has to be a worker and not self-employed, that is, someone bound by an employment relationship covering a genuine and effective economic activity pursued for the benefit of and under the direction of another for remuneration.¹ It makes no difference to the definition that employment is for the sole purpose of preparing the employee to work elsewhere;² is specific work for a specific employer for a limited period;³ or is a paid apprenticeship.⁴ A person may qualify as a worker even although the job is a temporary one to enable recipients of social assistance to integrate into working life and takes place at a cultural centre funded by public money and not in competition with undertakings in the general labour market;⁵
- (2) he or she has to be duly registered as belonging to the labour force ('appartenant au marché regulier' in the French version) of a Member State.⁶ This means being in employment which is either located within the territory of a Member State or which retains a sufficiently close link with it, as in the case of an international lorry-driver who has sufficient links with one Member State,⁷ or someone employed in the maritime shipping industry.⁸ To establish a close link with a particular Member State, it will be necessary to take into account the place where the worker was hired, the territory on which or from which employment is pursued, and the applicable national legislation in the field of employment and social security.⁹ A worker will be treated as duly registered if he or she is employed on the same conditions of work and pay as those claimed by workers who pursue identical or similar activities,¹⁰ and complies with the requirements laid down by the rules and regulations in the Member State concerned;¹¹

7.158 *European community law and related obligations*

- (3) he or she has to be in legal employment. This means having a stable and secure position in the labour force and an undisputed right of residence.¹² Legal employment is a concept of Community law, which must be defined objectively and uniformly in the light of the spirit and purpose of Article 6 of Decision 1/80.¹³ Accordingly, it does not matter that the worker may have been aware of the restrictions imposed by the host State.¹⁴ Employment of less than 12 months may not have sufficient stability to qualify,¹⁵ but the fact that employment contracts are temporary is of no relevance.¹⁶ The immigration status of the Turkish worker is of relevance to the issue of a stable and secure position. Where a worker has obtained his or her residence permit in fraudulent circumstances, he or she will not qualify,¹⁷ nor does one who is resident on a provisional basis awaiting the grant of a residence permit,¹⁸ or someone who is authorised to work while he or she appeals against a decision refusing a right of residence.¹⁹
- (4) it is settled case law that once Turkish workers have lawfully entered the territory of the host Member State and have entered into lawful employment, as described above, they can enjoy the rights conferred on them by Article 6 (1), irrespective of whether or not the authorities of the host Member State issue a specific administrative document, such as a work permit or residence permit.²⁰ This is of particular importance once workers have completed four years in employment and are fully integrated into the host Member State (7.156 above). It also applies to family members after five years' legal residence (7.162 below).
- (5) it is also settled case-law that Article 6(1) does not make the recognition of any rights, which it confers on Turkish workers, subject to any condition connected with the reason for which the right to enter, work, or reside was initially granted.²¹ So if someone is given leave to do an apprenticeship,²² or was allowed to work while their spouse was in full time education, these circumstances would not prevent them enjoying the rights conferred by Article 6(1).

¹ Case C-36/96 *Günaydin v Freistaat Bayern* [1997] ECR I-5143, ECJ; Case C-1/97 *Birden v Stadtgemeinde Bremen* [1998] ECR I-7747, ECJ. For the situation of the self-employed, see 7.166 below.

² *Günaydin* above.

³ Case C-98/96 *Ertanir v Land Hessen* [1997] ECR I-5179, ECJ.

⁴ Case C-188/00 *Kurtz v Land Baden-Württemberg* [2002] ECR I-10691, ECJ.

⁵ *Birden* above.

⁶ *Kurtz*, above, at paras 37–44; R (*on the application of Payir*) v Secretary of State for the Home Department; R (*on the application of Ozturk*) v Same; R (*on the application of Akyuz*) v Same, para 44.

⁷ Case C-434/95 *Bozkurt v Staatssecretaris van Justitie* [1995] ECR I-1475, ECJ, at paras 22–23.

⁸ Case C-230/03 *Sedef v Freie und Hansestadt Hamburg* (judgment dated 10 January 2006).

⁹ *Bozkurt* above.

¹⁰ *Günaydin* above, at para 29.

¹¹ *Birden* above, at para 33.

¹² Case C-192/89 *Sevince v Staatssecretaris van Justitie* [1990] ECR I-3461, para 30; Case C-237/91 *Kus v Landeshauptstadt* [1992] ECR I-6781, para 12; *Bozkurt* above, para 26; *Birden* paras 47–55, above. Case C-285/95 *Kol v Land Berlin* [1997] ECR I-3069, para 21.

- ¹³ *Ertanir* above, at para 39. In *FS (Breach of conditions: Ankara agreement) Turkey* [2008] UKAIT 00066 the AIT found that the Ankara Agreement does not entitle Turkish nationals to breach conditions of their leave. A Turkish national is not, therefore, entitled to base a claimed entitlement to remain in the United Kingdom on working in breach of conditions of their leave to enter.
- ¹⁴ *Ertanir* above.
- ¹⁵ Case C-306/95 *Eker* [1997] ECR I-2697.
- ¹⁶ *Günaydin*, above at paras 36–40; *Birden*, above at paras 37–39 and 64; *Kurtz*, above, at para 55.
- ¹⁷ *Kol* above.
- ¹⁸ *Kus* above, para 21.
- ¹⁹ *Sevince* above, para 31.
- ²⁰ *Bozkurt*, paras 29–30; *Günaydin* paras 36–40; *Ertanir*, para 55; *Birden* para 65; and *Kurtz* para 54.
- ²¹ *Kus* above, paras 21–22; *Günaydin* para 52; *Birden* para 57; and *Kurtz* para 56; *Payir* paras 43–44.
- ²² For example, *Kurtz*, above.

Establishment under Turkey Agreement

7.166 As regards establishment, Article 13 of the Ankara Agreement states that the parties agree to be guided by Articles 52 to 56 EC (now 42 to 46) for the purpose of abolishing restrictions on the freedom of establishment between them. Article 14 made similar provision for services. Article 41 of the additional Protocol is a standstill provision, which requires the Parties to refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.¹ In *Savas*² a Turkish couple who had overstayed their leave in the UK set up a very successful business and wished to regularise their position. The UK authorities wished to deport them. The case was referred to the ECJ, which ruled that Articles 13 and 41(2) did not have direct effect, but that the standstill clause in Article 41(1) prohibited the introduction of new national restrictions. It was for the national court to determine if the rules applied were less favourable than before the time that the Additional Protocol came into force. However, the clause is not in itself capable of conferring upon a Turkish national the benefit of the right of establishment or of residence which goes with it. The upshot of this is that so far as the UK is concerned no rules more onerous than the 1973 business rules (HC 510) will apply to Turkish nationals. These rules do not make entry clearance a pre-condition of entry³ and they are very much less onerous than the current rules, containing no minimum capital requirement or a need to create new jobs. In *OY (Ankara Agreement; standstill clause; worker's family) Turkey*⁴ the AIT has held that the standstill clause in Article 13 of the Decision 1/80 does not restrict Member States' ability to regulate and control entry to family members to those national rules in force in the 1970's. In *Tum and Dari*⁵ the European Court held that the restrictions contained in the Article 14 applied to both the substantive and the procedural conditions governing admission into the territory of the host state. It therefore applied as much to first entry as to those who had already entered. In the particular case it was irrelevant that the applicants were on temporary admission and had had their asylum applications turned down. In the domestic courts and the AIT, much of the focus of the cases have been on whether or not an asylum seeker has tried to seek an immigration advantage

by fraud. In *Tum and Dari* there were express findings in both the CA and the ECJ that there was no hint of dishonesty or fraud. It seems to us that many of the reported cases turn on their facts and are listed in a footnote accordingly.⁶ In *Aksoy v Secretary of State*⁷ the High Court agreed that much will turn on the particular facts of each case and the particular conclusions reached by the Immigration Judge. It does not follow that simply because a claim for asylum is rejected entry was sought to be obtained by means of a fraudulent story. However, where there is a fraudulent story, it cannot make a difference whether the applicant is someone who gained entry by false representations, or someone who is placed on temporary admission, and then seeks to gain entry by repeating those false assertions in front of an Immigration Judge who rejects them. Thus far, the refusals had turned on whether 'the fraud exception', as it was called applied. But in *R (on the application of LF (Turkey)) v Secretary of State for the Home Department*⁸ the Court of Appeal, relying on a dictum at para 64 of the ECJ judgment in *Tum and Dari*,⁹ that Community law cannot be relied on for abusive or fraudulent ends, broadened the fraud exception to mean that a Turkish national cannot benefit from his or her own wrongdoing including the historic establishment of a business in violation of his conditions. This has been recently followed by the AIT in *IY (Ankara Agreement-fraud and abuse) Turkey*,¹⁰ in a case where the applicant had left the United Kingdom voluntarily to make an application from overseas under the standstill clause.

¹ For the UK this means no new restrictions after 1 January 1973, the date of the UK's adherence to the EEC. This position contrasts with the former situation under the old Association agreements where restrictions on entry and the need for entry clearance was endorsed by the European Court: see Case C 327/02 *Panayotova v Minister Voor Vreemdekingenzaken en Integratie*. Under the 1973 rules appellants who wished to establish a business must show that they will be bringing into the country sufficient funds to establish a business that can realistically be expected to support them and where there was no attempt made to satisfy this requirement, an application would fail: *DD (Turkey) v Secretary of State for the Home Department* [2007] EWCA Civ 270 (21 February 2007). See also *R (on the application of Taskale) v Secretary of State for the Home Department* [2006] EWHC 712 (Admin) (17 March 2006 (not irrational for the Secretary of State for the Home Department to refuse an application when the business plan which formed the main documentary thrust of the original application is manifestly of a business which is completely different in scale and ambition to any that actually has been running, particularly when there was an absence of hard financial evidence supporting the application)).

² Case C-37/98 *R v Secretary of State for the Home Department, ex p Savas* [2000] INLR 398, ECJ; extended to services in Cases C-317/01 and C-369/01 *Abatay and Sabin v Bundesanstalt für Arbeit* [2003] 1 All ER (D) 342 (Oct), ECJ, paras 61–67. In *R (on the application of A) v Secretary of State for the Home Department* [2002] EWCA Civ 1008 [2003] CMLR 14, 353, the Court of Appeal said *Savas* settled the position in community law and there was no need to make a further reference to the ECJ on this subject.

³ Thus persons admitted as visitors or for education or other purpose may apply for leave to establish themselves. In *R (on the application of Tum) v Secretary of State for the Home Department* [2004] EWCA Civ 788, the CA held that the Secretary of State was wrong to apply the current business rules to two failed Turkish asylum seekers, who were on temporary admission to the UK, and to refuse them leave to enter. On appeal by the Secretary of State, the House of Lords referred the issue to the ECJ.

⁴ *OY (Ankara Agreement; standstill clause; worker's family) Turkey* [2006] UKAIT 00028 (17 March 2006).

- ⁵ Case C-16/05 *R (on the application of Tum and Dari) v the Secretary of State for the Home Department*, paras 61 and 63. It was also held that there was no evidence that they had relied on the application of the 'standstill' clause in Article 41(1) of the Additional Protocol with the sole aim of wrongfully benefiting from advantages provided for by Community law (para 66).
- ⁶ *R (on the application of Taskale) v Secretary of State for the Home Department* [2006] EWHC 712 (Admin) (17 March 2006); *R (on the application of Semsek) v Secretary of State for the Home Department* [2006] EWHC 1486 (Admin) (15 May 2006); *R (on the application of Aslan) v Secretary of State for the Home Department* [2006] EWHC 1855 (Admin) (10 July 2006); *R (on the application of Catal) v Secretary of State for the Home Department* [2006] EWHC 1882 (Admin); *R (on the application of Arslan) v Secretary of State for the Home Department* [2006] EWHC 1877 (Admin) (28 July 2006); *R (on the Temiz application of) v Secretary of State Home Department* [2006] EWHC 2450 (Admin). On the issue of the right of appeal and the absence of a need under the 1973 rules to have an entry clearance, see *R (on the application of Arslan) v Secretary of State for the Home Department* [2006] EWHC 1877 (Admin) (28 July 2006); *R (on the application of Parmak) v Secretary of State for the Home Department* [2006] EWHC 244 (Admin) (13 February 2006) and *R (on the application of Kocakgul) v Secretary of State for the Home Department* [2005] EWHC 3171 (Admin) (23 November 2005).
- ⁷ [2006] EWHC 1487 (Admin). See also *FS (Breach of conditions: Ankara Agreement) Turkey* [2008] UKAIT 00066.
- ⁸ [2007] EWCA Civ 1441, [2007] All ER (D) 257 (Oct).
- ⁹ Case C-16/05 *R (on the application of Tum and Dari) v the Secretary of State for the Home Department* [2008] 1 CMLR 18, [2007] All ER (D) 115 (Sep) ECJ.
- ¹⁰ [2008] UKAIT 00081.

HUMAN RIGHTS LAW

THE HUMAN RIGHTS ACT 1998

Interpretative obligation to achieve compatibility with Human Rights

8.14 The interpretative obligation also applies to subordinate legislation such as Immigration Rules.¹ Thus in *Boadi*² the Tribunal held that the requirement that an adopted child has ‘lost or broken her ties with her family of origin’ must be read as referring to ties of responsibility, not of affection, to be compatible with Article 8 ECHR.³ If it is impossible to interpret a provision in subordinate legislation in a way which is compatible with ECHR rights, and there is nothing in the parent Act requiring this incompatibility,⁴ the offending provision may be disapplied or struck down as *ultra vires* the parent Act, as the Court of Appeal did with the rule preventing access to the Tribunal in *Saleem*.⁵ However, it should be noted that the Tribunal has no power to strike down incompatible rules,⁶ although it can set aside an immigration decision which is unlawful as being incompatible with the appellant’s Convention rights, regardless of whether it is in accordance with the rules.⁷

¹ In *R v Secretary of State for the Home Department, ex p Arman Ali* [2000] INLR 89, Collins J interpreted the rules relating to recourse to public funds so as to give effect to Art 8 ECHR obligations.

² *Boadi v Entry Clearance Officer, Ghana* [2002] UKIAT 01323, [2003] INLR 54.

³ See also *Abdulla (Intekab)* [2002] UKIAT 07516, where the Tribunal read para 281(v) of the Immigration Rules (for admission of spouse, the couple must have no recourse to public funds) as allowing the spouse to depend on the sponsor’s savings from disability allowance ‘to ensure compliance with ECHR obligations. To prevent someone qualifying for family reunion solely on the basis of inevitable financial hardship could in certain circumstances, particularly where disability prevents a sponsor working, amount to disrespect for private and family life or discrimination contrary to Art 14 with Art 8.’

⁴ For example, if the rules are made in exercise of a general rule-making power such as that under the Immigration Act 1971, s 3(2).

⁵ *R v Secretary of State for the Home Department, ex p Saleem* [2000] 4 All ER 814, [2000] Imm AR 529, [2000] INLR 413.

⁶ See *Pardeepan v Secretary of State for the Home Department* [2000] INLR 447; *Koprinov* (01TH00095).

⁷ Nationality, Immigration and Asylum Act 2002, s 84(1)(c), (g); see *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167.

8.15 If incompatibility of primary legislation cannot be remedied by the new method of construction, or subordinate legislation cannot be read compatibly because the parent Act prevents this, the only remedy is a declaration of incompatibility.¹ A declaration of incompatibility may be made only by the higher courts, ie the High Court, the Court of Appeal, the Privy Council and the House of Lords, and in Scotland the High Court of Judiciary (except when it sits as a trial court) and the Court of Session.² The Special Immigration Appeals Commission may make a declaration of incompatibility in a derogation matter.³ It is a discretionary remedy; the court may decide to leave the incompatibility (although it is hard to reconcile this with its own duty as a

public authority to act compatibly with the ECHR, under s 6).⁴ If a court is considering making a declaration, the Crown is entitled to notice⁵ and to be joined as a party.⁶ In another example of the balancing of judicial guardianship of fundamental rights with parliamentary sovereignty, a declaration of incompatibility does not affect the continuing validity, operation and enforcement of the incompatible legislation, nor does it bind the parties.⁷ If a minister insisted on action (such as removal) under legislation which has been held incompatible with the Convention, however, it is likely that the court would grant a stay pending parliamentary consideration of a remedial amendment. The declaration empowers, but does not oblige Parliament to remedy the incompatibility,⁸ and if Parliament does not do so the victim can apply to the ECtHR as before. Declarations of incompatibility were made in the immigration context in respect of provisions in the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. One provision was declared incompatible with Article 14 of the ECHR on grounds of religion because it exempted those entering an Anglican marriage from the requirement, applicable in respect of other religious marriages, of obtaining permission to marry from the Home Office.⁹ The other provision declared incompatible was one which prevented the Secretary of State from investigating a claim that removal of an asylum seeker from the UK to a 'safe third country' would breach Article 3 even if there was apparently persuasive evidence supporting the claim.¹⁰ However, this decision was overturned by the Court of Appeal.¹¹

¹ Human Rights Act 1998, s 4(1)–(4). In the first two years of the Act's operation, nine declarations of incompatibility were made: see 'Two years of the Human Rights Act', in (2003) EHRLR 14–23. Recent cases involve the right of transsexuals to marry (*Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467) and the rights of mental patients: *R (on the application of M) v Secretary of State for Health* (2003) UKHRR 746. In *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728, the Court of Appeal held the statutory scheme penalising carriers of clandestine entrants (Immigration and Asylum Act 1999, ss 32–37) incompatible with Art 6 and Protocol 1, Art 1 because of the mandatory and inflexible nature of the penalties, the lack of fair proceedings to challenge penalties and the draconian powers of detention of transporters: see chapter 14 below. Measures denying all support to late asylum claimants (Nationality, Immigration and Asylum Act 2002, s 55) avoided a similar fate by saving provisions enabling support to be given 'to the extent necessary to prevent a breach of an applicant's Convention rights': see *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2003] UKHRR 607, [2003] 2 All ER 905.

² HRA 1998, s 4(5).

³ Anti-terrorism, Crime and Security Act 2001, s 30(2). On an appeal originating from a decision by SIAC under this section in *A and X v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 WLR 87 the House of Lords ruled that the derogation from Art 5 ECHR was discriminatory and disproportionate, quashed the Derogation Order and declared s 23 of the Anti-terrorism, Crime and Security Act 2001, which allowed indefinite detention without trial of foreign nationals, incompatible with Arts 5 and 14 of ECHR, since it addressed only the threat of terrorism posed by non-nationals, while that threat was as likely to emanate from nationals.

⁴ HRA 1998, s 6(3)(a); see below. But in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467, the House of Lords rejected the Crown's submissions to the effect that a declaration was unnecessary since the government was committed to changing the law after the adverse decision of the ECtHR in *Goodwin v United Kingdom* (28957/95) [2002] IRLR 664, holding it desirable 'in a sensitive case that this House, as the court of final appeal in this country, should formally record that the present state of statute law is incompatible with the Convention.'

⁵ HRA 1998, s 5(1).

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- ⁶ HRA 1998, s 5(2). The court will also be sympathetic to public interest organisations applying to be joined as interveners: see 8.25 below.
- ⁷ HRA 1998, s 4(6). The purpose of the declaration is to put Parliament under pressure to remedy the incompatibility: Lord Chancellor, 583 HL Official Report (5th series) col 546, 18 November 1997. Since the offending legislation continues in force, there can be no award of damages when a declaration is made: *Re K (a child)* [2001] 2 All ER 719, CA, paras 128–130, although costs should be awarded.
- ⁸ Parliament is not a ‘public authority’ for the purposes of the Human Rights Act 1998: s 6(3) (except for the judicial committee of the House of Lords: s 6(4)), and has no obligation to act compatibly with the ECHR, save under international law. Detailed description of the mechanism for remedying statutory incompatibility is beyond the scope of this work. In essence, the offending legislation may simply be amended when there is parliamentary time, or in cases where the minister considers there are compelling reasons not to wait, he or she may amend the legislation by an order under s 10, known as a remedial order. HRA 1998, Sch 2 contains the fairly complex procedural requirements for a valid remedial order.
- ⁹ *R (on the application of Baiai) v Secretary of State for the Home Department* [2006] EWHC 823 (Admin), [2006] 3 All ER 608 and *R (on the application of Baiai) v Secretary of State for the Home Department* [2008] UKHL 53, [2008] 3 All ER 1094 in respect of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 19(1).
- ¹⁰ *R (on the application of Nasser) v Secretary of State for the Home Department* [2007] EWHC 1548 (Admin), [2008] 1 All ER 411, in respect of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, Sch 3, para 3.
- ¹¹ *Secretary of State for the Home Department v Nasser* [2008] EWCA Civ 464, [2009] 1 All ER 116.

The duty on public authorities

8.22 Despite the rejection by the House of Lords of exceptionality as a legal requirement before an applicant could escape being trumped by the Secretary of State in Article 8 cases, there is some concern that the lower courts still cling to it as an indicator of how they should decide an appeal and still treat ‘immigration control’ as some kind of overarching legitimate public interest when dealing with Article 8(2). This is, in our view, one of the most indefensible domestic glosses put on ECHR rights and contrasts starkly with the current Strasbourg case law, which is outlined at 8.80, below, and which was so clearly endorsed by the House of Lords in *Huang*. First, immigration law is a conglomeration of many different policies, by no means all of which relate to the list of interests set out in Article 8(2) of ECHR. One important policy is family stability and reunion, the very thing that Article 8 rights are about. There is no antithesis of public interests against private rights here. Another of its driving forces, which has never been mentioned in a single case, is the appeasement of the racist lobby and the xenophobic outpourings against asylum seekers in much of the populist press. Ministers often explain that they are tightening up on ‘illegal immigrants’ and asylum seekers in order that the government does not lose out to the hate parties of the far right. Further, many of the Immigration Rules, such as those on family reunion for elderly dependent relatives, are very old, remain cast in deeply restrictive terms, and have not been amended since the Human Rights Act came into force. With this background, it seems to us that to suggest that the Immigration Rules are embodiments of policies which balance immigrants’ human rights against the economic well-being of the country or the prevention of crime and disorder is highly disputable and totally unproven. Yet this has been one of the underlying premises of much of the domestic case law under Article 8(2). The

equation of immigration control with economic wellbeing or the prevention of crime and disorder is taken as a given and has become part of a deeply ingrained trend which it will be hard to displace. Secondly, we have always understood that the policy of immigration law and practice has never been to treat the rules as the final arbiter of who should come in and who should not; of who should be deported and who should not; they are rules of practice.¹ Although laid before Parliament, they are never debated. Their laying is a pure formality, with some fundamental changes being brought into force the day following their laying.² They are complemented by employment policies, which do deal with the economic wellbeing of the country, but are largely separate and not part of the Rules. First, the Rules themselves have a built-in flexibility. Those who have been in the country a long time will only be removed once a whole set of factors have been considered and a balance has been struck.³ Secondly, the Home Secretary always has a residual discretion to admit, when the rules do not permit it.⁴ The Immigration Rules do not, and never have, represented a rigid policy yardstick of where the balance lies between the claims of democratic power and the claims of individual rights.⁵

¹ Immigration Act 1971, ss 1(4) and 3(2).

² See the sudden ending of the special voucher scheme: see 2.19, above, or the immediate suspension in 2007 of the Highly Skilled Migrant Programme by upgrading the skills needed to qualify and leaving thousands of lesser skilled people already on the programme floundering: see chapter 10.

³ See HC 395, paras 364 and 395C.

⁴ Immigration Act 1971, s 4(1).

⁵ See *Shala v Secretary of State for the Home Department* [2003] EWCA Civ 233, [2003] INLR 349, CA. In *Boultif v Switzerland* [2001] 2 FLR 1228, (2002) 33 EHRR 50, ECtHR, and *Sen v Netherlands* (2003) 36 EHRR 76, the European Court set out some guiding principles on the relevant criteria to assess each individual case, which have none of the rigidity of the English approach. See also *Jakupovic v Austria* (Application 36757/97) [2003] 2 FCR 361, ECtHR; and *Yildiz v Austria* (2003) 36 EHRR 32, ECtHR.

ECHR PRINCIPLES

8.34 The concept of State responsibility for the protection of fundamental rights is at the heart of the ECHR. States have negative and positive obligations under the Convention: not to interfere with core human rights, and to protect those within their jurisdiction from violations.¹ A positive obligation may also require action to give effect to rights, such as the provision of legal aid to enable access to a court to be effective,² or the promotion of family life through the admission of a family member to the country.³ The positive obligation to protect against killing and torture extends to an effective investigation when individuals have been killed (whether by State agents or private individuals) or when they allege torture.⁴ The state also has an obligation to appraise itself of conditions in a country to which it intends to remove individuals otherwise it cannot know, as it must, whether such removal would violate Article 3.⁵ In accordance with the ideas expressed in the Preamble and Article 1, the Convention is intended to guarantee rights that are practical and effective, not theoretical and illusory.⁶ Thus, rights must not be subject to conditions for their exercise which render them useless.⁷

¹ By, for example, not sending someone to a country where their human rights will be violated: *Soering v United Kingdom* (1989) 11 EHRR 439, or by preventing a death which was eminently foreseeable: *Osman v United Kingdom* (1998) 29 EHRR 245, para 115. See

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also *A v United Kingdom* (1998) 27 EHRR 611 (prevention of assaults on children by appropriate criminal penalties); *Platform Ärzte für das Leben v Austria* (1988) 13 EHRR 204, para 32 (dealing with threats of violence by opponents on demonstrations to ensure freedom of assembly).

² *Airey v Ireland* (1979) 2 EHRR 305, para 24. See also *Marckx v Belgium* (1979) 2 EHRR 330: 'Fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances the State cannot simply remain passive.'

³ *Sen v Netherlands* (2003) 36 EHRR 7. The distinction between positive and negative obligations, in the context of family reunion and separation, was held to be of lesser significance by Judge Martens in *Gul v Switzerland* (1996) 22 EHRR 93, see 8.81 below. For discussion on the relative precision, intensity and scope of negative and positive obligations see *R (on the application of Pretty) v DPP* [2001] UKHL 61, [2002] 1 AC 800; *R (on the application of A) v Lord Saville of Newdigate* (No 2) [2001] EWCA Civ 2048, [2002] 1 WLR 129; *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] INLR 381 (para 34); see also *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36. See also *R (on the application of Limbuela) v Secretary of State for the Home Department* [2004] EWCA Civ 540, [2004] QB 440, *R (on the application of Gezer) v Secretary of State for the Home Department* [2004] EWCA Civ 1730, see 8.56 below.

⁴ *Kaya v Turkey* (1998) 28 EHRR 1; *Gülec v Turkey* (1998) 28 EHRR 121, para 78; *Kaya (Mahmut) v Turkey* (28 March 2000, unreported), ECtHR, para 106–107.

⁵ *Secretary of State for the Home Department v Nasser* [2008] EWCA Civ 464, [2009] 1 All ER 116.

⁶ *Airey* above; *Golder v United Kingdom* (1975) 1 EHRR 524, paras 28–36.

⁷ *Winterwerp v Netherlands* (1979) 2 EHRR 387, para 60; *Artico v Italy* (1980) 3 EHRR 1, para 33; *Ashingdane v United Kingdom* (1985) 7 EHRR 528, para 57.

Territoriality

8.43 Although human rights issues might arise through detention of asylum seekers and denial of support, for the most part it is the act of expulsion or exclusion which engages human rights in the field of immigration. Both expulsions and exclusions raise the question to what extent the Convention (and the Human Rights Act) protects people from feared human rights violations in their own country. Article 1 ECHR requires Contracting States to 'secure the Convention rights and freedoms to everyone within their jurisdiction'.¹ Normally jurisdiction is co-extensive with territory. But there are exceptions. This was made clear in *Bankovic v Belgium* (bombing of Belgrade by NATO held not to engage Convention) where the court accepted that 'from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial',² and that acts of the contracting States performed, or producing effects, outside their territories would only in exceptional cases constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.³ The first exception occurs when the respondent State gains effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, and then exercises all or some of the public powers normally to be exercised by that government.⁴ Secondly, there are cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.⁵ Thirdly, there are the cases,

familiar to immigration practitioners, where as a result of expulsion or extradition someone is being sent to a country where they face the risk of a human rights violation. This was first made clear by the European Court in *Soering v United Kingdom*,⁶ an extradition case, and was then extended to deportation and removal cases.⁷ All these cases were Article 3 cases and the question then arose whether the Convention's application was limited to Article 3 or applied to other Articles, where the alleged violations would take place in the receiving country. In two consecutive appeals in *Ullah*⁸ and *Razgar*⁹ the House of Lords held that, in principle, all the Convention Articles could be engaged by expulsion. They distinguished between domestic cases, where a State is said to have acted within its own territory in a way which infringes the enjoyment of a Convention right within that territory (for example, expulsion which separates someone from family members living in the UK), and foreign cases, in which it is claimed that the conduct of the State in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's Convention rights in that other territory (for example, through detention, an unfair trial, inability to practice religion, or conditions damaging mental health).¹⁰ The House held that the Strasbourg case-law did not preclude reliance on Articles other than Article 3 in a foreign case, but, where the case involved qualified rights, such as those under Articles 8 and 9, it will be necessary to show a real risk of a flagrant denial or gross violation, where the very essence of the right will be completely denied or nullified in the destination country. Various different expressions have been used to describe the test: 'flagrant denial', 'gross violation', 'flagrant violation of the very essence of the right', 'flagrant, gross or fundamental breach', 'gross invasion of [the person's] most fundamental human rights', 'particularly flagrant breaches'. However, all describe the same test which requires 'a flagrant breach of the relevant right, such as will completely deny or nullify the right in the destination country'.¹¹ The test does not require that every last vestige of the right must be eliminated.¹² The majority in *Razgar* could not rule out such a flagrant breach in relation to the foreseeable consequences to health of removal of asylum claimants to Germany. In *EM (Lebanon)* the House of Lords held that the destruction of the family life between a mother and her child that would follow their removal to Lebanon would be a flagrant violation of their rights to respect for family life, notwithstanding that there might be continuing contact between mother and child.¹³ The Tribunal has held that a person outside the territory of the UK cannot normally rely upon Convention rights to claim an entitlement to entry clearance and it is only where the person enjoys family life with someone within the UK that issues under Article 8 might arise.¹⁴ In such circumstances, so the Tribunal says, the only human rights involved are those of the person in the UK and the rights of that person, not being an appellant, cannot be considered by the tribunal; they are enforceable by means of judicial review.¹⁵ We think that that the Tribunal was wrong not to treat decisions on entry clearance applications as one of the instances of extra-territorial jurisdiction acknowledged in *Bankovic*, as being 'cases involving the activities of [the state's] diplomatic or consular agents abroad', bearing in mind that the issuing of visas is plainly an activity of consular agents abroad.¹⁶ We also think that the Tribunal is wrong to regard breach of a non-appellant's human rights as not being justiciable in an appeal to the tribunal (see 8.111 below).

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- ¹ Article 1 is not one of the Convention rights set out in Sch 1 to the Human Rights Act 1998; the passage of the Act itself was to give effect to it, and the courts treat it as such.
- ² *Bankovic v Belgium* (2001) 11 BHRC 435, para 59.
- ³ *Bankovic* above, para 67. In *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, (2002) Times, 8 November, para 71, 106, where the claimant, held in a 'legal black hole' in Guantánamo Bay, sought a declaration that the British authorities had a duty to assist him diplomatically by making representations to US officials, the court held that nothing in the Convention imposed an enforceable duty to protect citizens from inhuman treatment abroad: it was 'a considerable extension' of the territoriality principle to postulate that the Convention requires a State to take positive action to prevent or mitigate the effects of violations of human rights that take place outside the jurisdiction and for which the State has no responsibility. In *R (on the application of Suresh) v Secretary of State for the Home Department* [2001] EWHC Admin 1028, [2002] Imm AR 345, an attempt to seek entry of a leading LTTE member to the UK to prevent his expulsion from Canada to Sri Lanka, where he feared torture, was dismissed on the basis there was no duty on the Secretary of State to prevent a breach of Art 3 by another country, either on the basis of the applicant's entry clearance application or because he had family members in the UK.
- ⁴ *Bankovic v Belgium* above, para 71. See *Loizidou v Turkey* (1995) 20 EHRR 90 (Turkish occupation of northern Cyprus).
- ⁵ *Bankovic v Belgium* above, para 73. See *Xhavara v Italy and Albania* (39473/98, 11 January 2001 (interception by Italian naval vessel of ship carrying refugees); *Öcalan v Turkey* (46221/99) (2003) 15 BHRC 297 (seizure of suspect abroad). Lord Bingham expressed the greatest doubt whether this included the actions of British immigration officers in Prague in *European Roma Rights Centre v Immigration Officer at Prague (United Nations High Commr for Refugees Intervening)* [2004] UKHL 55, [2005] 1 All ER 527 at para 21. But see *R (on the application of B) v Secretary of State for the Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [2005] 2 WLR 618, para 66. And consider the Haitians, intercepted at sea when trying to reach the coast of the US, whose plight was considered in *Sale, Acting Comr, Immigration and Naturalisation Service v Haitian Centers Council Inc* 509 US 155 (1993), p 183, fn 40. The United States authorities' treatment of them was understandably held by the Inter-American Commission of Human Rights (Report No 51/96, 13 March 1997, para 171) to breach their right to life, liberty and security of their persons as well as the right to asylum protected by Article XXVII of the American Declaration of the Rights and Duties of Man (para 163). The Commission also found the United States to be in breach of Art 33(1) of the Refugee Convention: paras 156–158, a view shared by Blackmun J in his dissent in *Sale*).
- ⁶ *Soering v United Kingdom* (1989) 11 EHRR 439.
- ⁷ *Cruz Varas v Sweden* (1991) 14 EHRR 1; *Vilvarajah v United Kingdom* (1991) 14 EHRR 248; *Chahal v United Kingdom* (1996) 23 EHRR 413; *D v United Kingdom* (1997) 24 EHRR 423; *HLR v France* (1997) 26 EHRR 29; *Gonzalez v Spain* (Application No 43544/98, 29 June 1999, unreported); *Dehwari v Netherlands* (2000) 29 EHRR CD 74; and *Hilal v United Kingdom* (2001) 33 EHRR 31.
- ⁸ *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] INLR 381.
- ⁹ *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368.
- ¹⁰ *Ullah* at paras 7 and 9.
- ¹¹ *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 All ER 559 in which the divorced appellant, on return to Lebanon would lose custody of her young child for no reason other than that Sharia law as applied automatically awarded custody to the father following a divorce. However, she had not shown that she would not be accorded some rights of access to the child.
- ¹² Lord Carswell, para 53. The House of Lords held that there would be a flagrant breach, even though it had not been shown that all contact between mother and child would be eliminated. At para 41 Lord Bingham said: 'In no meaningful sense could occasional supervised visits by the [mother] to [her child] at a place other than her home, even if ordered (and there was no guarantee that they would be ordered) be described as family life'.
- ¹³ *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 All ER 559.

- ¹⁴ *H (Somalia)* [2004] UKIAT 00027; and *Moon (USA)* [2005] UKIAT 00112. In *Tuquabo-Tekle v Netherlands* (2006) App No. 60665/00 the respondent government raised the argument that the applicant for entry clearance did not fall within the jurisdiction of the State within the meaning of Article 1 of the ECHR; for procedural reasons the court declined to entertain the issue.
- ¹⁵ *Moon (USA)* – following the line of cases saying that only the appellants’ human rights and not the impact of the decision on non-appellants’ human rights may be considered on an appeal to the Asylum and Immigration Tribunal. On this issue, see 8.111 below.
- ¹⁶ See the definition of ‘consular functions’ in Article 5 of the Vienna Convention on Consular Relations, 1963 which says ‘Consular functions consist in: ... (d) issuing ... visas or appropriate documents to persons wishing to travel to the sending state’.

THE ECHR RIGHTS

8.44 The main ECHR rights of potential relevance in immigration law are: the right to life (Article 2) and the prohibition of the death penalty (Protocol 6, Article 1 and Protocol 13); the prohibition of torture and inhuman or degrading treatment or punishment (Article 3); the prohibition of slavery and forced labour (Article 4); the right to liberty and security (Article 5); the right of access to courts and due process (Article 6); rights to the protection of private and family life (Article 8) and the prohibition of discrimination in the enjoyment of these rights (Article 14). Other rights of some relevance, particularly in asylum appeals, are freedom of conscience, expression and assembly (Articles 9–11).¹ The right to marry and found a family (Article 12) has recently assumed some significance, although it is generally of less relevance than might be supposed. For reasons of space we refer here only to the main Articles of relevance to immigration and asylum law.²

- ¹ See 12.46 below for an exposition of the common human rights foundation of the Refugee and Human Rights Conventions.
- ² For full coverage of the ECHR see Clayton and Tomlinson *The Law of Human Rights* (2000, OUP); Grosz, Beatson and Duffy *Human Rights: the 1998 Act and the European Convention* (2000, Sweet & Maxwell); Lester, Pannick and Herberg *Human Rights Law and Practice* (3rd edn, 2009, LexisNexis); Starmer *European Human Rights Law* (1999, LAG). For more detailed coverage of ECHR rights in the immigration context see Blake and Husai *Immigration, asylum and human rights* (2003, OUP).

Exposure to torture or inhuman or degrading treatment or punishment

8.47 Article 3 of the ECHR states that:

‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

Torture is not defined in the ECHR. It implies deliberately inflicted suffering of particular intensity and cruelty.¹ In the UN Convention Against Torture² it comprises three elements: severe pain or suffering, physical or mental; intentionally inflicted for purposes such as obtaining information or a confession or for punishment, for intimidation or coercion or from discrimination; inflicted by or at the instigation of, or with the consent or acquiescence of, a public authority or person acting in an official capacity.³ But the ECtHR does not require official involvement to find a breach of Article 3.⁴ The Convention being a living instrument, acts which were previously

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classified as inhuman treatment could now be classified as torture, as standards in the protection of human rights and fundamental liberties rise.⁵ It may be inflicted gratuitously without any intention to obtain information.⁶ Rape has been recognised as torture,⁷ and rape of a detainee by a State official is a specially grave and abhorrent form of ill-treatment because of the vulnerability and weakened resistance of the victim.⁸ But a finding of torture is not required to found a violation of Article 3:

'Ill-treatment [must] attain a minimum level of severity and involve actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be classified as degrading and also fall within the prohibition.'⁹

Inhuman treatment requires less serious suffering than torture, although the threshold is still high, and it need not be deliberately inflicted.¹⁰ Any recourse to physical force against a person deprived of his or her liberty which was not made strictly necessary by the person's own conduct is in principle an infringement of Article 3 rights.¹¹ What constitutes inhuman treatment will depend on the characteristics of the individual such as their age, sex and state of health.¹² A threat of torture, if sufficiently real and immediate, may give rise to such mental suffering as to constitute inhuman treatment,¹³ as may a callous disregard for the anguish of relatives of the 'disappeared'.¹⁴ Being kicked, robbed, intimidated, harassed and made to carry out forced labour on many occasions by members of a clan was inhuman treatment.¹⁵ Conditions of detention such as severe overcrowding, constant lighting, inadequate sanitation and lack of opportunities for outdoor exercise or human contact, may constitute inhuman treatment,¹⁶ as may subjection to a death sentence,¹⁷ or the agony of waiting on death row.¹⁸ The detention of an unaccompanied, five-year-old child in an adult immigration detention centre where no one was assigned to look after her and no measures were taken to ensure that she received proper counselling and education assistance from qualified personnel was inhuman treatment.¹⁹ An excessively long sentence may also give rise to a finding of inhuman treatment or punishment.²⁰ The authorities are under a particular obligation to protect the health of detainees, and the lack of appropriate medical treatment in custody may amount to treatment contrary to Article 3.²¹ The deportation of a five-year-old child without making adequate arrangements for her care on her arrival in the destination country was inhuman treatment.²² The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3 where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.²³ The relatives of a victim of a serious human rights violation may also be a 'victim' of the violation if there are 'special factors' such as the closeness or particular circumstances of the relationship and the way in which the State responds to the relative that distinguish their suffering from the inevitable emotional distress that relatives are likely to suffer.²⁴ Thus, for example, the infliction of FGM on a daughter might cause suffering of such intensity to her parent as to amount to persecution or Article 3 ill-treatment.²⁵ Article 3 contains within it a duty to investigate any ill-treatment for which the State may be held responsible.²⁶

- ¹ *Ireland v United Kingdom* (1978) 2 EHRR 25 where the ‘five techniques’ of hooding, wall standing, subjection to noise, sleep deprivation and deprivation of food and drink were held not to occasion suffering of the particular intensity and cruelty implied by the word ‘torture’, although they constituted inhuman or degrading treatment. See generally *A v Secretary of State for the Home Department* (No 2) [2005] UKHL 71, [2006] 2 AC 221, [2006] 1 All ER 575 on the nature and extent of the international law and common law prohibition of torture.
- ² Article 1, UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984. The prohibition against torture is a *ius cogens*, a binding obligation in international customary law: *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* (No 3) [1999] 2 WLR 827, per Lord Browne-Wilkinson.
- ³ In the absence of central government, armed factions (eg in Somalia) could be ‘public officials’: *Elmi v Australia* [1999] INLR 341 (UN Committee Against Torture).
- ⁴ *HLR v France* (1997) 26 EHRR 29, but see further below 8.51.
- ⁵ *Selmouni v France* (1999) 29 EHRR 403, para 97.
- ⁶ No intention to obtain information is necessary for a finding of torture: *Selmouni* above; *R v Secretary of State for the Home Department, ex p Singh* [1999] INLR 632 at 637, although such an intention may turn lesser violence into torture; cf *Denizi v Cyprus* (23 May 2002, unreported) (beating not torture as purpose not to extract information).
- ⁷ *Aydin v Turkey* (1997) 3 BHRC 300, 25 EHRR 251. A risk of sexual abuse and gang attacks in Jamaica were held to engage Art 3 in *A v Secretary of State for the Home Department* [2003] EWCA Civ 175, [2003] All ER (D) 151 (Jan); see also *Kaba* [2002] UKIAT 02289; *Kaur* [Joginder] [2002] UKIAT 07599; *Nkangala* [2002] UKIAT 05518, all Tribunal cases where the threat of rape or sexual violence precluded removal.
- ⁸ *Aydin v Turkey* para 83. See also the International War Crimes Tribunal for the former Yugoslavia judgment in *Furundzija* (IT-95-17/1-T) (10 December 1998, unreported).
- ⁹ *Pretty v United Kingdom* (2002) 35 EHRR 1.
- ¹⁰ The techniques in *Ireland v United Kingdom*, fn 1 above, were held to constitute inhuman treatment since, without causing bodily injury, they caused intense physical and mental suffering and led to psychiatric disturbances during interrogation. In *Tomasi v France* (1992) 15 EHRR 1 a 40-hour interrogation including slapping, kicking, punching, being threatened with a firearm and made to stand for long periods handcuffed or naked was held to constitute inhuman and degrading treatment.
- ¹¹ *Ribitsch v Austria* (1995) 21 EHRR 573, para 38: any recourse to physical force against a person deprived of his liberty, not made strictly necessary by his own conduct, diminishes human dignity and is in principle an infringement of Article 3 rights. Given that principle, the tribunal erred in law by finding that the treatment a returnee to Zimbabwe claimed to have suffered – being struck across the mouth whilst being interrogated and hearing shouts and groans from other detainees – was not serious enough to breach Article 3: *AA (Zimbabwe) v Secretary of State for the Home Department* [2007] EWCA Civ 149, [2007] All ER (D) 73 (Mar).
- ¹² *Tyrer v United Kingdom* (1978) 2 EHRR 1; *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, paras 28–30; *Soering v United Kingdom* (1989) 11 EHRR 439, para 100. In *Selçuk and Asker v Turkey* (1998) 26 EHRR 477 the destruction of the homes and property of two elderly residents of a Turkish village by security forces, ‘carried out contemptuously and without respect for the feelings’ of the applicants, was held to constitute inhuman treatment.
- ¹³ *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293.
- ¹⁴ *Kurt v Turkey* (1998) 27 EHRR 373; *Timurtas v Turkey* (23531/94), 13 June 2000.
- ¹⁵ *Salah Sheekh v Netherlands* (2007) App No 1948/04.
- ¹⁶ The *Greek case* (1969) 12 YB 186; *Cyprus v Turkey* (1984) 4 EHRR 482; *Loukanov v Bulgaria* (1995) 19 EHRR CD 65; *Dougoz v Greece* (40907/98) (2001) 10 BHRC 306; *Kalashnikov v Russia* (47095/99), *Van der Ven v Netherlands* (50901/99) (4 February 2002, unreported) (conditions in maximum security prison, and weekly strip search); *Poltoratskiy v Ukraine* (38812/97, 29 April 2003); *Khokhlich v Ukraine* (41707/98) (29 April 2003, unreported). Solitary confinement is not *per se* inhuman treatment but is capable of being so depending on the particular conditions, the duration and stringency of the measure, its objective and its effects. Complete sensory and social isolation may be so by virtue of its effect of breaking down the personality: *Ensslin, Baader and Raspe v Germany* (1978) 14 DR 64. *Ryabikin v Russia* (2008) App No 8320/04 – conditions of detention in Turkmenistan such that removal there to face prosecution would create a real risk of treatment violating Article 3.

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- ¹⁷ In *Öcalan v Turkey* (46221/99) (2003) 15 BHRC 287, the court held that the imposition of a death sentence did not violate Art 2 (8.46 above) but was inhuman and degrading, and violated Art 3.
- ¹⁸ *Soering v United Kingdom* (1989) 11 EHRR 439.
- ¹⁹ *Mayeka and Mitunga v Belgium* (2006) App No 13178/03.
- ²⁰ *Weeks v United Kingdom* (1988) 10 EHRR 293, para 47; *Hussain v United Kingdom* (1996) 22 EHRR 1, para 53. But it is not enough that the sentence is more severe than might apply in other European States: *C v Germany* 46 DR 179. The continued detention of a prisoner with cancer violated dignity and caused suffering in excess of that inevitably associated with a custodial sentence and treatment for cancer, giving rise to a breach of Art 3: *Mouisèl v France* (67263/01) (14 November 2002, unreported).
- ²¹ *Keenan v United Kingdom* (2001) 33 EHRR 38, para 115; see also *Kudla v Poland* (30210/96) (2000) 10 BHRC 269; *Price v United Kingdom* (33394/96) (2001) Times, 13 August.
- ²² *Mayeka and Mitunga v Belgium*, above.
- ²³ *Pretty v United Kingdom* (2002) 35 EHRR 1, para 52. (But no positive obligation to sanction actions intended to terminate life can be derived from Art 3.)
- ²⁴ *Mayeka and Mitunga v Belgium*, above. The mother's experience (in Canada) of her 5-year-old daughter being detained in Belgium and then deported to the Democratic Republic of Congo was found to have been sufficiently severe to breach Art 3.
- ²⁵ *FM (Sudan)CG* [2007] UKAIT 00060.
- ²⁶ See cases cited at 8.45 fn 7 and 8 above. Where an individual is taken into custody in good health but is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how the injuries were caused, failing which an issue arises under Art 3: *Tomasi v France* (1992) 15 EHRR 1.

8.49 The right not to be tortured or subjected to inhuman or degrading treatment contrary to Article 3 of the ECHR is an unqualified right and can never be balanced or give way to competing considerations. It:

'enshrines one of the fundamental values of democratic societies, prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention ... it makes no provision for exceptions and no derogation from it is permissible even in the event of a public emergency threatening the life of the nation ... the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.'¹

However, some domestic confusion has been caused by the court's observations in *Soering*:²

'What constitutes inhuman or degrading treatment or punishment depends on all the circumstances of the case. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. As movement becomes easier and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of notions of inhuman or degrading treatment or punishment in extradition cases.'³

The court confirmed in *Chahal* that there is no 'balancing' of interests in Article 3 cases:

'It should not be inferred from the court's remarks about the risks of undermining the foundations of extradition, as set out in para 89 of [*Soering*], that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged.'⁴

The United Kingdom government tried to persuade the court to revisit the *Chahal* principle in *Saadi*, arguing that criminal prosecution, surveillance and restrictions on individuals' movements were not an adequate substitute for deportation as a means to protect the community in cases concerning international terrorism. In such cases, so it was said, governments should be able to balance the risk to the individual consequent on removal against the gravity of the threat that he or she posed to the community and where there was evidence that an individual threatened national security, correspondingly stronger evidence had to be produced to establish that risk of ill treatment of that individual was such as to prevent the individual's deportation.⁵ In response, the court reaffirmed the principles that the protection afforded by Article 3 was absolute; that the conduct of the individual, 'however undesirable or dangerous' could not be taken into account and rejected the proposal that the individual had to discharge a higher standard of proof where there was a threat to national security. Even in such a case, it was 'necessary and sufficient for substantial grounds to have been shown for believing that there is a real risk' of prohibited treatment in the destination country.⁶ And in *Tyrer*, the court took the view that 'no local requirements relevant to the maintenance of law and order would entitle any of [the Contracting States] ... to make use of a punishment contrary to Article 3'.⁷

¹ *Chahal v United Kingdom* (1996) 23 EHRR 413. See also *Ahmed v Austria* (1996) 24 EHRR 278, para 41.

² *Soering v United Kingdom* (1989) 11 EHRR 439.

³ (1989) 11 EHRR 439 at para 89. In *Ullah v Special Adjudicator* [2002] EWCA Civ 1856, [2003] INLR 74 (para 38) and in *N v Secretary of State for the Home Department* [2003] EWCA Civ 1369, [2004] 1 WLR 1182 (para 30) the Court of Appeal used this passage to hold that the public interest in extradition or immigration control could be a relevant factor in deciding on the severity of ill-treatment in a receiving State which would preclude removal. The main legal holding in *Ullah* was reversed in the House of Lords ([2004] UKHL 26 [2004] INLR 381), but the speeches in the HL judgment in *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296 clearly had such considerations in mind: see 8.53 below. For criticism of the 'questionable recourse to the principle of proportionality' for the purpose of setting the minimum level of severity for triggering Art 3 see F Sudre, 'Article 3' in Decaux, Imbert and Pettiti, eds, *Commentaires par Articles de la Convention* (Paris, Economica, 1995) p 160.

⁴ *Chahal* (fn 1 above).

⁵ *Saadi v Italy* (Application No 37201/06) [2008] Crim LR 898.

⁶ *Saadi v Italy*.

⁷ *Tyrer v United Kingdom* (1970) 2 EHRR 1. 'A relativisation of the scope of one of the Convention's most fundamental rights would not only be both absurd and disturbing; it would also occur in the very midst of the western community of nations that is fond of stressing the universality of human rights on the international scene ... If ever there was an area symbolising such universality, it is ... the one covered by Article 3.' Callewaert 'Is there a margin of appreciation in the application of Articles 2, 3 and 4 of the Convention?' (1998) 19 HRLJ 1, pp 6–9.

8.50 The landmark case of *Soering*¹ established that extradition to a country where there is a real risk of treatment contrary to Article 3 of the ECHR

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engages the UK's responsibility under Article 3.² The principle has since been extended to expulsion of rejected asylum seekers,³ deportation on national security grounds⁴ and other removals. In *Vilvarajah*⁵ the court held that the expelling State's responsibility was engaged:

'where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the country to which he is returned.'⁶

The assessment of this risk must be thorough, in view of the importance of Article 3, and is carried out by reference both to the applicant's personal history and to the human rights conditions in the destination country, in much the same way as a Refugee Convention assessment.⁷ In exceptional cases, the country evidence may establish serious reasons for believing in the existence of a practice of systematically ill-treating a particular group; if it does, an individual need only establish his or her membership of the group in order to show that removal would violate Article 3.⁸ It is also possible for a general situation of violence to be so extreme that there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return'.⁹ Where the general situation is not by itself sufficient, the 'personal situation' of the applicant may nevertheless be such that removal would breach Article 3.¹⁰ The ECtHR has shown its willingness to review and reverse domestic courts' adverse credibility findings in carrying out the assessment.¹¹ The automatic and mechanical application of rigid procedural requirements for asylum claimants is at variance with the protection of the fundamental values embodied in Article 3.¹² In *Pretty v United Kingdom*, the ECtHR held that the act of expulsion is 'treatment' within the scope of the negative obligation;¹³ thus, expulsion which exposes a person to a real risk of ill-treatment abroad is a breach of a negative obligation.¹⁴

¹ *Soering v United Kingdom* (1989) 11 EHRR 439, where the applicant was awaiting extradition to the US, where he faced the prospect of waiting on death row for many years. The court upheld the principle that the sending State was responsible under Art 3 for 'all and any foreseeable consequences of extradition suffered outside their jurisdiction'.

² See *Alleweldt, Ralf* 'Protection against expulsion under Article 3 ECHR' in (1993) 4 EJIL 360–376, www.ejil.org/journal.

³ In *Cruz Varas v Sweden* (1991) 14 EHRR 1 the court held that the test in *Soering* applied *a fortiori* to expulsions of aliens. See also *Hilal v United Kingdom* (2001) 33 EHRR 2, [2001] INLR 595: rejection of claim of Tanzanian and decision to remove him breached Art 3.

⁴ *Chahal v United Kingdom* (1996) 23 EHRR 413. See also, in the domestic court, *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400 (exclusion under the Prevention of Terrorism (Temporary Provisions) Act 1989).

⁵ *Vilvarajah v United Kingdom* (1991) 14 EHRR 248.

⁶ See also *Matumbo v Switzerland* (1994) 15 HRLJ 164, a case on the UN Convention Against Torture. This standard of proof—substantial grounds for believing that a real risk of the prohibited harm exists—has been held to be the same to all intents and purposes as that under the Refugee Convention: *Kacaj* [2001] INLR 354, [2002] Imm AR 213 (starred) (reversed by the Court of Appeal on other grounds).

⁷ See eg *Chahal v United Kingdom* (1996) 23 EHRR 413; *Jabari v Turkey* (40035/98) [2001] INLR 136. The historical position is of interest insofar as it may shed light on the current situation and its likely evolution, but it is the present conditions which are decisive: *Ahmed v Austria* (1997) 24 EHRR 278. The Court of Appeal held in *Hariri v Secretary of State for the Home Department* [2003] EWCA Civ 807, (2003) 147 Sol Jo LB 659 (following *Iqbal (Muzafar)* [2002] UKIAT 02239) that where there is nothing to distinguish the applicant from others, he or she would need to show a 'consistent pattern of gross and systematic violations of fundamental rights' in the destination country to succeed

on an Art 3 claim. However, in *Batayav v Secretary of State for the Home Department* [2004] EWCA 1489, [2004] INLR 126, the Court of Appeal emphasised the danger of assimilating 'real risk' to 'probability' by the use of the test in *Hariri* (para 39); see also *R (on the application of Kpangui) v Secretary of State for the Home Department* (21 April 2005), per Munby J.

- ⁸ As in *Salah Sheekh v Netherlands* [2007] ECHR 36 in respect of the Ashraf in Somalia.
- ⁹ *NA v United Kingdom* (Application No 25904/07) (2008) Times, 28 July.
- ¹⁰ *FH v Sweden* (2009) App No 32621/06 (in respect of Iraq).
- ¹¹ See *Hatami v Sweden* (Commission) (32448/96) paras 95–106; see also *Hilal v United Kingdom* (fn 2 above), *Said v Netherlands* (2005) App No 2345/02 and *N v Finland* (2005) App No 38885/02. The court also obtains evidence for itself, eg by taking oral evidence, in appropriate cases which it did in *N v Finland*.
- ¹² *Jabari v Turkey* (fn 7 above): the imposition of a rigid five-day registration requirement as a condition of having an asylum claim examined prevented scrutiny of a claim based on a fear of inhuman and degrading punishment in Iran for adultery.
- ¹³ *Pretty v United Kingdom* (2002) 35 EHRR 1, [2002] 2 FCR 97, para 52.
- ¹⁴ For positive and negative obligations, see 8.34 above.

Domestic application of D

8.53A A majority¹ of the Grand Chamber of the European Court of Human Rights decided that removal of the applicant in *N v United Kingdom* would not breach Article 3.² It reviewed its caselaw and noted that since the decision in *D v United Kingdom* the Court had never found that a proposed removal from a contracting state would violate Article 3 on grounds of the consequences for the applicant's health. The Court had consistently applied the principle that an alien subject to expulsion could not claim any entitlement to remain in order to continue to benefit from medical, social or other forms of assistance and services provided in the expelling state. The fact that his or her life expectancy would be 'significantly reduced' as a result of removal would not be sufficient and 'only in a very exceptional case, where the humanitarian grounds against removal are compelling' might there be a breach of Article 3. However, Article 3 does not oblige states to alleviate the disparities in the social and economic circumstances and capacities to deal with illnesses in different countries. The same principles would apply in relation to any naturally occurring physical or mental illness. On the other hand, where the want of effective treatment in the home country which would exacerbate the suffering caused by the illness was a result of government policy intended to repress opposition, rather than just lack of national resources, removal might breach Article 3.³ The Strasbourg Court, so the Court of Appeal has said, has not indicated 'the requisite degree of exceptionality or what kind of exceptionality is required if Article 3 is to be engaged'.⁴ Article 3 might be breached if removal would not only result in an 'earlier and more wretched death' but also a real risk that the returnee would have no family and friends to look after her and a near certainty of losing what little remained of her eyesight.⁵

¹ Fourteen votes to three.

² (Application No 26565/05) (2008) Times, 6 June.

³ *RS (Zimbabwe) v Secretary of State for the Home Department* [2008] EWCA Civ 839, 152 Sol Jo (no 30) 30.

⁴ *AE (Ivory Coast) v Secretary of State for the Home Department* [2008] EWCA Civ 1509.

⁵ *AE (Ivory Coast)*.

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8.55 Article 3 is also capable of being engaged by general conditions in the receiving country, such as absence of water, food or basic shelter, where their effect on particularly vulnerable individuals (such as infants or old and infirm people) reaches the threshold of inhuman treatment,¹ although such cases must now be viewed through the restrictive lens of *N*, described above. Article 3 of the ECHR is thus considerably broader in its application than the Refugee Convention.² There are no exclusions from Article 3 protection on national security or criminality grounds;³ there is no need to show that the harm feared is for reasons of the applicant's race, religion, nationality, membership of a particular social group or political opinion;⁴ the harm feared need not have the character of 'persecution'⁵ or even be attributable to aggressive action.⁶ In *Chahal* the ECtHR said that given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the court attaches to Article 3, the notion of an effective remedy under Article 13 required independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3.⁷

¹ *The Home Office acknowledges this in its API on Post-refusal decisions: Humanitarian Protection*, para 2.4; see *Fadele v United Kingdom* (Application 13078/87) (1990) ICD 15, and see *CA v Secretary of State for the Home Department*, 8.53 fn 12 above. *Ibrahim v Secretary of State for the Home Department* [2005] EWCA Civ 1816, [2005] All ER (D) 202 (Dec) – conditions in Somalia were such that returning a vulnerable and traumatised woman would breach Article 3 because of her extreme resourcelessness.

² *R (on the application of Borak) v Secretary of State for the Home Department* [2005] EWCA Civ 110, [2005] All ER (D) 163 (Jan); *Ryabikin v Russia* (2008) App No 8320/04.

³ *Chahal v United Kingdom* (1996) 23 EHRR, 413; *Ahmed v Austria* (1997) 24 EHRR 278; cf *T v Immigration Officer* [1996] AC 742, HL (a Refugee Convention case). However, the EC Qualification Directive (Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or persons who otherwise need international protection (OJ 2004 L304/12)) Art 17 provides for the exclusion from subsidiary protection on grounds akin to those under the Refugee Convention (for which see 12.88ff below), and the grant of short periods of leave. These provisions are not binding, since the Directive sets out minimum standards of protection, leaving Member States free to be more generous.

⁴ For 'Convention grounds' under the Refugee Convention see 12.64ff.

⁵ For 'persecution' under the Refugee Convention see 12.46 below.

⁶ *D v United Kingdom* (1997) 24 EHRR 423.

⁷ *Chahal v United Kingdom* (1996) 23 EHRR 413, para 151.

Action with a view to deportation

8.61 To justify detention with a view to deportation, all that is required under Article 5 is that 'action is being taken with a view to deportation'.¹ This means that detention need not be necessary to effect removal or to ensure compliance with the enforcement process. In *Chahal v United Kingdom* the ECtHR expressly rejected the idea that Article 5(1)(f) required a connection between detention and the conduct of the person; detention need not be 'reasonably considered necessary, for example, to prevent his committing an offence or fleeing'.² However, the power to detain under this provision is limited to circumstances where deportation proceedings are actually in progress and removal can be effected; where the proceedings are being pursued with due diligence; where the overall period of detention is not excessive; and where proper explanation is given for any delay.³ These Convention restrictions match the limitations on the power to detain in domestic common law. Thus,

the detention of a Somali national was held to be outwith Article 5(1)(f) because expulsion to Somalia was practically impossible since the individual did not have the relevant travel documents.⁴ In *Chahal* a lengthy detention pending deportation was held not to violate Article 5(1) of the Convention, given the complexity of the issues in the proceedings, which were pursued diligently, and the seriousness of the case, given that it involved national security.⁵ The conduct of the detainee is a factor and if he or she has contributed to the length of the detention by delaying proceedings this will be a relevant consideration.⁶

¹ *Chahal v United Kingdom* (1996) 23 EHRR 413, para 413.

² *Chahal* above, at para 112; see also *Bozano v France* (1986) 9 EHRR 297 para 60.

³ *Chahal* above, at para 113. In *Ryabikin v Russia* (2008) App 8320/04 detention for just over 12 months was not justified because extradition proceedings were not being pursued with due diligence.

⁴ *Ali v Switzerland* (1998) 28 EHRR 304.

⁵ *Chahal* above, at paras 109 and 117.

⁶ *Kolompar v Belgium* (1992) 16 EHRR 197.

Articles 5(2) and (4)

8.68 Detention must be adequately reasoned¹ and subject to prompt and regular review by a court to comply with the procedural requirements of ECHR, Article 5(2) and 5(4). Article 5(2) states that anyone arrested or detained must be ‘informed promptly, in a language which he understands, of the reasons for the arrest and of any charge against him’. This applies to all cases and not just criminal charges.² It requires that the detainee must be told at least the essential legal and factual basis for his detention and something that goes beyond simple reference to the source of the power.³ Article 5(2) was violated by a document that was inexact as to the facts which were said to justify detention and which referred to a repealed statutory provision, not to its successor which conferred the power under which the individual was detained.⁴ The giving of reasons is an essential safeguard against arbitrary detention.

¹ *X v United Kingdom* (1981) 4 EHRR 188, para 66; *Fox, Campbell and Hartley v United Kingdom* (1990) 13 EHRR 157, para 40.

² *Van der Leer v Netherlands* (1990) 12 EHRR 567, paras 27–29.

³ *Fox, et al v United Kingdom* (1990) 13 EHRR 157, paras 40–41.

⁴ *Rusu v Austria* (2008) App No 34082/02.

Fair trial

8.73 Article 6 of the ECHR states (so far as relevant) that:

- ‘1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the

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- parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.’
- 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
 - 3 Everyone charged with a criminal offence has the following minimum rights:
 - a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b) to have adequate time and facilities for the preparation of his defence;
 - c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.’

The right to fair administration of justice holds a central place in a democratic society¹ and Article 6 of the ECHR is the most frequently invoked provision of the Convention. Article 6 guarantees rights to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of civil rights and obligations or of criminal charges.² In the ECtHR and domestic jurisprudence, the right to a fair trial guaranteed by Article 6 has been held not to apply to decisions about the entry and residence of aliens,³ nor about the determination of British citizenship,⁴ since ‘civil rights’ is an autonomous concept equated by and large with private law rights as opposed to administrative discretions.⁵ There may, however, be an exception where the immigration decision is said to be in breach of the person’s right to peaceful enjoyment of his or her property; in such a case the Administrative Court has held that Article 6 is applicable.⁶ Substantive Convention rights such as the right to liberty⁷ and family life rights⁸ are ‘civil rights’, even if they involve the exercise of discretion, so that bail hearings and hearings relating to contact with children attract Article 6 guarantees of equality of arms.⁹ The common law also recognises the rights guaranteed by Article 6 as applicable to cases before the immigration appellate authorities,¹⁰ and provides an equally high standard of procedural protection, at least where human rights issues are engaged by the decision.¹¹

¹ *Delcourt v Belgium* (1970) 1 EHRR 355, para 26.

² Article 6(1). Criminal proceedings are proceedings instituted to determine the veracity of an accusation, where the potential outcome is a sanction whose degree and severity belongs to the criminal sphere: *Engel v Netherlands* (1976) 1 EHRR 647; *Ezeh and Connors v United Kingdom* (39665/98, 40086/98) [2004] Crim LR 472. Article 6 has been held to apply to extradition proceedings: *R v Secretary of State for the Home Department, ex p Johnson* [1999] QB 1174, QBD.

³ *Agee v United Kingdom* (1976) 7 DR 164; *P v United Kingdom* (13162/87) (1987) 54 D & R 211; *Alam and Khan v United Kingdom* (1967) 10 Yb 478; *Uppal v United Kingdom* (1980) 3 EHRR 391; *Maaouia v France* (2001) 33 EHRR 42; *Ilic v Croatia* (42389/98) (19 September 2000, unreported). The IAT has held in the starred case of *MNM* [2000] INLR 576, that Art 6 does not apply to asylum appeals and SIAC in the context of refusal

- of entry in *BY v Secretary of State for the Home Department* (SC/65/2007) 7 November 2008 and the House of Lords in the context of deportation in *RB v Secretary of State for the Home Department* [2009] UKHL 10 held similarly.
- ⁴ *S v Switzerland* (1988) 59 DR 256; *Karashev v Switzerland* (314144/96) (14 April 1998, unreported); see *R (on the application of Harrison) v Secretary of State for the Home Department* [2003] EWCA Civ 432, [2003] INLR 284; *Al Jedda v Secretary of State for the Home Department* (SC/66/2008) 22 October 2008 (SIAC).
 - ⁵ *König v Germany* (1978) 2 EHRR 170. Proceedings classified under national law as being part of 'public law' could come under ... civil rights if their outcome is decisive for private rights and obligations': *Ferrazzini v Italy* (2002) 34 EHRR 1068. Rights to social security and social assistance have been recognised as 'civil rights' attracting Art 6 protection: *Feldbrugge v Netherlands* (1986) 8 EHRR 425; *Salesi v Italy* (1993) 26 EHRR 187; *Schüler-Zraggen v Switzerland* (1993) 16 EHRR 405. Although the drafting of asylum support provisions (in the Immigration and Asylum Act 1999) is in discretionary terms, the provisions are not genuinely discretionary, and the support received by destitute asylum seekers is a civil right within the meaning of Art 6: *R (on the application of Husain) v Asylum Support Adjudicator* [2001] EWHC Admin 832, (2001) Times, 15 November.
 - ⁶ *R (on the application of Murungaru) v Secretary of State for the Home Department* [2006] EWHC 2416 (Admin).
 - ⁷ *Aerts v Belgium* (1998) 5 BHRC 382, 29 EHRR 50. In *A, X and Y* [2002] EWCA Civ 1502, [2005] 3 All ER 169 the Court of Appeal rejected the submission of the appellants that a certificate under s 21 of the Anti-Terrorist Crime and Security Act 2001 amounted to a criminal charge within the meaning of Art 6 but confirmed that detention under s 23 of the Act (now lapsed) engaged Art 6 civil rights.
 - ⁸ *W v United Kingdom* (1987) 10 EHRR 29.
 - ⁹ *Toth v Austria* (1991) 14 EHRR 551, para 84; *Lamy v Belgium* (1989) 11 EHRR 529, para 29.
 - ¹⁰ See *R v Secretary of State for the Home Department, ex p Saleem* [2000] 4 All ER 814, [2000] Imm AR 529, [2000] INLR 413.
 - ¹¹ *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, 153 Sol Jo (no 7) 32.

8.79 In *Soering*¹ the European Court acknowledged that an expulsion could engage Article 6 ECHR in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the receiving country². This view has now been confirmed by the House of Lords in *Ullah*.³ In *RB (Algeria) v Secretary of State for the Home Department*⁴ the House of Lords approved the test formulated by the minority in *Mamatkulov*⁵ to the effect that a flagrant denial of justice went beyond 'mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself'. What had to be shown was 'a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification or destruction of the very essence of the right guaranteed by that article'. The House of Lords added the further requirement of a real risk that the flagrant breach of the person's Article 6 rights would result in a serious violation of a substantive right, eg imprisonment following conviction. The Special Immigration Appeals Commission had been entitled to conclude that there would be no 'complete denial of justice' and therefore no breach of Article 6, notwithstanding that the appellant would, following his removal to Jordan, be tried by a tribunal that was not independent. Moreover, the real risk that evidence obtained by torture would be admitted in the proceedings did not necessarily give rise to a flagrant breach of Article 6.⁶

¹ *Soering v United Kingdom* (1989) 11 EHRR 439.

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- ² *Soering v United Kingdom* (1989) 11 EHRR 439, para 113. In *Einhorn v France* (71555/01), 16 October 2001, the court, following *Soering*, held that in a case where an applicant had been unfairly convicted *in absentia*, extradition would be likely to raise an issue under Art 6 if substantial grounds existed for believing he could not get a retrial and would be imprisoned to serve his sentence. The IAT found no flagrant violation of fair trial rights such as to render the return of a conscientious objector to Israel in breach of Art 6 in *Nikulin* [2002] UKIAT 06719; see also *Din (Jamal)* [2002] UKIAT 06585 (Pakistan). See also *Lodhi v Governor of Brixton Prison* [2001] EWHC Admin 178, [2001] All ER (D) 136 (Mar), DC (extradition case).
- ³ *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] INLR 381.
- ⁴ *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, 153 Sol Jo (no 7) 32.
- ⁵ *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25.
- ⁶ *RB* overturning the decision of the Court of Appeal in respect of evidence obtained by torture.

Family and private life

8.81 A lawful and genuine marriage will be enough to constitute family life between two people,¹ even if the couple are not cohabiting,² but a sham marriage will not give rise to family life.³ A formally invalid marriage believed valid by the parties gives rise to family life.⁴ Although the most important ‘family’ relationships are those between husband and wife and parent and child, relationships between siblings, between grandparents and grandchildren,⁵ and uncle and nephew⁶ are all potentially within the scope of ‘family life’,⁷ depending on the strength of the emotional ties. A child born of an existing marital union will usually become part of the family from birth and will only cease to be so in exceptional circumstances,⁸ even where there has been a voluntary separation between the parents and child.⁹ The presumption in favour of family life between parent and child operates between a child and its natural father, provided he continues to have a level of contact with the child.¹⁰ Family ties may be established through adoption¹¹ and fostering¹² as well as through biological connections. But the Commission has held that Article 8 of the ECHR was not engaged by the deportation of a woman with her children from a country where her parents and sisters lived, on the ground that she and her children formed an independent family unit, so that the relationship with the extended family did not constitute family life.¹³ Whether relationships between adult siblings or adult children and their parents or other adult relatives fall within the scope of Article 8 is a question of fact as to whether there exist ties strong enough to constitute family life within the meaning of the Article.¹⁴ Moreover, it is not enough to consider existing family life; the State must also have regard to potential family life and refrain from inhibiting the development of a real family life in the future.¹⁵ If family ties are found not to constitute ‘family life’ the court may nevertheless take them into account when considering ‘private life’.¹⁶

In the landmark decision of the Court of Appeal in *Singh v Entry Clearance Officer, Delhi*¹⁷ the court recognised that with the enormous social and cultural changes which have taken place in the last decades, much greater flexibility may be applied to what constitutes family life. The appellant was a seven-year-old boy who had been adopted in India by his uncle and aunt who lived in the UK. The adoption had been carried out within the family in

accordance with a social, religious and cultural tradition which served a humane purpose. Although the child was still living with his natural parents, there had been a genuine transfer of parental responsibility, and the court held that he had become a member of his adoptive parents' family for the purposes of Article 8 of ECHR. Clearly these cases are fact sensitive. Whether a relationship amounts to 'family life' depends on substance as much as form;¹⁸ so informal heterosexual relationships of sufficient substance and stability have been classified as 'family life,'¹⁹ although stable homosexual relationships have not.²⁰ Where family members have lived apart for a considerable period of time Article 8 may nevertheless oblige the State to facilitate family reunion and not merely to refrain from interfering with their existing level of contact, particularly in cases involving unaccompanied children²¹ and cases where family separation was caused by flight from feared persecution,²² but even where it was freely chosen.²³ That is because respect for family life requires consideration of how family life might best develop²⁴ and entails a positive obligation to take measures enabling family ties to be developed.²⁵

- ¹ *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, para 62.
- ² *Abdulaziz* above; *Wakefield v United Kingdom* (1990) 66 DR 251. Cohabitation is not a *sine qua non* of family life; *Kroon v Netherlands* (1994) 19 EHRR 263; *Berrehab v Netherlands* (1988) 11 EHRR 322, para 21; *Boughanemi v France* (1996) 22 EHRR 228; but will be relevant in deciding whether interference is proportionate: *Söderbäck v Sweden* (1998) 29 EHRR 95.
- ³ However the definition of a 'sham' marriage in Immigration and Asylum Act 1999, s 24(5) is almost certainly too wide, since many of the marriages caught within it are based on genuine relationships which would in any event attract ECHR, Art 8 protection. See 11.61ff below.
- ⁴ *A and A v Netherlands* (1992) 72 DR 118. In *R v Secretary of State for the Home Department, ex p Glowacka* (26 June 1997, unreported), QBD, the Home Office agreed to treat the parties to an invalid Roma marriage as if they were validly married for the purposes of refugee family reunion following the grant of permission for judicial review. In relation to polygamous marriages, the ECtHR has held it legitimate on public policy grounds to prevent two wives living together with their husband: *Bibi v United Kingdom* (1962/8/92).
- ⁵ *Marckx v Belgium* (1979) 2 EHRR 330, para 45.
- ⁶ *Boyle v United Kingdom* (1995) 19 EHRR 179, Commission. The boy's father had died and the uncle stayed frequently. See *R (on the application of Lekstaka) v Immigration Appeal Tribunal* [2005] EWHC (Admin), 18 April 2005 (*de facto* family life with uncle and aunt).
- ⁷ *Moustaquim v Belgium* (1991) 13 EHRR 802; *X v Germany* (1978) 9 YB 449. Immigration Rules providing for the admission of only certain categories of 'distressed relatives' will need to be read so as to include other categories, not mentioned, to avoid offending against Art 8.
- ⁸ *Berrehab v Netherlands* fn 2 above, para 21; *Ciliz v Netherlands*, [2000] 2 FLR 469, paras 33, 44.
- ⁹ *Sen v Netherlands* (2003) 36 EHRR 7.
- ¹⁰ Even if at the time of the birth the relationship between the parents had ended: *Keegan v Ireland* (1994) 18 EHRR 342. See also *Boughanemi v France* (1996) 22 EHRR 228. The presumption may be defeated in the face of a total lack of interest or contact by the father.
- ¹¹ *X v France* (1992) 31 DR 241; *Lebbink v Netherlands* (45582/99) (1 June 2004, unreported); *Pini v Romania* (78028/01) (22 June 2004). The European Court is to consider the compatibility of para 310 of the Immigration Rules HC 395 and the Adoption (Designation of Overseas Adoptions) Act 1973 with the ECHR in *Singh (Pavittar) v United Kingdom* (60148/00), declared admissible on 3 September 2002, on the refusal to grant entry clearance to a child adopted in India (not a designated country under the 1973 Act: see 11.109 above). But see now *Singh v Entry Clearance Officer, Delhi* [2004] EWCA Civ 1075, [2004] INLR 515.
- ¹² (Application 8257/78) 13 DR 248.

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- ¹³ *A and family v Sweden* (1994) 18 EHRR CD 209. See also *Papayianni v United Kingdom* (5269/71) [1974] Imm AR 7, 39 CD 104; cf *Uppal v United Kingdom* (8244/78) (1979) 3 EHRR 391, a case where family life between children, parents, grandparents and married sisters forming a large and close family unit was argued, held admissible and subject of a friendly settlement.
- ¹⁴ See *Nasri v France* (1995) 21 EHRR 458; *Beldjoudi v France* (1992) 14 EHRR 801 and *Moustaquim v Belgium* (1991) 13 EHRR 802. In *Advic v United Kingdom* 20 EHRR CD 125, the ECommHR said that Art 8 did not cover links between adult brothers living apart for a long period and not dependent on each other, and that there must be more than the normal emotional ties between adult siblings or parents and adult children, for family life to exist within the meaning of Art 8. For UK courts and Tribunal application of this restrictive approach see eg *Kugathas v Immigration Appeal Tribunal* [2003] EWCA Civ 31, [2003] INLR 170 (where however there had been too little contact for family life to be real and effective); *R (Serbia and Montenegro)* [2004] UKIAT 78. But in *Senthuran v Secretary of State for the Home Department* [2004] EWCA Civ 950, [2004] 4 All ER 365 the Court of Appeal warned that each case is fact sensitive, and held both the length of time a young adult had been with his family in the UK, and the Secretary of State's unreasonable delay in determining his application, relevant to the existence of family life and the proportionality of any interference with it. See also *R (Johnson) (Renford) v Secretary of State for the Home Department* [2004] EWHC 1550 (para 16). In *Kaya v Germany* (Application no 31753/02), [2007] 2 FCR 527 the court held that there was family life between an adult son and his parents given that he had lived with his parents until the time of his imprisonment; he continued to write letters to his mother whilst in prison and he 'played a special role' in the family following the accidental death of his brother. A finding that a 23-year-old woman who had lived pretty well continuously with her parents and siblings all her life did not have family life with them 'would have been quite unreal' – *RP (Zimbabwe) v Secretary of State for the Home Department* [2008] EWCA Civ 825, [2008] All ER (D) 135 (Aug). See also *Krasniqi v Secretary of State for the Home Department* [2006] EWCA Civ 391, (2006) Times, 20 April – relationship between two women protected by Article 8, given their traumatic histories; their emotional and mental fragility; the nature of the love and support they offered each other and their shared experience of bringing up a child together. In *R (on the application of Katshunga) v Secretary of State for the Home Department* [2006] EWHC 1208 (Admin), [2006] All ER (D) 71 (May) Gibbs J held that the adult claimant could establish that her removal would breach Article 8 by reference to her relationship with her adult brother upon whom she was particularly dependant owing to her own and her family's traumatic history and her consequent mental illness. See also *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045, (2006) Times, 16 August, [2006] All ER (D) 367 (Jul) – the tribunal had been entitled to conclude that refusing leave to remain to a father who was in poor health and dependant upon his family in the UK for support breached Article 8. In *MT (Zimbabwe) v Secretary of State for the Home Department* [2007] EWCA Civ 455 the adjudicator had been entitled to find there was 'family life' between an adult on the one hand and her cousin, his wife and their children on the other, bearing in mind that she had been integrated into his family since the age of 14; the cultural norm that single adult women remain in the family home and their shared experience of violence in Zimbabwe giving rise to a closer bonding process than normal between adults.
- ¹⁵ *R (on the application of Fawad Ahmadi) v Secretary of State for the Home Department* [2005] EWCA Civ 1721, [2005] All ER (D) 169 (Dec).
- ¹⁶ As it did in *Slivenko v Latvia* (Application no 48321/99), [2004] 2 FCR 28.
- ¹⁷ *Singh v Entry Clearance Officer, Delhi* [2004] EWCA Civ 1075, [2004] INLR 515. The failure to grant the child entry clearance to come to the UK was a violation of Art 8.
- ¹⁸ *Marckx* above, para 31; *Kroon v Netherlands* (1994) 19 EHRR 263; *Attafuah* [2002] UKIAT 05922.
- ¹⁹ *Johnston v Ireland* (1986) 9 EHRR 203; *Marckx v Belgium* above.
- ²⁰ *X v United Kingdom* (1983) 32 DR 220; *S v United Kingdom* (1986) 47 D & R 274, para 2; *Kerkhoven v Netherlands* (19 May 1992, unreported) (relationship between a woman and the child of her long-term, same-sex partner not 'family life'). Homosexual relationships have been considered instead in the context of private life: *Roosli v Germany* (Application 28318/95) (15 May 1996), DR 85, p 149. Most recently in *Karner v Austria* (2003) 2 FLR 623 the ECtHR found it 'unnecessary' to consider whether homosexual relationships fell within the scope of 'family life'. The European Court of Justice in *Grant v South West Trains Ltd* [1998] ECR I-621 has similarly failed to recognise homosexual

relationships as constituting family life. With the advent of homosexual marriages in European countries such as the Netherlands and the wider legal recognition of homosexual relationships it is difficult to see that the European courts will be able to maintain this distinction between homosexual and heterosexual couples. In *X, Y and Z v United Kingdom* (1997) 24 EHRR 143, the relationship between a transsexual, her female partner and their child was 'de facto' family life. And in the UK a stable same-sex partner has been held to be 'part of the family' for the purposes of succession to a tenancy: *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705, [2000] 1 FLR 271, HL (reversing [1998] Ch 304, CA); in *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, HL a same-sex partner was equated with a spouse. This is another area where the common law can fertilise ECtHR jurisprudence in the UK courts.

²¹ *Mayeka and Mitunga v Belgium* (2006) App No 13178/03.

²² *Tuquabo-Tekle v Netherlands* (Application No 60665/00) [2005] 3 FCR 649, [2006] 1 FLR 798, [2006] Fam Law 267, [2005] ECHR 60665/00, ECtHR; *R (on the application of Yussuf) v Secretary of State for the Home Department* [2005] EWHC 2847 (Admin), [2005] All ER (D) 105 (Nov); *H (Somalia)* [2004] UKIAT 00027.

²³ *Sen v Netherlands* (2003) 36 EHRR 7.

²⁴ *Sen and Tuquabo-Tekle*.

²⁵ *Mehemi v France* (2) (2003) App No 53470/99.

8.83 The emphasis of the case law of the European Court has changed significantly in the last few years – a change that, in our view, has not been fully appreciated by the domestic courts or immigration practitioners who argue before them. The whole approach of the Court is in stark contrast to the very negative approach of domestic courts and tribunals, which we have described above. If Strasbourg is the bench mark, as the House of Lords has indicated in many occasions, domestic courts and tribunals will need a change of legal culture. In the court's jurisprudence there has been a considerable softening of the *Abdulaziz* principle on a State's right to control immigration, such that whilst Contracting States are not prohibited by Article 8 from exercising immigration control, the need for fair processes that 'afford due respect to the interests safeguarded by Article 8' is urged upon States.¹ There are now clear principles that emerge from the court's jurisprudence that can be applied to all types of immigration cases, whether long-term residents facing expulsion or those without any other legal entitlement seeking to join or remain with close family members. The court's judgment in *Boultif* lays down guiding principles in assessing the likelihood that a decision will interfere with family life and if so, its proportionality to its legitimate aim:

'the court will consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion.'²

Subsequently, the Court said that it wished to make explicit two further criteria that might already be implicit in the *Boultif* judgment which were:

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‘the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of the social, cultural and family ties with the host country and with the country of destination.’³

If family life was established when the persons involved were aware that the applicant’s immigration status was insecure, that will be weighed against finding a breach⁴ but it is a factor that may be outweighed by the gravity of the interference with the family life, eg where removal of a parent would seriously disrupt her relationship with her young child.⁵ In a later case following *Boultif*, the Court made clear that, in considering the proportionality of deportation as a response to criminal convictions, it will place considerable emphasis on the future threat that a person might pose to public order, rather than confining itself to consideration of the past.⁶

¹ *Ciliz v Netherlands* [2000] 2 FLR 469, para 66.

² *Boultif v Switzerland* (2001) 33 EHRR 50; followed in *Amrollahi v Denmark* (56811/00), 11 July 2002, where the applicant was convicted of drugs trafficking offences but had left Iran 15 years earlier and was married to a Danish woman with a child; *Yildiz v Austria* (2003) 36 EHRR 32, where the applicant had been subject of a five-year residence ban following serious traffic offences but had a wife (from whom he was divorced by the time of hearing) and a child in Austria making the residence ban disproportionate; *Mokrani v France* (52206/99), 15 July 2003, where the applicant had been convicted of drugs trafficking offences but his family ties in France meant that removal would breach Art 8 ECHR. *Boultif* has also been cited with approval by the European Court of Justice in *Carpenter v Secretary of State for the Home Department* Case C-60/00 [2003] QB 416.

³ *Uner v Netherlands* (Application No 46410/99), [2006] 3 FCR 340 (Grand Chamber). See for example, *Sezen v Netherlands* (2006) App No 50252/99 where deportation of a Turkish man convicted for possession of a large quantity of heroin and who had been resident for only 1 1/2 years at the time of the offence was found to breach Article 8 because it would be a ‘radical upheaval’ for his wife and in particular, his two children to follow him to Turkey. The children had always lived in the Netherlands and went to school there and had minimal ties with Turkey; they did not even speak Turkish. In *Keles v Germany* (2006) App No 32231/02 the applicant’s wife was, like him, a Turkish national and she had been in Germany for only 10 years so could reintegrate into Turkish society. However, the four children of the couple were born in Germany or entered at a young age and even if they spoke Turkish ‘would necessarily have to face major difficulties with regard to the different language of instruction and the different curriculum in Turkish schools’. See also *Sen v Netherlands* (2003) 36 EHRR 7 and *Tuquabo-Tekle v Netherlands* (Application No 60665/00), [2005] 3 FCR 649 where similar considerations led to conclusions that refusals to admit children of settled aliens breached Article 8.

⁴ *Konstadinov v Netherlands* (Application No 16351/03), [2007] 2 FCR 194. In *Omorieg v Norway* (2008) App No 265/07 the Court gave substantial weight to the fact that for the whole duration of the family life in issue, the husband had no right of residence in Norway and no reasonable expectation of obtaining such a right. His removal would interfere with the right to respect for family life but absent exceptional circumstances and insurmountable obstacles to family life being developed in Nigeria, there was no breach. See also *Y v Russia* (2008) App No 20113/07.

⁵ *Da Silva and Hoogkamer v Netherlands* (2006) App No 50435/99.

⁶ *Yildiz v Austria* (2003) 36 EHRR 32. In *Jakupovic v Austria* [2003] INLR 499, where the applicant joined his mother in Austria four years before the convictions for burglary relied on for expulsion, the court found a violation of Art 8, holding that ‘very weighty reasons’ would be needed to justify the expulsion of a 16-year-old, alone, to a country which had recently experienced armed conflict and where he had no close relatives.

8.86 Whilst the focus of *Boultif* and cases that have followed it has been on ‘family life’, the court had previously begun to take cognisance of the fact that

second generation migrants and long-term residents in Contracting States develop whole networks of social ties constituting 'private life'. In *Lamguindaz*,¹ a case involving the proposed deportation on conducive grounds of a Moroccan youth who had lived in the UK since the age of seven, Judge Schermers, in his concurring opinion, said:

'Even independent of human rights considerations I doubt whether modern international law permits a State which has educated children of admitted aliens to expel these children when they become a burden. Shifting this burden to the State of origin of the parents is no longer so clearly acceptable under modern international law.'²

In *Beldjoudi*³ Judge Martens, in his concurring opinion, said that 'mere nationality' should not constitute an:

'objective and reasonable justification for the existence of a difference as regards the admissibility of expelling someone from what may be called "his own country"... An increasing number of member States of the Council of Europe accept the principle that such "integrated aliens" should be no more liable to expulsion than nationals, an exception being justified if at all, only in very exceptional circumstances.'

However, the Grand Chamber in *Uner* rejected the proposition⁴ that the situation of a long resident and highly integrated alien, particularly one born in the country, should be equated with that of a national in relation to the power to expel from the country. Article 8 did not confer an absolute right not to be expelled on any category of alien and deportation was to be seen as a preventative not a punitive measure so that it did not constitute a double punishment.⁵ Thus, for example, deportation of a man who had been resident in the UK for 34 years did not breach Article 8.⁶ Nevertheless, 'the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there'.⁷ The Court would require 'very serious reasons' to justify the expulsion of a settled migrant who had spent all or a major part of his or her youth or childhood in the host country.⁸ Thus in *Uner* itself (where the applicant was 12 when he came to the Netherlands) and in the subsequent case of *Kaya*⁹ (where the applicant was born in Germany), the Court found that deportation did not breach Article 8. The gravity of the offences (manslaughter and assault by shooting two men of whom one died in *Uner*; aggravated trafficking in human beings and exceptionally brutal assaults on two women in *Kaya*) and the failure of the applicants to produce evidence to show they no longer posed a risk to public safety were decisive considerations. On the other hand, the Court has been willing to treat repeated offending that attracted substantial periods of imprisonment as insufficient to justify deporting a long resident foreigner because it was 'non-violent juvenile delinquency' that was sufficiently mitigated by a period of 1½ years' good conduct following release from the last period of imprisonment.¹⁰

¹ *Lamguindaz v United Kingdom* (1993) 17 EHRR 213.

² The government has accepted, in the amended policy DP5/96 relating to the removal of families with children, that children who have lived in the UK for seven years cannot be expected to adapt to life abroad. See 11.122 below.

³ *Beldjoudi v France* (1992) 14 EHRR 801.

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- ⁴ Contained in, for example, Recommendation Rec (2000)15 of the Committee of Ministers for the Council of Europe.
- ⁵ *Uner v Netherlands* (Application No 46410/99), [2006] 3 FCR 340. Three judges gave a dissenting judgment in which they said that the position of settled aliens should as far as possible be assimilated to that of nationals.
- ⁶ *Grant v United Kingdom* (Application No 10606/07) [2009] All ER (D) 82 (Jan). The applicant had children in the UK but did not live with any of them and none of them were dependent on him. He was a habitual offender and whilst his offences were not at the 'more serious end of the spectrum of criminal activity', their sheer number, committed over a long period of time and the want of evidence of any attempt to address the drug addiction which lay behind the offending meant that his deportation did not breach Article 8.
- ⁷ *Uner*.
- ⁸ *Maslov v Austria* (Application no 1638/03) [2007] 1 FCR 707.
- ⁹ *Kaya v Germany* (Application No 31753/02), [2007] 2 FCR 527.
- ¹⁰ *Maslov v Austria* (Application No 1638/03), [2007] 1 FCR 707. The applicant was Bulgarian and had lived in Austria from the age of six. He was sentenced to 18 months' imprisonment on 22 counts that included aggravated gang burglary, extortion and assault. Shortly after his release he was again convicted for a series of burglaries and sentenced to 15 months' imprisonment. The case has been referred to the Grand Chamber.

8.87 The importance of reviewing deportation and removal decisions in the context of the protection of private life has developed significantly in the Strasbourg jurisprudence. As Judge Martens stated:

'Expulsion severs irrevocably all social ties between the deportee and the community he is living in and ... the totality of those ties may be said to be part of the concept of private life'¹

The principle seemed to have been accepted by the court by the late 1990s. In *C v Belgium*,² relying on its approach in *Niemietz v Germany*,³ having looked at the family life of a long-term resident and proposed deportee, it examined his 'private life' in some detail:

'Mr C established real social ties in Belgium. He lived there from the age of 11, went to school there, underwent vocational training there and worked there for a number of years. He accordingly also established a private life there within the meaning of Article 8 (art. 8), which encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature (see, mutatis mutandis, the *Niemietz v Germany* judgment ... para 29).'⁴

The Grand Chamber (in *Uner*) has now said:

'it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of "private life" within the meaning of article 8. Regardless of the existence or otherwise of a "family life", therefore, the Court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life. It will depend on the circumstances of the case whether is appropriate for the Court to focus on the "family life" rather than the "private life" aspect'.⁵

In such cases, 'the guiding principles' established in the *Boutif* case and added to in *Uner* are to be applied.⁶ In the case of *Slivenko* the Court found that removal of a mother and her adult daughter 'from the country where they had developed uninterruptedly since birth, the network of personal, social and

economic relations that make up the private life of every human being' did not interfere with their rights to respect for family life but breached their rights to respect for their private life and also their home.⁷

¹ *Beldjoudi v France* (1992) 14 EHRR 801. This position was defended by other judges such as Judge Wildhaber in *Nasri v France* (1995) 21 EHRR 458. Judge Morenilla in *Nasri v France* and Judge De Meyer in *Beldjoudi v France* had gone further and expressed the view that the deportation of an integrated migrant per se would breach Art 3 ECHR. Judge Morenilla stated:

'The deportation of such dangerous "non-nationals" may be expedient for a State which in this way rids itself of persons regarded as "undesirable", but it is cruel and inhuman and clearly discriminatory in relation to "nationals" who find themselves in such circumstances. A State which for reasons of convenience, accepts immigrant workers and authorises their residence, becomes responsible for the education and social integration of the children of such immigrants as it is of the children of its "citizens". Where such social integration fails, and the result is anti-social or criminal behaviour, the State is also under a duty to make provision for their social rehabilitation instead of sending them back to their country of origin, which has no responsibility for the behaviour in question and where the possibilities of rehabilitation in a foreign social environment are virtually non-existent. The treatment of offenders whether on the administrative or criminal level should not therefore differ according to the national origin of the parents in a way which – through deportation – makes the sanction more severe in a clearly discriminatory manner.'

² *C v Belgium* (7 August 1996, unreported), para 25. The application failed on the facts.
³ (1992) 16 EHRR 97.

⁴ This was acknowledged in the domestic context in the case of *R v Immigration Officer, ex p James* (CO 2187/1999) where the Home Office accepted 16 years' residence, a close circle of friends, home and employment in the UK as engaging private life considerations.

⁵ *Uner v Netherlands* (Application No 46410/99), [2006] 3 FCR 340.

⁶ *Uner v Netherlands*.

⁷ *Slivenko v Latvia* (Application No 48321/99), [2004] 2 FCR 28. In *Nyanzi v United Kingdom* (Application 21878/06) (2008) Times, 23 April, the Court held that whether or not removal of a woman from the UK where she had been for 10 years without leave to remain interfered with her right to respect for private life, such interference was in any event justified.

Article 8 in the domestic courts

8.90 In *Razgar*¹ Lord Bingham identified five questions that should be addressed in order to determine whether a decision breaches Article 8. They are:

- (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- (3) If so, is such interference in accordance with the law?
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

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- (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

Questions (1) and (2) require positive answers and one or more of (3)–(5) requires a negative answer for a breach of Article 8 to be found. The first two questions relate to whether Article 8(1) is engaged. The second of them sets the threshold for Article 8 to be engaged and whilst it requires that the interference be real, it is not otherwise a specially high threshold.²

¹ *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, [2004] 3 All ER 821.

² *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801, [2007] NLJR 1235. See also *KR (Iraq) v Secretary of State for the Home Department* [2007] EWCA Civ 514, [2007] All ER (D) 426 (May) where Auld LJ observed that it was hard to see why there should be a particularly high threshold for Article 8 to be engaged when the issue was threatened removal from the UK compared with other less draconian interferences and *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5, [2009] All ER (D) 92 (Jan): the second question ‘simply reflects the fact that more than a technical or inconsequential interference with one of the protected rights is needed if Article 8(1) is to be engaged’.

8.92A In *R (on the application of Chikwamba) v Secretary of State for the Home Department*¹ the House of Lords addressed the question of whether the policy of insisting on departure from the UK to satisfy entry clearance requirements was legitimate and proportionate.² The answer was that ‘only comparatively rarely, certainly in family cases involving children, should an Article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad’.³ In ‘most cases’ it was better that the Article 8 claim should be decided once and for all, not deferred to be decided out of country by an entry clearance officer and then on appeal by the Tribunal.⁴ Considerations relevant to determining whether the entry clearance requirement should be enforced in a particular case included: the individual’s immigration history and whether he or she had entered the country illegally and if the person had, whether it was for a good reason (eg to advance a genuine asylum claim) or a bad reason (eg to enrol as a student); whether and if so for how long the Secretary of State had delayed in dealing with the case; the length and degree of family disruption involved in going abroad for entry clearance would always be ‘highly relevant’; whether the ECO would be better placed to investigate the claim (eg as to the genuineness of a marriage or other relationship) in which case there might be good reason to enforce the entry clearance requirement; whether it was likely that there would be an appeal against a refusal of entry clearance at which the appellant would be unable to give live evidence. Home Office policy in relation to entry clearance requirements has been altered⁵ to reflect *Chikwamba* and does so accurately, by contrast to the submission often made for the Secretary of State that *Chikwamba* is only about the spouses of refugees who have young children and cannot go to the country from which asylum was granted.

¹ [2008] UKHL 40, [2009] 1 All ER 363.

² Paragraph 39.

³ Lord Brown, para. 44; Lord Bingham (para. 1); Lord Hope (para. 2) Lord Scott (para. 3) and Baroness Hale (para. 7) agreeing.

⁴ Paragraph 44.

⁵ Casework Instruction 'Article 8 ECHR', 7 August 2008.

8.93A One of the unsuccessful appellants in *HB*¹ appealed to the House of Lords.² Their Lordships held that delay in the decision-making process could be relevant in three ways. Firstly, it could result in the applicant developing closer personal and social ties and establishing deeper roots in the community thereby strengthening any Article 8 claim. Secondly, the precarious immigration status of one party to a relationship may imbue it with a sense of impermanence and so counts against the immigrant in the assessment of proportionality. However, the passage of time without a decision being made reduces that sense of impermanence and thereby affects the proportionality of removal. Thirdly, 'if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes' then it may reduce the weight to be given in the assessment of proportionality to the requirements of immigration control.³

¹ *HB v Secretary of State for the Home Department* [2006] EWCA Civ 1713, [2006] All ER (D) 213 (Dec).

² *EB Kosovo (FC) v Secretary of State for the Home Department* [2008] UKHL 41, [2008] 4 All ER 28.

³ Lord Bingham, para 16. Lord Brown dissented in respect of this third way in which delay could be relevant.

8.94A Whilst the phrase 'insurmountable obstacles' has been used in Strasbourg judgments and most notably in *R (on the application of Mahmood) v Secretary of State for the Home Department*¹ 'the inquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts'.² The issue is whether the decision gives rise to hardship far enough beyond matters of mere hardship, mere difficulty, mere obstacle or mere inconvenience.³ The impact of proposed relocation on the rights attending the British citizenship of any family member would weigh heavily. In many cases, a decision-maker cannot be expected to determine whether in fact future removal would break up a family; in such cases, the hardship of the dilemma facing family members confronted with having to decide between staying together and staying in the country would have to be evaluated.⁴

¹ *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840.

² Sedley LJ in *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5, [2009] All ER (D) 92 (Jan), following *LM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2008] EWCA Civ 325, [2008] All ER (D) 226 (Mar).

³ *VW (Uganda)*.

⁴ *VW (Uganda)*.

8.95 The decision of the House of Lords in *Huang*¹ necessitates a different approach by the courts and the tribunal to Article 8 cases. First of all, it confirmed that the tribunal's task is to determine whether an immigration decision is incompatible with a Convention right and therefore unlawful and that that requires the tribunal to determine for itself the lawfulness of the immigration decision, not merely to review the decision of the primary

decision maker.² Secondly, it reminds the courts of the obligation to follow the clear and constant jurisprudence of the Strasbourg court unless there are special circumstances such that it should not be followed³ and highlights the value of that jurisprudence as 'showing where, in many different factual situations, the Strasbourg court, as the ultimate guardian of Convention rights, has drawn the line, thus guiding national authorities in making their own decisions'.⁴ Thirdly, it emphasises that Article 8 exists to protect a 'core value' and that what protection of that value may require necessitates consideration of a very wide range of factors:

'Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant.'⁵

Fourthly, general principles applicable to the assessment of proportionality⁶ apply no less to immigration than to other areas⁷; they require the proportionality of an interference with family life to be assessed by answering the 'ultimate question':

'whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide.'⁸

One thing that is clear from that formulation of the 'ultimate question' as well as the general analysis of proportionality is that the policy expressed in the Immigration Rules and supplementary instructions cannot simply be treated as having 'struck the balance between the public interest and the private right' that is required by Article 8, save in a 'truly exceptional case'⁹ so that the assessment of proportionality becomes merely the determination of whether a case is 'truly exceptional'.¹⁰ The suggestion that the Immigration Rules could be so treated was made by analogy with public housing policy which the House of Lords had accepted¹¹ as striking that balance. However, the analogy was rejected because whereas housing policy represented a genuinely democratic reconciliation of the various competing interests following debate in Parliament in which each of those interests was represented the same could not be said of the Immigration Rules and policies; they were not actively debated in Parliament and the interests of affected non-nationals were not represented.¹² The Court of Appeal has now completely resiled from the proposition that the Immigration Rules are intended to secure compliance with Article 8 or indeed that they have any overarching purpose other than to articulate the Secretary of State's current policy with regard to immigration

control.¹³ Nevertheless, there are general considerations relating to the effective and consistent operation of immigration control that may weigh in favour of refusal when assessing proportionality:¹⁴

‘the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on.’

- ¹ *Huang v Secretary of State for the Home Department* [2007] UKHL 11[2007] 2 AC 167, [2007] 4 All ER 15.
- ² *Huang*, paras 11 and 13. Thus decisions such as *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716 [2003] 1 WLR 2979 were wrong on that issue.
- ³ *Huang*, para 18.
- ⁴ *Huang*, para 18.
- ⁵ *Huang*, para 18.
- ⁶ Citing *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 where the questions to be asked to decide whether a measure is proportionate are whether ‘(i) the legislative object is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more important than is necessary to accomplish the objective’. In addition, citing *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 [2004] 2 AC 368, the judgment on proportionality ‘must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage’.
- ⁷ *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801, [2007] NLJR 1235 where the Court, recapitulating various statements of principle generally applicable to the assessment of proportionality, including *de Freitas* said that whilst courts and tribunals need not adopt a set formula for determining proportionality ‘they should have proper and visible regard to relevant principles in making a structured decision about it case by case’.
- ⁸ *Huang*, para 20.
- ⁹ *Huang* in the Court of Appeal [2005] EWCA Civ 105, [2006] QB 1.
- ¹⁰ In *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465.
- ¹¹ ‘It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality’: *Huang*, para 20.
- ¹² *Huang*, para 17. The importance of this was underlined by Blake J in *R (on the application of Vu) v Secretary of State for the Home Department* [2008] EWHC 1192 (Admin), [2008] All ER (D) 172 (May).
- ¹³ *AM (Ethiopia) v Entry Clearance Officer* [2008] EWCA Civ 1082, [2008] All ER (D) 150 (Oct).
- ¹⁴ *Huang*, para 16 where those considerations are identified.

8.98 The domestic courts have been slower to find in applicants’ favour where removal is said to interfere with physical or moral integrity as an aspect of private life. However, in *Razgar*¹ the House of Lords accepted that in an Article 8 claim reliance may in principle be placed on the consequences for a person’s mental health of removal to the receiving country. ‘Private life’ in Article 8 extended to those features which are integral to a person’s identity or ability to function socially as a person. This must be taken as a more definitive statement of the ambit of and meaning of ‘private life’ than that of the Court

of Appeal which considered that ‘there must be a sufficiently adverse effect on physical and mental integrity and not merely on health’ for Article 8 to be engaged. The House of Lords judgment must also call into question the decision in *Djali*,² where the Court of Appeal found that the removal of a woman with severe post-traumatic stress disorder suffered as a result of her ill-treatment in Kosovo would not engage Article 8, since at worst it would merely imperil her prospects of a better recovery,³ and added that even if Article 8(1) had been engaged, the decision-maker would inevitably regard the interests of immigration control, as the imperative and overriding factor, given the grave problems of asylum overload.⁴ In *Jegatheeswaran*,⁵ the High Court held that removal of a child with severe hearing loss and learning difficulties to Germany could breach Article 8, since he would be unable to communicate in any spoken language. Having to live with a constant fear for one’s own safety might also breach the right to respect for private life.⁶ The Tribunal dismissed the risk to physical integrity from depleted uranium in Kosovo as ‘remote’ in *FZ*.⁷ The Court of Appeal has acknowledged, consistently with the Strasbourg jurisprudence, that the right to respect for private life includes the right to conduct ordinary activities, including the right to work.⁸ The extent of an individual’s contribution (or lack of contribution) to the community is not a freestanding matter to be taken into account when making a decision on proportionality, but may be of relevance if it forms part of the individual’s private life.⁹ Whilst the decision of the House of Lords in *Huang* was concerned with interference with the right to respect for family life, its reasoning applies equally to cases concerned with private life.¹⁰

¹ *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, at para 9, quoting with approval an Article by Professor Feldman ‘The Developing Scope of Article 8 of the European Convention on Human Rights’ (1997) EHRLR 265, at 270.

² *Djali v Immigration Appeal Tribunal* [2003] EWCA Civ 1371, [2004] 1 FCR 42.

³ *Djali* above, para 17.

⁴ *Djali* above, para 26, per Simon Brown LJ. One has to ask whether the ‘interests of immigration control’, which is not one of the factors listed in Art 8(2), is factored into the ‘fair balance’ not by virtue of its connection to any of these factors, but because of the international law rule that States have a right to control the entry and expulsion of aliens. It is certainly the darling concept of some sections of the judiciary, but like any unruly pet, it needs to be kept in its proper place: see in particular Lord Bingham in *European Roma Rights Centre v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 1 All ER 527, para 11ff. See also *R (on the application of Ay) v Secretary of State for the Home Department* [2003] EWCA Civ 1, where the Court of Appeal considered that the harm suffered by children on removal to Germany had to be weighed against the interests of the public and the consequences flowing from the fact that the children might benefit from the unlawful actions of their parents who had remained in the UK in breach of immigration controls and evaded return to Germany.

⁵ *R (on the application of Jegatheeswaran) v Secretary of State for the Home Department* [2005] EWHC 1131 (Admin), [2005] All ER (D) 178 (Apr).

⁶ *R (on the application of Sivapalan) v Secretary of State for the Home Department* [2008] EWHC 2955 (Admin), [2008] All ER (D) 01 (Dec).

⁷ [2003] UKIAT 315, [2003] Imm AR 633.

⁸ *MA (Afghanistan) v Secretary of State for the Home Department* [2006] EWCA Civ 1440, 150 Sol Jo LB 1330.

⁹ *RU (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 753, [2008] All ER (D) 21 (Jul).

¹⁰ *JN (Uganda) v Secretary of State for the Home Department* [2007] EWCA Civ 802, [2007] All ER (D) 502 (Jul).

The right to marry and found a family

8.103 Article 12 of the ECHR provides that:

‘Men and women of marriageable age have the right to marry and found a family according to the national laws governing the exercise of his right.’

The right to marry and found a family is one right, not two, and it is at least questionable whether it applies only to persons of opposite biological sex.¹ The right to marry ‘is a strong right’ which, by contrast to Articles 8, 9, 10 and 11 has no second paragraph permitting interferences or limitations.² It is subject only to ‘national laws’ which may interfere with the right in relation to procedural matters and in order to protect the institution of marriage³ but also to promote other social goals such as the prevention of marriages of convenience for immigration purposes⁴ and to that end the authorities may delay a proposed marriage for a reasonable period in order to investigate whether it is one of convenience.⁵ However, the article does not authorise a scheme such as that operated under Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 19 whereby permission to marry would be withheld not as a result of individualised assessment of whether the proposed marriage was a sham but on the basis of immigration status.⁶ Moreover, national laws regulating the exercise of the right to marry may not injure or impair the substance of the right eg by charging of a fee for applications for permission to marry which needy applicants could not afford.⁷ Article 12 does not confer a right to choose a particular country in which to marry, even the country in which both parties currently reside⁸ but that by itself is not sufficient to justify preventing marriage in that country.⁹ The refusal of a marriage registrar to marry a couple could engage Article 12.¹⁰ The ECtHR has held that the arrest of an illegal entrant immediately before his or her marriage could found an Article 12 claim if it had the effect of preventing or substantially delaying it.¹¹

¹ The right of ‘a man and a woman’ to marry does not assume that these terms must refer to a determination of gender by purely biological criteria: *Goodwin v United Kingdom* (28957/95), 11 July 2002, departing from its earlier decisions in *Rees v United Kingdom* (1986) 9 EHRR 56, para 49 and *Cossey v United Kingdom* (1990) 13 EHRR 622 para 43. The House of Lords refused to follow *Goodwin* in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467, holding it was for Parliament to remedy the incompatibility of the Matrimonial Causes Act.

² *R (on the application of Baiai) v Secretary of State for the Home Department* [2008] UKHL 53, [2008] 3 All ER 1094.

³ In relation to matters such as capacity, consent, prohibited degrees of consanguinity or the prevention of bigamy – see, for example, *Hamer v United Kingdom* (1979) 4 EHRR 139 and *F v Switzerland* (1987) 10 EHRR 411.

⁴ *Klip and Kruger v Netherlands* (1997) 91-A DR 66.

⁵ *R (on the application of Baiai) v Secretary of State for the Home Department* [2008] UKHL 53, [2008] 3 All ER 1094.

⁶ *R (on the application of Baiai) v Secretary of State for the Home Department* [2008] UKHL 53, [2008] 3 All ER 1094.

⁷ *R (on the application of Baiai) v Secretary of State for the Home Department* [2008] UKHL 53, [2008] 3 All ER 1094. The fixed fee of £295 or £590 if both of a couple were subject to immigration control imposed by the Immigration (Procedure for Marriage) Regulations 2005, SI 2005/15 would be likely to have such an effect.

⁸ *App No 9773/82 v United Kingdom* (1982) 5 EHRR 296 and *App No 10914/84 v Netherlands* (1986) 8 EHRR 308.

⁹ *Secretary of State for the Home Department v Baiai*.

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- ¹⁰ But registrars are merely giving effect to primary legislation, Immigration and Asylum Act 1999, s 24(5) and so would not be liable under the Human Rights Act 1998. For discrimination in pre-marriage checks see *Tejani v Superintendent Registrar for the District of Peterborough* [1986] IRLR 502, CA. Article 12 ECHR should be read with Art 14.
- ¹¹ *Shahara and Rinea v Netherlands* (Application 10915/85), held inadmissible because the marriage was only deferred for nine days.

Protection of property

8.104 The right to enjoyment of private property is protected by Article 1 of the first protocol to the Convention¹ which begins ‘every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the general public interest and subject to conditions provided for by law and by the general principles of international law’. Exclusion from the UK may be challenged on the ground that it interferes with a person’s peaceful enjoyment of his possessions in circumstances where the applicant is outside the UK and his property can only be enjoyed in the UK.²

- ¹ Which is one of the ‘Convention rights’ protected by the Human Rights Act 1998 – see s 1(1)(b) of that Act.
- ² *R (on the application of Murungaru) v Secretary of State for the Home Department* [2006] EWHC 2416 (Admin). The property concerned here was a contract for the provision of medical treatment to the applicant. However, the Court of Appeal held that whilst possessions could include contracts, the contract in this case was not a possession so that on the facts, no Convention claim arose – *M (Kenya) v Secretary of State for the Home Department* [2008] EWCA Civ 1015, [2008] All ER (D) 66 (Sep).

Non-discrimination

8.105 Article 14 of the ECHR prevents discrimination in the enjoyment of the Convention rights on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.¹ The Article does not create a free-standing right not to be discriminated against,² but one linked to enjoyment of Convention rights.³ It is not necessary to show a breach of a substantive right, however, to establish a breach of Article 14.⁴ The questions which arise in relation to a claim engaging Article 14 are similar to those arising in respect of a qualified right: has there been a difference in treatment in an area within the ambit of the Convention;⁵ if so, was it on a ‘status’ ground such as race, sex etc,⁶ did the differential treatment have a legitimate aim, and an objective and reasonable justification, ie was there a reasonable relationship of proportionality between the means employed and the aim sought to be realised?⁷ Discrimination on ‘suspect’ grounds⁸ such as race,⁹ sex,¹⁰ sexual orientation,¹¹ nationality,¹² religion¹³ or legitimacy,¹⁴ is identified as particularly serious. There is a consensus in the Member States to eliminate discrimination on such grounds, backed by international instruments.¹⁵ In such cases the court will subject the alleged discrimination to ‘severe scrutiny’¹⁶ and a heavier burden is placed upon the State to justify the difference in treatment¹⁷ by giving ‘very weighty reasons’.¹⁸ By contrast, a difference in treatment on grounds other than suspect grounds would not be

subject to such intense scrutiny by the court and a rational justification for the distinction would be sufficient.¹⁹ Differences of treatment in such cases are said to be underpinned by decisions about the general public interest which are properly for the elected branches of government rather than the court²⁰ but this does not mean that the issue can be left entirely to Parliament and the executive;²¹ the difference in treatment still has to be justified.²² There are borderline cases in which it is not easy to allocate the ground of discrimination to one category or another²³ and it may be that there is a spectrum rather than a clear demarcation of categories.²⁴ An unjustifiable difference in treatment in the operation of the Immigration Rules regarding admission of spouses on grounds of gender was held to constitute a breach of the anti-discrimination provision of ECHR, Article 14 in conjunction with Article 8 in *Abdulaziz*.²⁵ However, in the same case the ECtHR rejected the argument that the Rules also discriminated on grounds of race, an argument which relied on the disproportionate impact the Rules had on immigrants from the Indian sub-continent as constituting indirect discrimination. The broad margin of appreciation which the court gave there to the domestic authorities meant it could not establish any ulterior discriminatory purpose behind government policy. This approach can of course be avoided by looking at the discriminatory *effect* of policy rather than seeking a discriminatory *purpose*, the approach of the European Court of Justice and of the UK courts under the Equal Treatment Directive²⁶ and the Sex Discrimination and Race Relations Acts.²⁷ The Strasbourg Court has now accepted that there is no need to establish a discriminatory intent to show a breach of Article 14 and that a general policy or measure that has a disproportionately prejudicial effect on a particular group may be considered discriminatory even if not aimed at that group.²⁸ In such circumstances, the government would have to show that the differential impact of the measure was a consequence of objective factors, unrelated to the ground on which discrimination was alleged.²⁹ The House of Lords rejected the claim that the 'family amnesty' breached Article 14 owing to the difference in treatment between individuals who were or had been part of a family unit in the UK with their parents and individuals who were in the UK without their parents, their parents being dead or missing.³⁰

¹ 'Status' has been interpreted by the Strasbourg Court as 'a personal characteristic ... by which persons or groups of persons are distinguishable from each other' – *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, applied in *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196. 'Immigration status' (in *R (on the application of Morris) v Westminster City Council* [2005] EWCA Civ 1184) and being an unaccompanied asylum seeking child or not being a member of a family (*AL (Serbia) v Secretary of State for the Home Department* [2006] EWCA Civ 1619, [2008] 4 All ER 1127) have been accepted as falling within 'other status'.

² Such a free-standing right is created by ECHR, Protocol 12, adopted by the Committee of Ministers in June 2000 and opened for signature in November 2000. The UK has not signed or ratified it, and by March 2004 there were only six ratifications. It requires ten Council of Europe States to ratify it to come into force.

³ The Secretary of State's refusal to register as a British citizen an illegitimate child of a British father was held not to violate Art 14 ECHR together with Art 8 in *R (on the application of Montana) v Secretary of State for the Home Department* [2001] 1 WLR 552, CA, as the right to nationality is not within the ambit of the Convention, and the discrimination did not in fact impact on family life.

⁴ In *R (on the application of Morris) v Westminster City Council* [2005] EWCA Civ 1184 Sedley LJ said 'Convention rights have a penumbra within which unjustifiable discrimination is forbidden even in the absence of a violation of the right'. The Strasbourg court has

also recognised that the right not to be discriminated against is also violated when States without objective and reasonable justification fail to treat differently persons whose situations are significantly different: *Thlimmenos v Greece* (2001) 31 EHRR 411 (ban on civil service employment for those with criminal convictions caught an applicant with a conviction for conscientious objection, and thus discriminated in the enjoyment of rights of conscience).

⁵ *Inze v Austria* (1987) 10 EHRR 394.

⁶ The prohibited grounds set out in Art 14 are illustrative, not exhaustive. In *R (on the application of T) v Secretary of State for Health* [2002] EWHC 1887, (2002) Times, 5 September, the status of 'asylum seeker' was held to be a status within Art 14 such that discriminatory denial of fundamental rights of asylum seekers could breach the ECHR.

⁷ *Belgian Linguistics Case* (No 2) (1968) 1 EHRR 252; *Marckx v Belgium* (1979) 2 EHRR 330; *Rasmussen v Denmark* (1984) 7 EHRR 371; *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471. The Court of Appeal has set out the 'structured task' it faces in assessing an Art 14 claim: has there been (i) a difference in treatment (ii) in an area within the ambit of the Convention; (iii) is the chosen comparator analogous; (iv) is there an objective or reasonable justification for the differential treatment: *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271, [2003] 1 WLR 617, para 20. However, the *Michalak* approach has been 'superseded' by *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173 in which Lord Nicholls 'sounded a new keynote' (to use Sedley LJ's phrase in *Morris* fn 1 above) saying: 'Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in Article 14. If this prerequisite is satisfied, the essential question for the courts is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the Court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact'.

⁸ *Le* 'those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual', Lord Hoffmann in paragraph 15 of *R (Carson)*.

⁹ *East African Asians v United Kingdom* (1973) 3 EHRR 76. The court held differential entitlement to emergency social security assistance as between nationals and non-nationals to violate Article 14 with Protocol 1 Article 1, as not based on any objective and reasonable justification, in *Gaygusuz v Austria* (1997) 23 EHRR 364.

¹⁰ *Abdulaziz*, fn 6, above. It is no longer appropriate for the State to discriminate against transsexuals in the enjoyment of family and private life: *Goodwin v United Kingdom* (2000) 34 EHRR 18.

¹¹ Differences in treatment based on sexual orientation require particularly serious reasons by way of justification: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493; *SL v Austria* (45330/99) (9 January 2003, unreported) para 37; *L v Austria* (39392/98, 39829/98) (2003) 13 BHRC 594, para 37; *Karner v Austria* (40016/98) [2004] 2 FCR 563. See also *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557 and *LD S(Brazil)* [2006] UKIAT 00075.

¹² *R (on the application of Baiai) v Secretary of State for the Home Department* [2006] EWHC 823 (Admin), [2006] 3 All ER 608, Silber J, relying in part on *Gaygusuz v Austria* (1997) 23 EHRR 364 and *Morris* as in fn 1 above.

¹³ *R (on the application of Baiai) v Secretary of State for the Home Department* [2006] EWHC 823 (Admin), [2006] 3 All ER 608 holding that the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 19 discriminated on grounds of religion and nationality because the requirement that it imposed to obtain the Secretary of State's permission to marry did not apply to those marrying by an Anglican ceremony but did apply to those marrying by any other religious ceremony.

¹⁴ *Marckx* fn 6 above.

¹⁵ Convention for the Elimination of All forms of Discrimination Against Women 1978 (CEDAW); Convention for the Elimination of all forms of Racial Discrimination (CERD).

¹⁶ Lord Walker's phrase in *R (on the application of Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173.

¹⁷ *Abdulaziz* above.

- ¹⁸ 'In its judgments the European Court of Human Rights often refers to "very weighty reasons" being required to justify discrimination on these particularly sensitive grounds', Lord Walker in *R (on the application of Carson)* above.
- ¹⁹ *R (on the application of Carson)*, Lord Walker, paras 56, 58.
- ²⁰ *R (on the application of Carson)*, Lord Hoffmann, para 16.
- ²¹ As the tribunal said it could in *HK (Somalia)* [2006] UKAIT 00021 (where it was argued that the refugee family reunion rules discriminated against a refugee child who could not bring a parent whereas a refugee parent could bring her child) and in *KP (India)* [2006] UKAIT 00093 (where it was argued that paragraph 317 of the rules discriminated against mothers in law compared with mothers).
- ²² *AL (Serbia) v R (on the application of Morris) v Westminster City Council* [2006] EWCA Civ 1619.
- ²³ *R (on the application of Carson)*.
- ²⁴ *AL (Serbia) v R (on the application of Morris) v Westminster City Council* [2006] EWCA Civ 1619 where the Court of Appeal had difficulty deciding whether being an unaccompanied asylum seeking child was a suspect category.
- ²⁵ *Abdulaziz* above, where the court rejected the government's attempt to justify on economic grounds and grounds of 'public tranquillity' the rules which made it more difficult for foreign husbands to join wives in the UK than vice versa.
- ²⁶ ETD 76/207.
- ²⁷ Sex Discrimination Act 1975; Race Relations Act 1976. See the House of Lords' application of the proportionality test to a situation of indirect discrimination in *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1.
- ²⁸ *DH v Czech Republic* (2007) App No 57325/00 (Grand Chamber).
- ²⁹ *DH v Czech Republic*.
- ³⁰ *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42.

HUMAN RIGHTS APPEALS

The human rights of non-appellants

8.111A In relation to Article 8, this issue has now been resolved by the House of Lords in *Beoku-Betts v Secretary of State for the Home Department* which was concerned with an appeal under the Immigration and Asylum Act 1999, s 65 but which proceeded on the basis that the statutory provisions were not materially different to those of the Nationality, Immigration and Asylum Act 2002: both referred repeatedly to 'the appellant's human rights'.² That language was held to be insufficient to drive their Lordships to adopt the 'narrow construction' that an appeal was concerned only with the Article 8 rights of the appellant and not those of affected non-appellants in the light of countervailing considerations that included: the inconvenience of having the appellant's Article 8 rights considered in one proceeding, those of affected family members in another;³ the unlikelihood that legislation whereby Parliament intended to streamline and simplify proceedings, including by introducing 'one-stop' appeals should result in family members having to take multiple proceedings; the unlikelihood that the appellate authority should consider only the effect of a decision on the appellant whereas the decision-maker and the Strasbourg Court would have to consider its effects on family members as well and that there is only one family life: as Baroness Hale said of the narrow construction, it 'risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts'. We would say that whilst *Beoku-Betts* was concerned with Article 8, a similar approach should be adopted in respect of other human rights, eg where a non-appellant mother says that the effect on her of removal of her daughter to a real risk of suffering

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genital mutilation would amount to persecution, serious harm or Article 3 ill treatment.⁴ In *EM (Lebanon)* the appellant's child, who was not an appellant was permitted to intervene in the House of Lords in her appeal against removal from the UK.⁵ Their Lordships and Ladyship emphasised the importance of ascertaining and communicating to the Court the views of affected children and giving separate consideration to their interests and indeed allowed that particular appeal as much because of the impact of the immigration decision on the child's human rights as on his mother's.⁶

¹ [2008] UKHL 39, [2008] 4 All ER 1146.

² Immigration and Asylum Act 1999, s 65(3) and (5) and the Nationality, Immigration and Asylum Act 2002, s 84(1)(c) and (g).

³ A claim under the Human Rights Act 1998, s 7.

⁴ Cf *FM (Sudan)* CG [2007] UKAIT 00060 where the tribunal held that infliction of FGM on the daughter would amount to persecution and Article 3 ill treatment of the mother.

⁵ *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 All ER 559.

⁶ *EM (Lebanon)*. Separate representation of different family members might be called for but only in cases of genuine conflict.

VISITS, STUDY AND TEMPORARY PURPOSES

VISITORS

9.5 People may visit this country for a variety of reasons – as tourists, to see relatives or friends, to transact business, to take part in a conference or in some sporting competition or to seek medical treatment. A visit is any temporary stay in the UK for a purpose which does not place the person in a different category of the Immigration Rules.¹ It is perfectly proper for a person to seek entry as a visitor in order to give evidence at his or her own appeal,² to take over domestic responsibilities temporarily or to care for a sick relative,³ to be a temporary child minder for a relative,⁴ to visit a spouse who is a student⁵ or a working holidaymaker,⁶ or for the purpose of marriage or entering into a civil partnership⁷ Overseas doctors coming to take the Professional and Linguistic Assessment Board (PLAB) test to demonstrate their knowledge of English and their medical expertise used to come in as visitors, but since 15 March 2005 a specific category was created within the Immigration Rules for them.⁸ The Immigration Rules now cater for nine different categories of visitor, but then there a whole bunch of other people who, according to the IDI (as they were updated in February 2006), who can also come in as visitors. We refer to some of these in 9.6 below. The visitor rules have been considerably reorganised by the rule changes which came into force on 27 November 2008 under HC 1113. The eventual aim is to have three main categories of general visitor – tourist, business and sponsored family. Only the second of these – business and academic visitors – is introduced in these rules. But these latest rule changes do make changes in four of the existing categories: (i) general visitors, including tourists dealt with in HC 295, paras 41–46; (ii) Business Visitors, which includes Academic Visitors (para 46G); (iii) Sports Visitors (para 46M); and (iv) Entertainer Visitors (para 46S). For these there are new rules. There are also a number of minor changes. These are with regard to child visitors, visitors in transit, visitors coming for private medical treatment, parents of a child at school, those coming to marry or enter into a civil partnership and student visitors. A Special Visitors category is also created to enable a new Special Visitors visa to be issued.

¹ *Secretary of State for the Home Department v Xi* [1993] Imm AR 519; *Kelada v Secretary of State for the Home Department* [1991] Imm AR 400.

² *Patel v Visa Officer, Bombay* [1991] Imm AR 97; *Patel v Entry Clearance Officer, Bombay* [1991] Imm AR 273. In *Gaud* (16386) 1999 2 IAS No 6, the Tribunal held that visitor was the correct category for someone in the UK awaiting trial for a criminal offence. The IDI (Feb/06), Ch 2, s 1, Annex B, para 3 points out that since 1 October 1996 an appeal is deemed abandoned if the appellant leaves the UK, so that generally speaking appellants will be seeking leave to enter as visitors to attend entry-clearance appeals or other out of country appeals.

³ See IDI (Feb/06), Ch 2, s 1, Annex B, para 6; but with fuller details at IDI, Ch 17 (employment outside the rules), s 2 (carers).

9.5 Visits, Study and Temporary Purposes

- ⁴ *Entry Clearance Officer, Manilla v Magalso* [1993] Imm AR 293; IDI (Feb/06), Ch 2, s 1, Annex B, para 7.
- ⁵ *Secretary of State for the Home Department v Xi* [1993] Imm AR 519.
- ⁶ *Deen* (9563) unreported; referred to in [1993] INLP 73.
- ⁷ Visits for marriage and civil partnership (HC 395, paras 56D–56F) are dealt with below.
- ⁸ Any doctor who wishes to practice medicine in the UK must register with the General Medical Council (GMC). Doctors who qualify overseas and wish to come to the UK to sit their PLAB test are now dealt with by HC 395, paras 75A–75F. If they pass, they can take up employment or self-employment later on.

General rules on admission

9.7 The rules relating to the admission of visitors are contained in HC 395, paragraphs 40–46. The Home Office's IDI and the Foreign Office, visa section DSPs give further guidance.¹ Under paragraph 41 passengers seeking entry as visitors must satisfy the immigration authority that:

- (i) they are genuinely seeking entry for a limited period as stated by them, not exceeding six months; and
- (ii) they intend to leave the UK at the end of the period of the visit; and
- (iii) they do not intend to take employment in the UK; and
- (iv) they do not intend to produce goods or provide services within the UK, including the selling of goods or services direct to members of the public; and
- (v) they do not intend to study at a maintained school; and
- (vi) they will maintain and accommodate themselves and any dependants adequately out of resources available to them without recourse to public funds or taking employment, or will, with any dependants, be maintained and accommodated adequately by relatives or friends;
- (vii) they can meet the cost of the return or onward journey; and
- (viii) is not a child under the age of 18.³

Leave to enter is discretionary and the immigration officer must be satisfied that each of the requirements of para 41 is met;⁴ otherwise, leave will be refused.³

HC 1113 has added the following four requirements for entry to the existing list set out in HC 395, para 41. The visitor:

- (ix) does not intend to do any of the activities covered by the new rules for business visitors, sports visitors or entertainment visitors;
- (x) does not, during his or her visit, intend to marry or form a civil partnership, or to give notice of marriage or civil partnership;
- (xi) does not intend to receive private medical treatment during the visit; and
- (xii) is not in transit to a country outside the common travel area.

A feature of the changes is that other types of visitor cannot switch half way through their visit into the general visitor category except child visitors (see para 44(iii)) and a general visitor cannot generally switch into any of those other categories other than a medical visit.

On 25 June 2008, the government announced ‘tough’ new sanctions for people who fail to ensure family members visiting from abroad leave before the expiry of their visa. People will have to become licensed to sponsor family members to visit from abroad under proposed changes to the visa system. Sponsors will have a duty to ensure that their visitors leave before their visa runs out. If sponsors fail in their duties, they face a ban on bringing anyone else over, penalties of up to £5,000 or a jail sentence.

¹ IDI (Feb/06), Ch 2, s 1 (visitors); and DSPs, Ch 10 (visit entry requirements). See the Home Office website: www.ind.homeoffice.gov.uk/lawandpolicy/ and the DSPs: www.ukvisas.gov.uk/.

² Inserted by HC 819.

³ HC 395, para 42.

⁴ HC 395, para 43.

Extension of stay as a visitor

9.14 Six months is, as a general rule, the maximum permitted leave which may be granted to a visitor.¹ A visitor who has been given less than six months on entry may, however, extend his or her visit up to the six-month period.² To obtain such an extension a visitor must continue to meet the requirements for a visit, in particular the maintenance and accommodation provisions and the ability to meet the cost of the return or onward journey. If these requirements continue to be met an extension may be granted,³ but otherwise refusal is mandatory.⁴ In *YT (HC 395 paragraph 44 – extension of stay) Belarus*,⁵ the AIT held that, prior to its amendment by HC 1113 with effect from 27 November 2008, para 44 of HC 395 (requirements for an extension of stay as a visitor) was not limited in its application to persons in the UK on a visitor’s visa and there was no legal impediment to someone switching from leave under the sector-based scheme to leave as a visitor. However, the new wording of para 44 reverses this decision. Visitors under the Approved Destination Status Agreement with China are not allowed to extend the length of their stay.⁶ Where a visitor had leave for less than six months and seeks an extension which, if granted, would take him or her over the maximum, the Secretary of State should not refuse an extension outright but should consider granting leave up to the six month limit, and if this is refused there is a right of appeal.⁷ Those caring for sick relatives or friends who are terminally ill under the carer’s concession may obtain extensions of stay, if there are ‘sufficient compassionate circumstances to warrant the grant of leave to remain outside the rules for a longer period than 6 months.’ Persons caring for a sick or disabled friend are under the much less caring and tightened up instructions, which provide for the grant of three months’ leave to remain in the first instance and only allow an extension if ‘there are wholly exceptional circumstances’.⁸ Where child visitors wish to have an extension of stay, within the maximum six-month period allowed for visits, they will have to be able meet the cost of their return or onward journey, be under the age of 18, can demonstrate that there are suitable arrangements for their care in the UK and that they have a parent or guardian in their home country or country of habitual residence who is responsible for their care.⁹

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- ¹ HC 395, para 44. However, 12 months' leave may have been given to special categories such as academic visitors, including postgraduate researchers sponsored by particular bodies, privately funded researchers, visiting lecturers, etc (IDI, Ch 2, s 1, Annex B, para 1), and volunteers on archaeological excavations (IDI, Ch 2, s 1, Annex B, para 3). For visitors under the ADS Agreement with China see 9.29 below.
- ² HC 395, para 44(ii). Visitors under the ADS Agreement with China may not extend their leave: HC 395, para 44(iii), inserted by HC 486 from 5 April 2005.
- ³ HC 395, para 45.
- ⁴ HC 395, para 46. But see fn 1 above. Persons in these categories may obtain extensions taking them over the six months' limit, and sometimes over the 12 months, outside the Rules.
- ⁵ [2009] UKAIT 00003.
- ⁶ HC 395, para 44(iii).
- ⁷ Wong [1995] Imm AR 451. Refusal on the ground that the passenger seeks leave for a period greater than that permitted by the rules is not appealable: see Nationality, Immigration and Asylum Act 2002, s 88(2)(c).
- ⁸ The concession is applied to those caring for a patient suffering from terminal illness or from mental or physical disability. see 9.26, below. See also *R v Secretary of State for the Home Department, ex p Zakrocki* [1996] COD 304.
- ⁹ HC 395, para 46D, inserted by HC 819 with effect from 12 February 2006.

Particular visits

9.15A HC 1113 has created a new category of 'Special Visitor' and plans to introduce a new Special Visitor visa 'to bring together what are currently separate Immigration Rules that have been introduced when a special need has been identified. Special Visitors are:

- (a) a visitor granted leave for private medical treatment under paras 51–56 of these Rules;
- (b) a person granted leave for the purpose of marriage under para 56D–F;
- (c) a person granted leave as a Parent of a child at school under paras 56A–C;
- (d) a person granted leave as a Child Visitor under paras 46A–F;
- (e) a person granted leave as a Student Visitor under paras 56K–M;
- (f) a person granted leave as a Prospective Student under paras 82–87;
- (g) a person granted leave as a Visitor in transit under paras 47–50;

Child visitors

9.16 HC 819, which took effect on 12 February 2006, inserts a number of new rules relating to child visitors.¹ The main points are as follows:

- (1) Children under 18 and travelling alone and applying for entry as visitors will have to meet all the visitor requirements as they do at present in the Immigration Rules. In addition, they will now have to show that suitable arrangements have been made for their travel to, and reception and care in the UK² and will also need to demonstrate that they have a parent or guardian in their home country or country of habitual residence who is responsible for their care.³ If they are foreign visa nationals, they must have either: (a) a valid UK entry clearance for entry as an accompanied child visitor and be travelling in the company

of the adult identified on his entry clearance, who is on the same occasion being admitted to the UK; or (b) a valid entry clearance as an unaccompanied child visitor.⁴

- (2) The intention of these rules is that in the case of a child, who subsequently comes to the attention of the caring or educational services, there will be a record of their family or carers, both prior to, and immediately after, their arrival. If the provision of these gives cause for concern, then entry to the UK may be refused or further investigation will need to take place.
- (3) Children who are accompanying an adult, whether a family member or not, and seeking entry as visitors, will have to give details of the accompanying adult so that the nature of the journey and the relationship can be established.
- (4) If the provisions of this information or the information itself gives cause for concern, either when provided or at the point of entry, then entry to the UK may be refused and further investigation may have to take place. The information and identities provided will be a record that may be assessed, if the child subsequently comes to the attention of the caring or educational services.

The concern which has prompted these rules is the concern that minors are brought to the UK for trafficking purposes or that the accompanying adult disappears and the children then claim asylum. HC 1113 has added the following additional requirements for entry to the existing list, set out in HC 395, para 46C: the child visitor (a) is genuinely seeking entry as a child visitor for a limited period as stated by him not exceeding 6 months; and (b) meets the requirements of the general visitor sub-paras 41(ii)–(iv), (vi), (vii) and (ix)–(xii). As before, a child visitor can have a visit up to 6 months, which may be split between a child visit and a general visit (see para 44(iii)) but will also be able to switch to a medical visit should the need arise.

¹ See also IDI, Ch 2, s 1, Annex A, para 7.

² HC 359, para 46A(iii)

³ HC 359, para 46A (iv). Entry Clearance Officers need to establish and record that the parent/guardian is in the home country and agrees to the child travelling. In routine cases, the parent/guardian travelling with the child can either sign the application form or, where they are not travelling, they can provide a letter of consent. See DSPs, Ch 10.3.

⁴ HC 359, para 46A(v). The IDI (Ch 2, s 1, Annex A, para 7.2) warn ECOs and officers at UK ports to pay particular attention to the applications and circumstances of a child who seeks to enter the UK unaccompanied, but say it may be unavoidable if the child obtains a multi-entry visa and does not always intend to travel with the same adult and it may be better for them to be issued with an 'unaccompanied' visa even though they may not be travelling alone. A child with an 'Unaccompanied' Child Visitor visa is able to travel with or without any other person.

Student visitors

9.17 As from 1 September 2007, the Immigration Rules (Cm 7074) have introduced a new category of student visitor. Previously, visitors could study during their stay provided it was not at a maintained school. Now visitors cannot study at any institution, unless they seek entry either in the new

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student visitor category or under the student route.¹ The requirements to be met by a person seeking leave to enter the UK as a student visitor are that he or she²:

- (i) is genuinely seeking entry as a student visitor for not more than six months;
- (ii) has been accepted on a course of study which is to be provided by an organisation which is included on the Department for Education and Skills' Register of Education and Training Providers;
- (iii) intends to leave the UK at the end of his or her stated visit;
- (iv) does not intend to take employment in the UK;
- (v) does not intend to engage in business, to produce goods or provide services within the UK, including the selling of goods or services direct to members of the public; and
- (vi) does not intend to study at a maintained school;
- (vii) has adequate maintenance and accommodation (including for any dependants) without recourse to public funds or taking employment; or will, with any dependants, be maintained and accommodated adequately by relatives or friends;
- (viii) can meet the cost of the return or onward journey;
- (ix) is not a child under the age of 18.

If each of these requirements is met the student visitor may be admitted for up to six months, subject to a condition prohibiting employment.³

¹ Explanatory Memorandum to Cm 7074, para 7. In *CT (Rule 60(i), student entry clearance?) Cameroon* [2008] UKAIT 00010 (12 February 2008): the Tribunal held that a person who entered the United Kingdom with entry clearance as a short-term student prior to 1 September 2007, although subject to a condition prohibiting work, was admitted to the UK in possession of a valid entry clearance in accordance with para 57 of HC 395 and as a student not as a visitor.

² HC 395, para 56K.

³ HC 395, para 56L.

Business and academic visits

9.18 The ambit of a business visit has not always been easy to define, as can be seen from the text below. Under the changes made by HC 1113, which came into force on 27 November 2008, the old formula of coming 'to transact business (such as ...)' has gone. The new requirements, set out in HC 395, para 46G, are: the business visitor (i) is genuinely seeking entry as a Business Visitor for not more than (a) 6 months or (b) 12 months if seeking entry as an Academic Visitor; (ii) meets the requirements of the general visitor sub-paras 41(ii)–(viii) and (x)–(xii); and (iii) intends to do one or more of the following during his visit:

- (a) to carry out a 'Permissible Activity' meaning a business activity of a type listed in United Kingdom Border Agency guidance specifying the activities that a business person may undertake during a short-term business visit to the UK;¹
- (b) to take part in a location shoot as a member of a film crew;

- (c) to represent overseas news media including as a journalist, correspondent, producer or cameraman provided he is employed or paid by an overseas company and is gathering information for an overseas publication;
- (d) to act as an Academic Visitor;²
- (e) to act as a Visiting Professor;³
- (f) to be someone who is seconded from an overseas company which has a contract with a UK company, provided that he or she is paid by the overseas company;
- (g) to undertake some preaching or pastoral work as a religious worker, provided his or her base is abroad and he or she is not taking up an office, post or appointment;
- (h) to act as an adviser, consultant, trainer or trouble shooter employed abroad by the same company to which the client firm in the UK belongs, provided this does not amount to employment paid or unpaid for the UK branch;
- (i) to undertake specific, one-off training in techniques and work practices used in the UK, provided this is not on-the-job training.

This is a much clearer list than existed before, but there is still room for concessions and grey areas, as is indicated by the UKBA's need for a guidance list. On arrival, a Business Visitor who meets the requirements of the Rules will usually be admitted for 6 months. All Business or Academic Visitors are subject to a condition prohibiting employment.⁴ An academic visitor with entry clearance can get up to 12 months; those without one, 6 months. Twelve months is the maximum permitted leave which may be granted to an Academic Visitor and six months is the maximum that may be granted to any other form of Business Visitor.⁵ The Business Visitor category is a self contained one and a business visitor cannot generally switch to any other category during their visit other than a medical visit should the need arise (see para 46J(iv)). Under the rules a 'Business Visitor' is defined to include two additional classes of visitor: (i) medical graduates coming to the UK to take the PLAB test under paras 75A–F, and (ii) medical and dental graduates coming to undertake a clinical attachment or dental observer post in the UK under paras 75G–M of these Rules. These are quite separate rules and are discussed at 9.54 and 9.55 in the main text.

¹ This is as defined in HC 395, para 6.

² An 'Academic Visitor' is a person who is from an overseas academic institution or who is highly qualified within his own field of expertise seeking leave to enter the UK to carry out research and associated activities for his own purposes, but only if he or she has been working as an academic in an institution of higher education overseas, or in the field of their academic expertise immediately prior to seeking entry: HC 395, para 6.

³ A 'Visiting Professor' is a person who is seeking leave to enter the UK as an academic professor to accompany students who are studying here on Study Abroad Programmes: HC 395, para 6.

⁴ HC 395, para 46H.

⁵ HC 395, para 46J.

9.18A Passengers do not qualify as visitors if they intend to take employment or to produce goods or provide services in the UK, including selling goods and services direct to the public.¹ They are normally prohibited from taking

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employment by a condition stamped in their passport,² and sometimes the stamp also prohibits them from entering any business or profession, although there is no provision for this condition in the Acts or the Immigration Rules. However, neither prohibition prevents business visitors from transacting business during their visit. Under the Immigration Rules a visitor includes a person living and working outside the UK, who comes to transact business, including attending meetings and briefings, fact finding, negotiating or making contracts with UK businesses to buy or sell goods or services.³ The immigration officer must be satisfied that he or she works abroad and has no intention of transferring his or her base to the UK even temporarily. Business visitors are expected to receive their salary from abroad but may receive reasonable expenses to cover the costs of their travel and subsistence. They must not receive a salary or fee from a UK source.⁴ The 'list of typical business visitors' in the current IDI⁵ also includes those coming to purchase trade goods and those coming for training in techniques and work practices used in the UK, provided that the training is confined to observation, familiarisation and classroom instruction. Others accepted as business visitors under the instructions as a matter of administrative policy, although strictly falling outside the visitor provisions,⁶ include:

- those delivering goods and passengers from abroad, such as lorry drivers and coach drivers, provided they are genuinely working an international route;⁷
- tour group couriers who are contracted to a firm outside the UK, who seek entry to accompany a tour group and intend to leave with that group;
- those coming as speakers at a 'one-off', non-commercial conference;
- advisers, consultants, trainers, trouble-shooters, etc who are employed abroad (directly or under contract) by the same company or group of companies to which the client firm in the UK belongs. Their involvement must not extend to actual project management or to providing advice or consultancy services direct to clients of the UK company. Training should be for a specific 'one-off' purpose (eg in the use of products manufactured overseas, or specific to the operation of the group of companies of which the UK firm is a member), should not go beyond classroom instruction and should not otherwise be readily available here;
- representatives of computer software companies coming to install, debug or enhance their products. They may also be admitted as visitors to be briefed as to the requirements of a UK customer but may not use their expertise to make a detailed assessment of a potential customer's requirements, which is regarded as consultancy work for which a work permit is required;
- representatives of foreign manufacturers coming to service or repair their company's products within the guarantee period;
- representatives of foreign machine manufacturers coming to erect and install machinery too heavy to be delivered in one piece, as part of the contract of purchase and supply;
- monteurs—workers coming for up to six months to erect, dismantle, install, service, repair or advise on the development of foreign-made machinery.

In addition, permission may be given to allow a visitor entry for purposes which arguably involve provision of a service such as giving professional advice or taking instructions, where the visit is short (for a day or so), is 'one-off' and without significant implications for the resident workforce.⁸

¹ HC 395, para 41(iii) and (iv). For special dispensation to enter as a visitor for recognised festivals and charity concerts, which would normally require a work permit, see chapter 10; and see IDI (Jul/03), Ch 17, s 3 for a list of such events.

² HC 395, para 42.

³ HC 395, para 40.

⁴ IDI (Feb/06), Ch 2, s 1, Annex B, para 5. See also the list at DSP, Ch 10.6.

⁵ IDI (Feb/06), Ch 2, s 1, Annex B, para 5.1.

⁶ IDI (Feb/06), Ch 2, s 1, Annex B, para 5.2.

⁷ The majority of long-distance lorry-drivers come from the EEA in any event, or are employed by an EEA-established company; in either case they are covered by the EC free movement provision: *Rush Portuguesa Lda v Office National d'Immigration* [1990] ECR I-1417; see chapter 7 below.

⁸ IDI, Ch 2, s 1, Annex B, para 5.2. This could be a foreign lawyer coming to consult with a British client on the effect of foreign law. In addition, ministers of religion and preachers may come as visitors for preaching tours lasting no longer than six months, provided this is not disguised employment: DSP, Ch 10.5.

Academic visitors

9.20 The academic visitor category has been a concession outside the Immigration Rules allowing academics to visit the UK for 12 months to undertake certain academic activities,¹ but is now treated as part of the new Business Visitor rules, as we have described in para 9.18, above. In fact, of course, academics visit the UK in order to undertake a variety of activities and entry clearance applications from visiting academics are usually made under one of four categories: Ordinary Visitor,² Business Visitor,³ Academic Visitor under the concession, and Sponsored Researcher. The normal rule is that academics coming to the UK to carry out paid research or to lecture for a fee must have a work permit or come in under the Highly Skilled Migrant Programme (HSMP). All postgraduate researchers who are studying for a UK qualification should enter as students. Recent graduates, especially those who gained their degrees in the UK, who wish to do research would not normally qualify under the concession and will need a work permit. But a concession is made outside the Immigration Rules for certain specified academics to come to UK academic institutions as visiting academics and to remain for as much as 12 months, double the allowed period for normal visitors.⁴ In all other respects, they must satisfy the rules for visitors and they may be accompanied by their families. Applications for leave to enter or remain in the UK as an Academic Visitor for longer than six months must apply for an entry clearance before leaving their home country.⁵ An individual seeking leave under this concession must be well qualified within his or her own field of expertise. They may be on sabbatical leave from their university or college and wish, for example, to do research for a book, or they may be academics (including doctors) taking part in formal exchange arrangements with UK counterparts. Eminent senior doctors and dentists may come to take part in research, teaching or clinical practice. They should not receive funds from a UK source, but are allowed payments of expenses and reasonable honoraria as well as payments on an exchange basis. The concession only covers work in the UK

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with permitted academic institutions but not those who are on sabbatical leave from private research companies, who are not eligible for leave under these provisions. Twelve months in total (from the date of entry to the UK) is the maximum period of stay permitted under these provisions. It is not permitted to switch into leave as an Academic Visitor after entry in any other category, and no one in this category is permitted to switch into work permit employment.

¹ DSP, Ch 10.11.

² The Visitor category may be appropriate for those academics who want to come to the UK simply to share knowledge or experience, or to hold informal discussions with their UK counterparts. The Visitor category may also be suitable for applicants who intend to conduct research for their own private purposes – such as to do research for a book – and are funded from a UK source (some fellowships exist to facilitate such research). See DSP, Ch 10.11.

³ The Business Visitor category may be appropriate for those academics who want to come to the UK for more formal discussions, or to speak at non-commercial conferences (where the conference is a ‘one-off’). This category may also be appropriate for those academics who want to come to the UK to observe techniques or practises used in the UK, provided that their activity is confined to observation, familiarisation or classroom instruction. See DSP, Ch 10.11.

⁴ IDI (Jul/06), Ch 2, s 1, Annex B, para 1, which contains all the details of the concession. The following text is a distillation of the IDI and no further footnote references need to be made.

⁵ See 9.2, above.

Entertainers and sportspersons

9.21 As from 27 November 2008 these provisions have been made subject for the first time to the Immigration Rules (see below). Professional entertainers and sportspersons, players and coaches, who wish to come and work in the UK usually need work permits unless they are EEA citizens or Swiss. But the position is much less clearcut, where someone seeks entry for a single concert, a golf tournament or a football match. The Immigration Rules and the DSP are silent and we have to rely on the Home Office IDI to find out who can come in as a visitor and who has to get a work permit.¹ The IDI (Feb/06) distinguishes between amateurs and professionals. It is alright for amateurs to be given board and lodgings and reasonable expenses, but not appearance money, fees or sponsorship or cash prizes. Amateur sportspersons can join amateur clubs, provided that the team is represented wholly or predominantly by amateur players and they are not being paid by the club in cash or in kind other than board and lodging and reasonable expenses arising from sporting activity (for example reasonable sponsorship of equipment) and provided they are not giving coaching.² Professionals can come as visitors for personal appearances and promotions such as signing album covers, television chat shows, the publication of a book, negotiating contracts, discussing sponsorship deals etc, provided no performance other than a private audition or trial is involved. Professional sportspersons can come in as visitors to take part in a specific event or tournament, such as the British Open Golf or Wimbledon tennis, or a series of events as individual competitors or as members of overseas touring rugby, soccer or cricket teams, or a boxer coming for one fight. Amateurs or professionals may also come to take part in specific one-off charity sporting events, testimonials, benefit and exhibition matches, even

though they may be joining UK-based teams, provided that they do not receive payment other than for travelling and other expenses. In all other cases, on our reading of the IDI, they will need a work permit.

¹ IDI (Feb/06), Ch 2, s 1, Annex B and IDI, Ch 17, s 8.

² IDI, Ch 17, s 8, para 3.3.

Entertainer Visitors

9.21A Entertainer Visitor is a new category of visit introduced by HC 1113 as from 27 November 2008. The requirements to be met by a person seeking entry under this category, set out in HC 395 para 46S, are that he or she: (i) is genuinely seeking entry for not more than six months; (ii) meets the requirements of the General Visitor rules contained in sub-paras 41(ii)–(viii) and (x)–(xii) and (iii) intends to do one or more of the following during his or her visit:

- a. to take part as a professional entertainer in one or more music competitions; and/or
- b. to fulfil one or more specific engagements as either an individual Amateur entertainer or as an Amateur group; and/or
- c. to take part, as an Amateur or professional entertainer, in a cultural event (or one or more of such events) that appears in the list of events to which this provision applies that is published in guidance issued by the United Kingdom Border Agency; and/or
- d. serve as a member of the technical or personal staff, or of the production team, of an entertainer coming for one or more of the purposes listed in (a), (b), or (c).

If the person satisfies each of the above requirements, leave to enter as an Entertainer Visitor may be granted for a period not exceeding 6 months, subject to a condition prohibiting employment.¹ Six months is the maximum permitted leave which may be granted to an Entertainer Visitor.² Entertainer Visitors cannot generally switch to any other class of visit during their stay other than a medical one, should the need arise (see para 46V(iii)). Although this is a new arrival into the Immigration Rules the full ambit and reach of the Rules will depend very much as before on published guidance given by the Home Office.

¹ HC 395, para 46T.

² HC 395, para 46V.

Sports Visitors

9.21B Sports Visitor is a new category of visit introduced by HC 1113 as from 27 November 2008. The requirements to be met by a person seeking leave to enter the United Kingdom as a Sports Visitor, set out in para 46M of HC 395 are that he or she: (i) is genuinely seeking entry as a Sports Visitor for up to six months; (ii) meets the requirements of the General Visitor rules contained in sub-paras 41(ii)–(viii) and (x)–(xii); and (iii) intends to do one or more of the following during his or her visit:

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- a. to take part in a particular sporting event as defined in guidance published by the United Kingdom Border Agency, a tournament or a series of events;¹
- b. to take part in a specific one off charity sporting event, provided no payment is received other than for travelling and other expenses;
- c. to join, as an Amateur,² a wholly or predominantly amateur team provided no payment is received other than for board and lodging and reasonable expenses;
- d. to serve as a member of the technical or personal staff, or as an official, attending the same event as a visiting sports person coming for one or more of the purposes listed in (a), (b) or (c).

If the person satisfies each of the above requirements leave to enter as a Sports Visitor may be granted for a period not exceeding 6 months, subject to a condition prohibiting employment.³ Six months is the maximum permitted leave which may be granted to a Sports Visitor.⁴ Sports Visitors cannot generally switch to any other class of visit during their stay other than a medical one should the need arise (see para 46P(iii)). Although this is a new arrival into the Immigration Rules the full ambit and reach of the Rules will depend very much as before on published guidance given by the Home Office.

¹ A 'Series of events' is two or more linked events, such as a tour, or rounds of a competition, which do not add up to a league or a season: HC 395, para 6.

² An 'Amateur' is a person who engages in a sport or creative activity solely for personal enjoyment and who is not seeking to derive a living from the activity.

³ HC 395, para 46N.

⁴ HC 395, para 46P.

Medical treatment

9.22 Under the Immigration Rules visitors may be admitted for private medical treatment at their own expense, provided that they meet the ordinary requirements of the visitor rule (no work or provision of services, no study at a maintained school, maintenance and accommodation and ability to meet the costs of the return or onward journey).¹ In the case of a passenger suffering from a communicable disease, the medical inspector must be satisfied that there is no danger to public health.² If required to do so, the passenger must be able to show that any proposed course of treatment is of finite duration and that he or she intends to leave the UK at the end of it,³ but the passenger is not required to be precise about the length of it.⁴ Before being admitted for medical treatment a passenger may be required to produce evidence of his or her medical condition, of the arrangements for consultation and treatment, the estimated costs, the likely duration and the availability of sufficient funds in the UK to meet the cost, and may be required to give an undertaking to this effect.⁵ The IDI state that the treatment may be from a GP or alternative medical practitioner, but that leave granted for such treatment will not be extended beyond six months.⁶ The reference in the Rules to consultation or treatment 'at his own expense' does not mean that the visitor must necessarily pay personally.⁷ Nor is the availability of treatment in the passenger's own country a ground for refusing admission.⁸ Where leave is granted it will

normally be for a period not exceeding six months, subject to a condition prohibiting employment.⁹ If the passenger cannot meet all the requirements of the Rules, leave is to be refused.¹⁰

HC 1113 has added the following additional requirement for entry to the existing list, set out in HC 395, para 51: (i) the person seeking entry for medical treatment meets the requirements of the General Visitor rules contained in sub-para 41(iii)–(vii), (ix)–(x) and (xii) of HC 395. Paragraph 54 contains a similar requirement when the person is applying for an extension of leave. Visitors under the Approved Destination Status (ADS) with China cannot switch to a medical visit during their stay (para 54(v)).

¹ HC 395, para 51(i), referring to para 41(iii)–(vii).

² HC 395, para 51(ii).

³ HC 395, para 51(iii) and (iv).

⁴ See *Foon v Secretary of State for the Home Department* [1983] Imm AR 29 and *Onofriou* (2704).

⁵ HC 395, para 51(v).

⁶ IDI (Dec/01), Ch 2, s 3, Annex F, para 6.

⁷ See *Foon v Secretary of State for the Home Department* [1983] Imm AR 29.

⁸ *Mohan v Entry Clearance Officer, Lahore* [1973] Imm AR 9.

⁹ HC 395, para 52.

¹⁰ HC 395, para 53.

Parent of a child at school

9.25 Under early Immigration Rules, visits for family purposes for quite long periods at a time were allowed.¹ In *Hamilton v Entry Clearance Officer, Kingston, Jamaica*² a three-year visit by a mother, while her daughter did a teachers' training course, was allowed. Family visits to be with older children have long been impossible, because of the six-month time limit,³ but since September 2000 there has been specific provision in the rules for the parents of young children (under 12) at independent fee-paying schools.⁴ The child must meet all the rules relating to students who have their main home outside the UK, to be given leave to remain for 12 months at a time.⁴ Thus the parent who wishes to remain continuously in the UK with a child during his or her primary education may do so, provided they are not seeking to make the UK their main home.

A requirement for leave to enter or remain as the parent of a child at school is that the child is attending an independent fee paying school and meets the requirements of the student rules as set out in para 57 of the Immigration Rules in HC 395. Due to the additional requirements within the student rules, para 56A(ii) of HC 395 is amended accordingly to ensure that, where relevant, the new requirements are met.

HC 1113 clearly contains an omission, but we presume (by inference) that the requirement for entry it has added to the existing list, set out in HC 395, para 56A, is that: the parent must now meet the requirements of the General Visitor rules contained in sub-paras 41(ii)–(xii). Visitors under the Approved Destination Status (ADS) with China cannot switch to this category during their stay (para 54A(vi)).

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- ¹ See Cmnd 4298 (pre-1973 Rules), para 12; *Afoakwah v Secretary of State for the Home Department* [1972] Imm AR 17.
- ² [1974] Imm AR 43. See *Nourai v Secretary of State for the Home Department* [1978] Imm AR 200; *Obeyesekere v Secretary of State for the Home Department* [1976] Imm AR 16.
- ³ *Kelada v Secretary of State for the Home Department* [1991] Imm AR 400.
- ⁴ HC 395, paras 56A–C, inserted by Cm 4851 in Sep 2000. The Rule requires satisfactory evidence of adequate and reliable funds for maintaining a second home in the UK and compliance with all the visitor requirements save the six-month time limit. See IDI (Feb/06), Ch 2, Annex B, para 12.

Carers

9.26 The rules make no express provision for applications from persons here as visitors or in another temporary capacity seeking leave to remain to care for a sick relative or a friend who is suffering from a terminal illness, but there may be sufficient compassionate circumstances to warrant the grant of leave to remain outside the rules for a longer period than six months, in which case the IDI state that it should be made clear to applicants that their stay is only in a temporary capacity and that once alternative arrangements have been made or if the patient should die then the ‘carer’ will be expected to return home.¹ Where an applicant wishes to care for a friend or relative for a short period, the application may be considered under the requirements of the rules relating to visitors.² Applications for leave to remain in order to care for a sick or disabled friend should normally be refused. However, in an emergency (eg where the patient has suddenly fallen ill and there is insufficient time to arrange permanent care or where there is nobody else in the UK to whom the patient can turn) leave to remain may granted for a period of three months, but an extension of further leave should not be given unless there are wholly exceptional circumstances.³ Under a further concession outside the rules⁴ it is acceptable for visitors to act as temporary child minders for relatives where: (i) the visitor is a close relative of the parent (eg parent, sibling, in-law). More distant relatives are only acceptable if they have formed part of the family unit or are the closest surviving relatives of the parents; (ii) neither parent is able to supervise the daytime care of the child; (iii) it is not simply an arrangement to enable both parents to take gainful employment or to study; (iv) neither parent is in a category leading to settlement; (v) the visitor will not receive a salary (disregarding provision of board, accommodation and pocket money); (vi) the visitor intends to remain in the UK for not more than six months. In both these cases the carer or baby minder retains the status of visitor, provided they do not receive pay.⁵ Under the Citizens’ Directive ‘the host member State shall, in accordance with its national law, facilitate entry and residence for ... family members ... where serious health grounds strictly require the personal care of the family member of the Union citizen.’⁶ In *TR (reg 8(3) EEA Regs 2006)*⁷ the Tribunal examined the right of family members to act as carers under the EEA Regulations. They held that the use of the word ‘serious’ requires the ‘health grounds’ to be well beyond ordinary ill health and as a matter of practice to require detailed medical evidence in support of any claim. The Regulation of Care (Scotland) Act 2001 provided a useful definition of ‘Personal care.’ The word ‘Strictly’ is a restrictive or limiting requirement and imports a need for complete compliance or exact performance and reinforces the need for personal care to be provided on a day to day basis.

- ¹ IDI (Feb/06), Ch 2, s 1, Annexe B, para 6; Ch 17, s.2, para 1.
- ² IDI (Feb/06), Ch 17, s 2, para 2.
- ³ IDI (Feb/06), Ch 17, s 2, para 3.
- ⁴ IDI (Feb/06), Ch 17, s 2, Ch 2, s 1, Annexe B, para 7.
- ⁵ See *Goodluck* (4244) (undertaking child-minding duties for a young mother and her baby for payment was employment, not just a visit); *Tan (Swee Hong)* (5212) (looking after a sister's baby for payment was employment). The IDI (Jun/03), Ch 2, s 1, Annex B, para 6 makes it clear that a childminder may be provided with board, accommodation and pocket money.
- ⁶ Directive 2004/38/EC. This has been transcribed into domestic law by reg 8(3) of the EEA Regulations 2006, SI 2006/1003.
- ⁷ [2008] UKAIT 00004 (28 December 2007).

Visitors from China

9.29 HC 486 created a new category of 'ADS visitor'¹ or those seeking to enter the UK under the terms of the Memorandum of Understanding (MoU) on visa and related issues concerning tourist groups from the People's Republic of China to the UK.

The new rule is intended to regulate outward tourism from China to the UK by providing a mechanism for issuing visas for groups of Chinese tourists to authorised travel agents. The new category is necessary because the terms of the MoU differ from the existing requirements for visitors under the Immigration Rules. ADS visitors will have to meet the requirements for ordinary visitors at para 41(ii)–(vii) of HC 395, but in addition, applicants must be Chinese nationals; must be genuinely seeking entry as a visitor for a maximum period of 30 days; must intend to enter, travel and leave the UK as part of a group and will not be permitted to extend their stay beyond the maximum 30-day period.² In conjunction with these rules changes, the Immigration (Leave to Enter and Remain) (Amendment) Order 2005, which came into force on 5 April 2005, provides that visas issued pursuant to the MoU shall have effect as single entry visas and have effect as leave to enter on one occasion unless endorsed as dual entry visas; in which case they shall have effect as leave to enter on two occasions.³ As from 27 November 2008, HC 1113 has added the following additional requirement for entry to the existing list, set out in HC 395, para 56G: the visitor must meet the requirements of the General Visitor rules contained in sub-paras 41(ii)–(xii).

- ¹ Approved Destination Status, created by The UK/China ADS Memorandum of Understanding which was signed on 21 January 2005.
- ² In order to prevent ADS tourists being able to extend their stay by applying for an extension in another visitor category, visitors under the ADS with China cannot switch to a general visit or a medical or parent visit during their stay (paras 44(iii), 54(v) and 54A(vi)).
- ³ SI 2005/1159.

Visitors—switching categories

9.31 The switching rules from visitor to student have been changed yet again. Previously non-visa nationals who were admitted to the UK as visitors could be granted leave as a student if they had been accepted on a course of degree

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level or above. All other visitors (visa nationals, and non-visa nationals accepted for courses below degree level) were prohibited from gaining leave as a student without having the necessary entry clearance.¹ Visitors who wish to remain in the UK in order to do something else have quite limited options. They cannot generally switch to other categories of visitor, except medical visitor; but Child Visitors can become General Visitors (see 9.16). However, they can apply for indefinite leave, if they are Gurkhas, or foreign or Commonwealth citizens, who have seen service in the British armed forces.² But they cannot switch to other temporary categories such as trainee,³ au pair⁴, or student other than a student nurse who is a non visa national⁵ or a medical or dental graduate undertaking a clinical attachment or dental observer post.⁶ People who wish to visit with a view to enrolling on a course or going to college need to obtain a prospective student visa before leaving home. A non-visa national who obtains entry as a visitor while harbouring an intention to study risks summary removal as an illegal entrant.⁵ The position of visitors who are EEA, Swiss or Turkish nationals under community law is dealt with in chapter 7.

¹ HC 1016 has now removed the more favourable rules for non-visa national visitors who have been accepted for courses of degree level or above, so that they too must have entry clearance as a student or prospective student before they will be allowed to gain leave as a student. See HC 395, para 60(i), as substituted by HC 1016, with effect from 3 April 2006. There was a brief exception. Non-visa nationals who were granted leave to enter as a visitor before 1 July 2006 were not subject to this rule change and were able to continue to enjoy the same rights as before: HC 395, para 60(i)(b).

² HC 395, paras 276I (Gurkhas) and 276O (foreign and Commonwealth citizens), as inserted by HC 1112, as from 18 October 2004.

³ HC 395, para 119(ii).

⁴ HC 395, para 92(i).

⁵ HC395, para 67.

⁶ HC 395, paras 75G and 75K.

Appeals by visitors

9.34 An applicant who applied to enter the UK to visit a family member has the right to appeal against the refusal of an entry clearance.¹ A 'family visitor' is a person who applies for entry clearance to visit a spouse, father, mother son, daughter, grandfather, grandmother grandson, granddaughter, brother, sister, uncle, aunt, nephew, niece or first cousin, the father, mother, brother or sister of his or her spouse, the spouse of his or her son or daughter, his or her stepfather, stepmother, stepson, stepbrother or stepsister, or unmarried partner with whom he or she has lived for two of the last three years before the day on which his application for entry clearance was made.² It is not clear whether this covers adoptive relationships. Anyone not covered by the list would have a right of appeal on discrimination or human rights grounds only.³ The right of appeal attaches only to refusal of entry clearance, not to the refusal of leave to enter in this capacity. Thus application for entry clearance is essential to obtain appeal rights. The Immigration, Asylum and Nationality Act 2006 (Commencement No 8 and Transitional and Saving Provisions) Order 2008⁴ brings into force on 1 April 2008, s 4 of the IAN 2006 (restricted right of appeal in relation to refusal of entry clearance for visitor or student) subject to saving and transitional provisions, which provide that notwithstanding the

commencement of s 4 and the substitution of s 88A of the 2002 Act and s 23 of the 1999 Act, s 4(1) (appeals: entry clearance) and s 4(2) of the 2006 Act (monitoring refusals of entry clearance) shall have effect only so far as they relate to applications of a kind identified in immigration rules as requiring to be considered under a 'Points-Based System'.

¹ Nationality, Immigration and Asylum Act 2002, s 90.

² Immigration Appeals (Family Visitor) Regulations 2003, SI 2003/518, reg 2(2). In *SB (family visit appeal: brother-in-law) Pakistan* [2008] UKAIT 00053, the relationship of brother- (or sister-) in-law between an appellant and sponsor was held to fall within the Immigration Appeals (Family Visitor) Regulations 2003 where the sponsor is the sibling of the appellant's spouse but not where the appellant's brother or sister is married to the sponsor in the UK.

³ For appeals and judicial review see chapter 18.

⁴ SI 2008/310.

STUDENTS

9.35A In March 2006 *A Points-Based System: Making Migration Work for Britain* (CM 6741) was published.¹ This set out proposals to bring in a tough new Australian-style points system comprising five tiers. Tier 4 will deal with students. The intention is to implement Tier 4 in 2009.² Under the new scheme all colleges and universities that want to recruit foreign students will need a licence to do so and will have to take on a policing role for their international students, helping the government crack down on those who abuse the system. The licence acts as a pledge from the college or university that they accept responsibility for the student while they are in the UK. They face losing their licence and being banned from recruiting any more international students, if they fail to (i) keep copies of all their foreign students' passports; (ii) keep and update their students' contact details; (iii) alert the UKBA to any students who fail to enrol on their course; (iv) report unauthorised absences to the UKBA; and (v) inform the UKBA if any student stops their studies.³ Students on courses for longer than 12 months will have to show they have sufficient funds to pay their first year of fees, plus £9,600 to cover their first year in the UK. Students wishing to bring their dependants with them will need to show they have a further £535 per month for each person they bring and stricter rules on work placements for students will also ensure that the UK's labour market is protected.⁴ From 28 July 2008, employers and educational institutions could apply to join the sponsor register for Tiers 2, 4 and 5 of the points-based system. By the 5 January 2009, the UKBA website reported that more than 520 universities and colleges had applied to join the new sponsorship register which will allow them to bring foreign students into Britain to study.

¹ This document can be found at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/pbsdocs/>

² Explanatory Statement to HC 1113 at para 6.2.

³ In a letter to the Guardian, organised by Ian Grigg-Spall, academic chair of the National Critical Lawyers Group and signed by leading academic lawyers and the head of the lecturers' union, it is said that the proposed new rules for students goes far beyond the present monitoring of student progress systems in universities, which has as its basic purpose assisting students to reach their full potential. 'In our view it is hard to justify such detailed monitoring of overseas students, even for immigration control purposes. Surely the Border Agency just needs to know students have registered and are at the university? It

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does not need to have this constant monitoring. This police-like surveillance is not the function of universities, and alters the educational relationship between students and their teachers in a very harmful manner.’

⁴ UKBIA website News, 30 July 2008.

Intention to leave

Student nurses and midwives

9.49 Student nurses and midwives who qualify in the UK can go straight into work permit employment, but with nurse and midwives who have qualified overseas, their entry into the UK labour market has been much more fraught and uncertain. Under the old ‘supervised practice programme’ (formerly called an ‘adaptation’ course), overseas qualified nurses and midwives would apply to the Nursing and Midwifery Council (NMC) for pre-registration and then enter the UK as either student nurses or as work permit holders. They were arbitrary alternatives. However, neither route was entirely appropriate as a period of supervised practice was simply a bridge to employment in the UK. The requirements of the student nurse rules relating to intentions to leave are inappropriate as the whole idea of the supervised practice course was to prepare and shunt the newly qualified nurses into employment as quickly as possible. On the other hand, it is a requirement of the work permit rules that a person is capable of taking the employment in question. Strictly, this requirement cannot be met until a nurse has completed supervised practice and been fully registered with the NMC. Now the situation has been dealt with by the creation by HC 645, which took effect on 30 November 2005, of an intermediate category of permit free employment while the nurse or midwife gets his or her adaptation training, before switching into work permit employment. These provisions have now been subsumed into the new points-based system. We deal with this in chapter 10.

Postgraduate doctors and dentists

9.51 Graduate doctors and dentists may both wish to spend time in the UK training for further qualifications at basic or higher specialist level. For a long time the Immigration Rules have catered for these needs under the student rules, although much of what is being done is clearly in the nature of employment training, and other doctors and dentists in non-training posts at the same grades as those covered by this category were in fact working under work permits. That policy has now been dramatically recast in the latest round of rule changes contained in HC 1016, which took effect on 3 April 2006.¹ The changes make a lot of sense. What is properly classified as on the job training is now moved into employment and the basic training is only kept under the student rules for those who have completed their medical or dentistry degrees in the UK. But why now? The government says that, first, the needs and the structure of the health service and medical training programmes have changed considerably since this category was introduced. Secondly, the number of places in UK medical and dental schools has increased, meaning that there are now more UK graduates seeking relevant training posts. There is

therefore no longer a need for a specific category in the Immigration Rules to enable doctors and dentists to train in the UK for many years, prior to either leaving the UK or switching into an employment or self-employment category.² For further changes under the new points-based scheme, see chapter 10.

¹ There was another set of rules, HC 974, laid before Parliament on the same day and coming into force on the same day in almost identical terms to HC 1016. They can be ignored.

² IDI (Jul/06), Ch 3, s 6: Explanatory Memorandum to HC 1016.

9.52 With effect from 3 April 2006, the revised rules for postgraduate doctors and dentists only made provision for those doctors and dentists who had completed their medical or dental studies in the UK¹ to take their Foundation Programme in the UK.² They qualify to take the Foundation Programme and nothing else. The Foundation Programme consists of one year at Pre-Registration House Officer level and one year at Senior House Officer level and was introduced on 2 August 2005 for doctors (although it only became compulsory in August 2007).³ The previous rules for Postgraduate Doctors and Dentists covered training at the following levels:

- Foundation Programmes;
- Basic Specialist Training;⁴
- Higher Specialist Training.⁵

Work permits can now be issued for training posts at these grades, if all the relevant requirements are met (see chapter 10 below).⁶ Those left in the student trainee category are still considered as trainees for this period, and are expected to leave the UK at the end of their training,⁷ unless they have been able to switch into work permit employment or one of the other categories of leave as set out in paragraph 70(vi) of the Immigration Rules.⁸ Consequently, this period of student training does not lead to settlement and any period spent in Foundation training will not count towards settlement, if a graduate later switches into a settlement category of employment or self employment.⁹ Other non-EEA doctors and dentists, who did not complete their medical degrees in the UK, will still be able to come to the UK. However, those taking up a Senior House Officer or Specialist Registrar post (or equivalent grades at either level) will now be considered as in employment for immigration purposes, and will need to meet the requirements of the work permit or other employment schemes. The same applies for to those wanting to undertake a Foundation Programme in the UK but who do not meet the requirements of the revised Immigration Rules introduced by HC 1016. According to the IDI, the new arrangements apply for all posts at these grades.¹⁰ There has previously been confusion about which of these posts are recognised training posts (and therefore eligible for leave as a postgraduate doctor or Dentist), and which posts at the same grade are not recognised as training posts, even where filled by trainee doctors or dentists (and where a work permit is therefore required). Since the changes to the rules for Postgraduate Doctors and Dentists, there is no longer any distinction between training and non-training posts for immigration purposes.¹¹

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- ¹ The applicant must have successfully completed and obtained a recognised UK degree in medicine or dentistry from either: (a) a UK publicly funded institution of further or higher education; or (b) a UK bona fide private education institution which maintains satisfactory records of enrolment and attendance: HC 395, para 70(i), as inserted by HC 1016. Secondly, they must previously have spent the final academic year of their above studies as an ordinary student, a student nurse, doing resits of their exams, or writing up a thesis, and have been enrolled as an ordinary student for at least one other academic year (aside from the final year) of their studies: HC 395, para 70(ii).
- ² HC 395, para 70(iii) and (iv), as inserted by HC 1016. Pre-Registration House Officer is now the first year of the Foundation Programme.
- ³ IDI (Jul/06), Ch 3, s 6.
- ⁴ This refers to Senior House Officer (SHO) and equivalent grades: IDI (Jul/06), Ch 3, s 6.
- ⁵ This refers to Specialist Registrar and equivalent grades. The General Practice Vocational Training Scheme (GPVTS) is also considered as higher specialist training: IDI (Jul/06), Ch 3, s 6.
- ⁶ Those caught by the change of rules are not catered for in the Immigration Rules, but should consult the very full list of interim and transitional measures in the IDI to safeguard their positions: IDI (Jul/06), Ch 3, s 6, pp 26–31.
- ⁷ HC 395, para 70(vi), as inserted by HC 1016.
- ⁸ These are: (a) a doctor or dentist undertaking a period of clinical attachment or a dental observer post; (b) a work permit holder; (c) a highly skilled migrant; (d) someone intending to establish themselves in business; or (e) an innovator. See HC 395, para 70(vi), as inserted by HC 1016.
- ⁹ IDI (Jul/06), Ch 3, s 6.
- ¹⁰ IDI (Jul/06), Ch 3, s 6.
- ¹¹ IDI (Jul/06), Ch 3, s 6.

PLAB tests

Spouses and children of students and prospective students

9.56 Spouses and civil partners and their children under 18 of a person admitted or allowed to remain as a student or prospective student¹ are to be given leave to enter in line, if they satisfy the requirements for leave to enter or remain. The rules do not require entry clearance, unless entry is sought for more than six months (except for visa nationals).² A spouse may be admitted if the couple are married, the marriage is subsisting and the couple intend living with each other as husband and wife during the student's stay. Likewise a civil partner may be admitted if the civil partnership is subsisting and the couple intend to live with each other as civil partners during the student's stay. There must be adequate provision for maintenance and accommodation of the couple and any dependants without recourse to public funds.³ The spouse or civil partner may be permitted to take employment if the period of leave granted is 12 months or more,⁴ but if not must not intend to seek it, and there must be an intention to leave the UK at the end of any period of leave granted.⁵ The child of a student or prospective student, if the child is not married or in a civil partnership, qualifies for admission if he or she has not formed an independent family unit and is not leading an independent life, is under 18 or has leave to enter or remain in the same capacity,⁶ can and will be maintained and accommodated adequately without recourse to public funds and will not stay in the UK beyond any period of leave granted to the child's parent.⁷ The children of a student may work if admitted for 12 months or more. Children of a student may also receive state education while their parent is studying here, but may not receive child benefit.⁸ Where the student

is on a short course and the period of leave granted is less than 12 months, the spouse, civil partner and the children will not be able to work. Clearly the ability of the spouse or civil partner to work is a very important factor and may be crucial to the student's continued ability to study and to fulfil the maintenance and accommodation provisions of the Immigration Rules.⁹

¹ Under HC 395, paras 57–75 (ordinary students, student nurses and post graduate doctors and dentists) or 82–87 (prospective students): see paras 76–80. Civil partners, as well as spouses, of students are admitted in line with the student partner's or spouse's leave under the amendments made by HC 582 as from 5 December 2005.

² See 9.47.

³ In *PA (Student's family: third-party support?) Bangladesh* [2008] UKAIT 00016, UKIAT has given a very narrow definition of the maintenance requirements of para 76 (leave to enter for spouses of students) of the Immigration Rules, holding that they are not met by the provision of maintenance by a third party. A person who comes as a student may well have the benefit of third party support for himself. It may be a government grant, it may be a scholarship or it may be parents or relatives. The considerations applying to a spouse are different and the draftsman of the Rules has chosen for the spouse the very same formulation as he or she chose for para 281 (maintenance of spouses).

⁴ HC 395, paras 77 and 78. The IDI recognise that it would clearly be wrong to penalise a person if the leave granted to the student is less than 12 months solely as a result of queuing and processing times. In those circumstances the dependant should be granted leave on Code 1 to cover the period applied for. IDI (Mar/06), Ch 3, s 4, para 4.4.

⁵ HC 395, paras 76–78, as amended by Cm 4851.

⁶ This covers a student's child who was under 18 when first admitted with or joining the student, and is now over 18 but still lives with the family and should not be disqualified and required to leave the UK.

⁷ HC 395, paras 79, 80, as amended by Cm 4851. Children may go to state schools while their parent is studying here, but will be expected to leave or to switch to private education when the parent's studies are complete. But children may be granted a short period of leave to finish a school year or take an important examination after a parent's studies are complete: IDI, Ch 3, s 4, paras 4.6–4.7.

⁸ IDI (Mar/06), Ch 3, s 4, paras 4.5 and 4.6.

⁹ See IDI (Aug/07), Ch 3, s 3, para 17.4; the potential earnings do not count but the actual ones do.

Extensions for students and student nurses

9.62 Those admitted as students can have their stay extended to continue a course or begin the next one, and prospective students may extend their stay to continue looking for a course (up to a six-month maximum)¹ and then as students. Non-visa nationals who entered as visitors or in some other temporary capacity used to be able to switch to degree student or student nurse status,² but can no longer do so,³ unless they switch to student nurse or are a medical or dental graduate undertaking a clinical attachment or dental observer post.⁴ To obtain an extension ordinary students must first meet certain requirements about their earlier stay. These are:⁵

- (a) they were last admitted to the UK in possession of a valid student entry clearance or valid prospective student entry clearance; or
- (b) they have previously been granted leave to enter or remain in the UK to re-sit an examination under the rules;⁶ or
- (c) if they have been accepted on a course of study at degree level⁷ or above; have previously been granted leave on a student union sabbatical; have been a work permit holder, on the international graduates scheme, or a participant in the working in Scotland scheme;⁸ or

(d) they have valid leave as an ordinary student; and

Secondly, they must meet the requirements for admission as a student set out in paragraph 57(i)–(ix) of the Immigration Rules, as amended.⁹ Thirdly, they must be enrolled on a full-time course of study which meets the requirements of paragraph 57.¹⁰ Fourthly, they need to produce satisfactory evidence of regular attendance during any course already begun or any other course for which they have been enrolled in the past.¹¹ However, an appellant cannot trade on his past good attendance if his attendance during current leave is poor and unacceptable.¹² A more difficult question is whether attendance is to be judged at the time of the decision on the application, and not by evidence showing that attendance has improved subsequent to the refusal;¹³ In some ways this may a bit of an academic question, because tribunals have said that the course they find relevant is the last one for which leave was last given; if that is ongoing they will look at the attendance up to the date of hearing or the last day of the course, whichever was the earliest.¹⁴ Fifthly, they need to show evidence of satisfactory progress in their course of study,¹⁵ including the taking and passing of any relevant exams.¹⁶ A lack of success in exams¹⁷ or a failure to sit them¹⁸ can be taken into account and may be determinative: *Obed v Secretary of State for the Home Department*.¹⁹ The grant of clearance to enter the United Kingdom as a student did not confine the entrant to a particular course of study. The Secretary of State has no authority to impose conditions on a student entrant as to the course he was to follow. Further, failing an examination did not always negate the making of satisfactory progress in a course of study within the meaning of the Immigration Rules, para 60(v). Although the wording of the rules is not clear, there is a discretion which involves taking into account all relevant matters including the exam failure. Tribunal decisions to the contrary should not be followed. Where there are doubts as to progress but attendance is satisfactory and all other requirements are met, leave may be granted but with a warning that failure to produce evidence of satisfactory progress could result in a refusal of a further extension.²⁰ Sixthly, they would not, as a result of the extension of stay, spend more than two years on short courses below degree level (ie courses of less than a year's duration, or longer courses broken off before completion).²¹ Seventhly, students whose studies are sponsored by a government or international scholarship agency must show that the sponsorship has not come to an end or, if it has, they have the written consent of their official sponsor for a further period of study and evidence that sufficient sponsorship funding is available.²² The rules enables students left stranded by a sponsoring government or agency, often because of a sudden change of government or civil war, to remain if they can find alternative funding and obtain the consent of the official sponsor.

¹ HC 395, para 85.

² HC 395, para 60(i)(a), (b), as amended, and para 67(i) (student nurses). The list of visa countries is set out in HC 395, Appendix 1.

³ HC 395, para 60(i) Transitional provisions (long since out of date) allowed non-visa national visitors to switch to studies below degree level if they entered the UK before 22 July 2004, or applied for student leave before 30 September 2004: IDI (Mar/04), Ch 3, s 3, para 3.10.2 (now replaced).

⁴ HC 395, paras 75G and 75K.

⁵ HC 395, para 60(i). All relevant parts of the rule need to be satisfied: *Mohey-ud-Din* (15998) IAS 1998 Vol 1 No 6, IAT.

- ⁶ This rule does not cover a person who was last admitted to complete a thesis under HC 395, paras 69G–69L. See also IDI (Aug/07), Ch 3, s 3, para 11.2.3.
- ⁷ This is defined as ‘degree level study’ in HC 395, para 6.
- ⁸ In accordance with HC 395, paras 87A–87F, 128–135, 135O–135T and 143A–143F.
- ⁹ HC395, para 60 (ii) as amended by HC 80, which came into force on 30 November 2007. This means that students wishing to extend their stay in the UK to undertake or continue with the designated postgraduate studies will be required to hold a valid ATAS certificate when applying for further student leave. See 9.36, above.
- ¹⁰ HC 395, para 60(iii). There were no transitional provisions enabling students to obtain extensions of leave after 1 January 2005 to continue studies at institutions which were not registered with the DfES: IDI (Dec/04), Ch 3, s 3, para 3.4. Now, following changes to the machinery of government in June 2007, the DfES Register of Education and Training Providers, for which this former department had responsibility, has been renamed as the Register of Education and Training Providers.
- ¹¹ HC 395, para 60(iv). The IDI state that, since poor attendance is linked with progress and may signify a lack of funds and/or *bona fides*, checks on funds and progress should be made whenever attendance checks are made: IDI (Aug 2007), Ch 3, s 3, para 15. But in *WR (Student: Regular Attendance; Maximum Period) Jamaica* [2005] UKAIT 00170, [2006] Imm AR 177 the Tribunal held that ‘regular’ in the context of HC 395, para 60(iv) meant ‘sufficiently often, habitual or frequent’ to meet the demands of the particular course, which was a question of fact in each case and there was no fixed percentage, but the greater the attendance the more likely that it would satisfy the rule. Students should be given an opportunity to explain any non-attendance: IDI (Aug/07), Ch 3, s 3, para 15.1. A person in the UK with student leave did not cease to be a student when his attendance fell below 15 hours per week, so as to enable the Secretary of State to remove him for breach of conditions (for working part-time): *R (on the application of Zhou) v Secretary of State for the Home Department* [2003] EWCA Civ 51, [2003] INLR 211.
- ¹² *JJ and SS (Student; regular attendance; which course) Gambia* [2007] UKAIT 00050.
- ¹³ *Juma v Secretary of State for the Home Department* [1974] Imm AR 96. This case may no longer be good law, because of the effect of s 85(4) Nationality, Immigration and Asylum Act 2002: see *DR (ECO post decision evidence) Morocco* [2005] UKIAT 00038 (starred); *LS (post decision evidence, direction, appealability) Gambia* [2005] UKIAT 00085; and see 18.63 below.
- ¹⁴ See *TY (Student; ‘satisfactory progress’; course of study) Burma* [2007] UKAIT 00007; *JJ and SS (Student; regular attendance; which course) Gambia* [2007] UKAIT 00050; and *ML (Student; ‘satisfactory progress’; Zhou explained) Mauritius* [2007] UKAIT 00061.
- ¹⁵ If after two years an English language student is seeking leave to remain to continue on a new course at the same level, of less than one year’s duration, the application should normally be refused: IDI (Aug/07), Ch 3, s 3, para 16.1. In *TB (Student application; variation of course, effect) Jamaica* [2006] UKAIT 00034 (6 April 2006) the AIT found that, where a student had chosen, prior to the date of decision, to take a course falling into a different student leave category so that at the date of decision it was clear she had abandoned any intention of following the course for which she had applied for an extension of stay, the nature of the change was such that she could not comply with the requirements of the Immigration Rules in relation to the course for which she had initially applied.
- ¹⁶ HC 395, para 60(v). Students should provide evidence of all examinations attempted, and their results: IDI (Aug/07) Ch 3, s 3, para 16.3. For accountancy and banking students the IDI (Aug/07) Ch 3, s 3, para 16.2 describes the entry requirements, structure of courses and examinations of the five main bodies offering qualifications (CIMA, ACCA, AAT, ABE and CIB) against which to track a student’s progress.
- ¹⁷ *R v Immigration Appeal Tribunal, ex p Gerami* [1981] Imm AR 187, DC; *Mahendran* [1988] Imm AR 492; *Amer v Secretary of State for the Home Department* [1979–80] Imm AR 87; *Blay* (18720) 23 June 1999. Passing exams is important, but it is not the only factor: *Sayeed* (G0068) IAS 1999 Vol 2 No 9, IAT. In *SW (Paragraph 60(v): meaning of ‘including’)* *Jamaica* [2006] UKAIT 00054 the AIT have taken a hard line on the need to pass exams, holding that whatever other evidence of progress is provided, the applicant is required to show that she has both taken and passed any ‘relevant examinations’. No other cases were cited or discussed. This rigorous line has been followed in *SM (Paragraph 60(v): ‘passing’ and ‘relevant’)* *Pakistan* [2007] UKAIT 00068, where the AIT held that failure in an examination is always fatal to an application for further leave under the Rules. But see

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- now *Obed v Secretary of State for the Home Department* [2008] EWCA Civ 747, (2008) Times, 23 July which has effectively overruled these AIT cases and followed *Gerami*.
- ¹⁸ *R v Secretary of State for the Home Department, ex p Adebodin* [1991] Imm AR 60. Dogged persistence over a lengthy period may not be enough to overcome repeated exam failure: *Ofori-Agyemang* (14323) IAS 1997 Vol 3 No 16. See below for rules on resits, para 69A.
- ¹⁹ [2008] EWCA Civ 747, (2008) Times, 23 July, [2008] Imm AR 747.
- ²⁰ IDI (Aug/07), Ch 3, s 3, para 16.3. Refusing further leave without a warning might be premature in the light of the instruction. Account should be taken of the student's family's investment: *Ofoajoku* [1991] Imm AR 68. Students who have been unable successfully to complete an access course (a 12-month course providing access to a degree course for those without qualifications) will normally be refused on the basis that they are unlikely to be able to follow a degree course: IDI (Aug/07), Ch 3, s 3, para 7.1.
- ²¹ HC 395, para 60(vi) as amended by Cm 6339 from 1 October 2004. The amendment reduced the total length of permissible short courses below degree level from four years to two and the length of each course to one year. It is not intended to prevent a person from taking short courses which form part of a planned course with a defined educational objective, but inquiries as to a student's educational plans should be considered where he or she has enrolled on a new course bearing no coherent relation to previous studies: IDI (Aug/07), Ch 3, s 3, para 13.2. Previous short courses may not matter if the extension is for a long course: *Navarthinarajah* (14373) ILD 2000 Vol 6 No 1.
- ²² HC 395, para 60(vii), amended by Cm 4851, paras 11, 12 (by substituting 'official' sponsor for 'original' sponsor). Failure to obtain written consent may result in refusal: HC 395, para 39A. Thus an appellant such as *Salah* (20272) 2 February 2000, IAS 2000 Vol 3 No 10, IAT, whose father was willing to sponsor at the end of an official sponsorship, would no longer qualify unless the official sponsor gave written consent for the switch.

Re-sits, writing up a thesis, and sabbaticals

9.65 The Immigration Rules enable students to apply for leave to enter or remain to re-sit examinations provided that they meet the requirements for admission as a student, or, if no longer enrolled and following a course as required by sub-paragraphs 57(i) to (iii), that they met these requirements in the previous academic year and can still fulfil the general requirements in sub-paragraphs 57(iv) to (viii).¹ They must have written confirmation from the school or college concerned that they are required to re-sit an examination,² and evidence of regular attendance on any course currently or previously taken.³ The sponsorship requirements apply,⁴ and applicants will be refused if they have previously been granted leave to re-sit the examination.⁵ The wording of this last Rule suggests that a re-sit leave may be available for each examination, although this will obviously be subject to the general student rules as to satisfactory progress.⁶ The period of leave granted will be whatever is sufficient to enable the student to re-sit the exam at the first available opportunity, and will be subject to a condition restricting, but not prohibiting, employment.⁷ Doctors may obtain extensions of leave for up to 18 months to re-sit the PLAB test.⁸ In *OG (Student – thesis – term time employment) Nigeria*⁹ the Tribunal held that the fact that a student is writing up a thesis rather than attending classes at a university does not exempt him from the limitation on paid work of twenty hours per week during term time.

¹ HC 395, paras 69A(i), 69D, inserted by Cm 4851 on 20 September 2000. Amendments to the rules, as a result of the introduction of the ATAS, makes a mandatory requirement for those intending to undertake postgraduate studies leading to a Doctorate or Masters degree by research, or a Taught Masters degree, in designated subjects, to obtain an Academic Technology Approval Scheme (ATAS) certificate from the Foreign and Commonwealth Office: HC 40, amending para 69A, above.

- ² HC 395, paras 69A(ii), 69D.
³ HC 395, paras 69A(iii), 69D.
⁴ HC 395, paras 69A(iv), 69D.
⁵ HC 395, paras 69A(v), 69D.
⁶ HC 395, para 60(iv).
⁷ HC 395, paras 69B, 69E. An additional two months is granted to allow time for the results to be received: IDI Ch 3 s 3, para 3.20.
⁸ HC 395 para 75D(v), inserted by HC 346 from 15 March 2005.
⁹ [2008] UKAIT 00057.

Changing from student status

9.71 Students can switch from one course to another within the limits set out at 9.61 above. An ordinary student can become a student nurse.¹ On graduation, medical students can take employment as house officers and undertake postgraduate training.² Other students can switch to Home Office-approved training or work experience.³ But the Immigration Rules do not allow the possibility of switching to other temporary categories, such as au pair⁴ or working holidaymaker.⁵ Graduates from British institutions,⁶ student nurses, doctors and dentists and overseas doctors admitted for PLAB tests and clinical attachments or dental observation⁷ may switch into other categories either as employees under the work permit scheme or become a GP under the Highly Skilled Migrants Scheme. Graduate students, who meet the requirements of the schemes, may also seek and take work under in the International Graduates Scheme or 'The Fresh Talent: Working in Scotland Scheme' (see chapter 10 below). These are stepping stones into later employment or self employment.⁸ Otherwise the only categories leading to settlement into which non-graduate and non-medical students may switch are: (i) Commonwealth citizens with a UK-born grandparent intending to take or seek employment;⁹ (ii) close relatives, such as a student child of parents who decide to settle,¹⁰ or a student wishing to remain as a dependent relative on compassionate grounds;¹¹ and (iii) students who marry someone settled here, or cohabit with an unmarried partner for two years, who may apply for leave to remain as a spouse or unmarried partner.¹² The positions described in this paragraph have now been subsumed into the points-based scheme, and although not much has changed, these new rules must be consulted. See further chapter 10.

- ¹ HC 395, para 67(i).
² HC 395, para 73.
³ HC 395, para 119(i) (substituted by Cmnd 5253).
⁴ HC 395, para 92(i).
⁵ There is now no scope for switching to working holidaymaker by students or anyone else under the rules, HC 395, para 98(i) having been repealed by HC 302.
⁶ HC 395, para 131A (inserted by Cmnd 5597).
⁷ HC 395, para 131B (as inserted), I31G, inserted by HC 346 from 15 March 2005.
⁸ HC 395, paras 135DB, 135DC (as inserted), 135DG, inserted by HC 346 from 15 March 2005. Students with official sponsorship need the written consent of their official sponsor; and HC 395, paras 135O, 135R (as inserted). To qualify, students must have obtained a second class honours or better degree, Masters or PhD before 1 May 2007 in a science or engineering subject approved by the DfES, but the scheme has been extended to those with a recognised UK degree, Master's degree, or PhD in any subject completed on or after 1 May 2007; or a postgraduate certificate or postgraduate diploma in any subject completed on or after that date: HC 395, para 135O, as amended by CM 7075, which took effect on 1 May 2007.
⁹ HC 395, para 189.

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¹⁰ HC 395, paras 298, 311 (adopted child).

¹¹ HC 395, para 317.

¹² HC 395, paras 284, 295D (inserted by Cm 4851). Certain students would require Home Office permission to marry: see chapter 11, below.

AU PAIRS

Nature of the arrangement

9.72 According to the current Immigration Rules, an 'au pair' placement is an arrangement whereby a young person comes to the UK to learn English, lives for a time as a member of an English-speaking family with appropriate opportunities for study, and helps in the home for a maximum of five hours a day in return for a reasonable allowance and with two free days a week.¹ The arrangement is open to young men and women from European but non-EEA countries (nationals of EEA countries are dealt with exclusively under EC law² and are excluded from the 'au pair' Rule). Apart from the reference to a 'reasonable allowance', the Rules are silent on pay³ and there is no supervision by Work Permits (UK) or the Department of Work and Pensions, so the relationship is open to exploitation and abuse.⁴ This category has now been subsumed into the new points-based system. See chapter 10 below.

¹ HC 395, para 88.

² Under community law au pairs and working holiday makers are workers and entitled to benefit from the free movement provisions of the EU; see *R (on the application of Payir) v Secretary of State for the Home Department*; *R (on the application of Ozturk) v Secretary of State for the Home Department*; *R (on the application of Akyuz) v Secretary of State for the Home Department* [2006] EWCA Civ 541, [2006] ICR 1314. See 7.157 below.

³ The IDI (Mar/04), Ch 4, s 1, Annex A refer (para 4) to an allowance of 'up to £55 a week. Any sum significantly in excess of this might suggest that the person is filling the position of domestic servant, or similar, which would require a work permit'.

⁴ Au pairs are not covered by minimum wage legislation. In a publication prepared by the Home Office in 1973 (when the arrangement was confined to young women) it was stated that an au pair 'receives her keep, entertainment and pocket money and is expected to help with the housework and take care of any children'. It referred to the relationship not as one between employer and employee but between 'the girl and her hostess'. 'Under a proper au pair arrangement the relationship between the hostess and the girl involves acceptance of social equality and is not founded on a mistress/servant basis': *Au pair in Britain* (1973) COI.

WORKING HOLIDAYMAKERS

9.75 Young citizens of specified Commonwealth countries, BOCs, BOTCs and BNOs¹ aged 17 to 30 inclusive² may be admitted to the UK as working holidaymakers if they satisfy the immigration officer that they are coming to the UK for a working holiday and that they intend only to take employment incidental to a holiday, and do not intend to engage in business or professional sport, or to work for more than 12 months during their stay.³ They must have the means to pay for their onward or return journey⁴ and not need to have recourse to public funds,⁵ and they must intend to leave the UK at the end of their working holiday.⁶ They must not have spent time in the UK on a previous working holidaymaker entry clearance.⁷ A working holidaymaker must be unmarried or not a civil partner unless the spouse or civil partner

qualifies in his or her own right and the two are taking a working holiday together.⁸ Working holidaymakers should be childless, except for children who will still be under five at the end of the working holiday.⁹ Entry clearance is required and leave to enter will be refused without one.¹⁰ A dependent child will only be admitted if both parents are making the trip, except where the working holidaymaker is a sole surviving parent, has sole responsibility for the child's upbringing, or there are serious and compelling family or other considerations and suitable arrangements for the child's care.¹¹ The child also needs entry clearance in this capacity.¹² If any of these conditions is not met, leave is to be refused.¹³ Prior to an amendment of the Immigration Rules relating to working holidaymakers (WHMs) by HC 302 in February 2005, the WHM Rules referred to leave being granted on arrival in the UK for a period not exceeding two years.¹⁴ The amendments in HC 302 were silent on the maximum period of stay. HC 104, which became effective on 6 July 2005, then made it clear that the two-year period starts from the date when the entry clearance became valid for use, not from the date of arrival in the UK. Then came HC 645 on 13 November 2005, which accidentally deleted Annex 3 to the Rules, which contained the list of countries whose nationals were eligible for working holidays in the UK. Finally, there was HC 697, one week later on 22 November 2005, which reinstated the list 'inadvertently deleted.' We hope this is the final jinx on WHMs. They deserve a better break. Under EC law EEA nationals who are working holiday makers are treated as workers and are entitled to the free movement rights of the EU.¹⁵ This category has now been replaced by new rules under Tier 5 of the new points-based system, where the new rules have created a much narrower and precise category, based upon a very narrow group of countries who provide reciprocal arrangements for British citizens. See chapter 10.

¹ HC 395, para 95(i), substituted by HC 302 from 8 February 2005. The specified Commonwealth countries are set out in Appendix 3 to the Immigration Rules. Although the Appendix currently contains nearly all Commonwealth countries and overseas territories, the Rules changes create the framework for bilateral agreements, contained in Memoranda of Understanding (MOU) with the country concerned. Each MOU will require a satisfactory returns agreement with the UK as a precondition to taking part in the scheme, and will contain provisions to suspend the bilateral scheme in the event of a sudden and unmanageable rise in applications: UK Visas to User Panel, 8 February 2005.

² The relevant date for the age requirement is the date of application: HC 395, para 95(ii) as substituted.

³ HC 395, para 95(vi). The restrictions on business, professional sport and on the total period of employment during a WHM's stay are new. Although the Rules no longer specify the length for which a WHM visa will be granted, the IDI, Ch 4 s 2 and Annex C, as amended to reflect the rule changes, indicate that the normal grant will still be two years. The changes do not include a transitional period for applications pending on 8 February 2005.

⁴ HC 395, para 95(iv).

⁵ HC 395, para 95(v). Money in a bank account is relevant to but not conclusive of means: *Tanveer* (L00008) IAS 2000 Vol 3 No 1, IAT.

⁶ HC 395, para 95(viii).

⁷ HC 395, para 95(ix) as substituted. This is a new provision. A working holiday visa is available only once. The IDI, Ch 4, s 2 and Annex C, indicate that the rule can be waived where the previous visa was not used, for good reason.

⁸ HC 395, para 95(iii).

⁹ HC 395, para 95(vii).

¹⁰ HC 395, paras 95(x), 97.

¹¹ HC 395, para 101(iv), substituted by HC 302 from 8 February 2005.

¹² HC 395, para 101(v).

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¹³ HC 395, para 103.

¹⁴ HC 395, paras 96 and 98 (as printed in the 5th edn of this work).

¹⁵ See 9.72, fn 2, above.

Chapter 10

WORKING, BUSINESS, INVESTMENT AND RETIREMENT IN THE UK

INTRODUCTION

Points-based system

10.2 The whole of this chapter has to be read bearing in mind that the introduction of the points-based system in 2008 has profoundly changed the commercial and business landscape. During the transition to a fully operating points-based system the old rules will still apply to applications for leaves to enter and remain made before the transition. So we have left intact most of the chapter details indicating only that a change to the points-based system has taken place as from a certain date. We also outline the main requirements of the points-based system which have already been brought into operation at 10.7A ff below.

Managed migration and rules versus schemes

10.3 The government's framework policy within which commercial immigration law now falls is known as the managed migration policy. Managed migration is a concept that has emerged from developments in recent years and particularly from the 2002 Home Office White Paper *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*. Identifying the UK's precise needs, such as for short-term casual labour, and opening up new migration routes into the UK to satisfy those needs, are key aspects of the UKBA's managed migration policies.

10.4 Certain commercial immigration categories which have come into existence within the managed migration framework have reinforced the difference between two distinct approaches to the formulation of commercial immigration law. Historically, categories such as businesspersons, together with certain employment categories, have been contained within the Immigration Rules, administered by Home Office officials based in the IND/BIA (now UKBA) at Croydon and subject to the statutory immigration appeals regime. By contrast, the work permit category was a 'scheme' whose requirements were set out in easily amended guidance notes and administered, not by the Home Office, but by the department of state responsible for employment matters. Refusals were not justiciable before the statutory immigration appellate authorities. Responsibility for the work permit scheme, and for processing work permit applications, shifted in 2001 from the Overseas Labour Section of the then Department for Education and Employment to a new Home Office

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department, Work Permits (UK). The distinction between categories wholly within the Immigration Rules and 'scheme'-based categories was reinforced by the addition of new scheme-based categories.

10.4A Those seeking to enter or remain in the non-scheme based categories applied in the normal way, either to an entry clearance officer abroad or to the IND/BIA, now UKBA. Those in the scheme-based categories needed first to obtain a separate prior written approval which might be in the form of a work permit,¹ some other form of prior approval, or another type of 'immigration employment document' (IED).² An IED includes work permits, Multiple Entry work permits, TWES permits, Seasonal Agricultural Work Cards and approval under the Highly Skilled Migrants Programme (HSMP). It also includes, in the words of the 2002 Act's Explanatory Notes, 'letters of permission issued in-country, which give authority to work and which underpin employment-related leave to enter or remain'. It has been the scheme, and not statute or even the Immigration Rules, that has described the principal requirements to be met for the issue of an immigration employment document (IED). While most IEDs, including those for highly skilled migrants, have been issued by Work Permits (UK), not all IEDs were; seasonal agricultural workers (whom we treat in the non-scheme category, because they have been treated as visitors who do work) applied direct to the approved operator, and the International Graduates Scheme participants applied to BIA in Croydon and not to Work Permits (UK). Innovators and exchange teachers (whom we treat under the non-scheme category, because the requirements for entry were mainly to be found in the Immigration Rules) also needed approval under a scheme, but they did not need IEDs. It was thus important to establish, in relation to any applicant, not only whether he or she needed a work permit, but also whether he or she fell within the scope of any scheme which required an IED, or some other form of approval, before an application for leave to enter or remain could be made.³

¹ Defined as '... a permit indicating, in accordance with the Immigration Rules, that a person named in it is eligible, though not a British citizen, for entry into the UK for the purpose of taking employment': Immigration Act 1971, s 33(1). The need for prior approval will change once these various schemes become points based under the new Tier 1 Migrant scheme, for which highly skilled migrants are the flagship.

² An IED, introduced in 2002, is defined to include 'a work permit ... and any other document which relates to employment and is issued for a purpose of immigration rules or in connection with leave to enter or remain in the United Kingdom': Nationality, Immigration and Asylum Act 2002, s 122(2).

³ These distinctions have caused some confusion as to what actual document a person needs to be able to fulfil the criteria of the Immigration Rules. In *R (on the application of Onotota) v Secretary of State for the Home Department* [2007] EWHC 797 (Admin), [2007] All ER (D) 60 (Apr) the Administrative Court had to deal with the issue of what constitutes 'a valid work permit' for the purpose of paragraph 128 of the Immigration Rules. The problem, said the court, is that the documentation required to work in the UK varies depending on whether an individual is present in the UK or not, because those applying outside the UK need 'a valid work permit' while those applying within the UK and who are given leave to remain as students, student nurses, working holiday makers or other categories require 'a valid Home Office Immigration Employment document for employment' and 'an Immigration Employment document' is not a specific 'work permit' (Silber J).

10.5 The ad hoc development of the rules has been to blame for the multiplicity of schemes and the lack of coherence among them. However, it is not hard to see why the Home Office prefers schemes to traditional immigration rules-based categories. Schemes are more flexible and refusals can be reviewed in-house as they fall beyond the reach of the statutory immigration appeals regime.¹ Overall, following the transfer of the Sheffield work permits bureaucracy to the BIA (now the UKBA) there was less and less cause to distinguish between Croydon and Sheffield – they both became part of the then BIA and their acts were the acts of the Secretary of State for the Home Department. But the distinction between Immigration Rules categories and the scheme-based categories – originally defined in terms of the two separate bureaucracies which administered them – became more sharp and significant than ever before in the period immediately preceding the introduction of the points-based system. As we shall see the points system cuts a swathe through the previous distinctions. First, the points-based system adopts the single application of the old permit free categories of employment. It is based on what the Home Office calls the concept of one decision. Secondly, although every application is regulated by the Immigration Rules and subject to the normal appeal procedure where applications are made in the UK, where they are made from abroad, like the decision to issue work permits, the substantive basis of the decision cannot be challenged on an appeal to the AIT but is only subject to a rather formal and restrictive administrative review. And, since the question whether an applicant has achieved the right score is largely a question of being able to tick enough boxes, the emphasis of the scheme is based on a need to achieve formal compliance, the assumption being that substantial compliance will already have been achieved by the prior calculation of the correct way in which the points are to be awarded.

¹ Section 88 of the NIA Act 2002 extinguishes appeal rights in certain circumstances, one being where the person concerned does not have an ‘immigration document’ (s 88(2)(b)). Section 88(3) defines an ‘immigration document’ as including ‘a work permit or other immigration employment document within the meaning of section 122’.

Points system

10.6 In March 2006 *A Points-Based System: Making Migration Work for Britain* (CM 6741) was published. This set out proposals to bring in an Australian-style points system comprising five tiers:

- Tier 1: Highly Skilled individuals to contribute to growth and productivity;¹¹ More detailed plans for Tier 1 were set out in a Statement of Intent published on 5 December 2007.
- Tier 2: Skilled workers with a job offer to fill gaps in the UK labour force;
- Tier 3: Low skilled workers to fill specific temporary labour shortages;
- Tier 4: Students;
- Tier 5: Youth mobility and temporary workers: people coming to the UK to fulfil primarily non-economic objectives.

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In its statement of intent published in December 2007, the government called this the biggest shake-up of the immigration system in its history.¹ The promised changes included implementing the Australian-style points system; counting all migrants in and out of the UK; and introducing compulsory identity cards for foreign nationals, so that the government would know who is here and what they are entitled to do. As promised they launched the points-based system in the first quarter of 2008, beginning with Highly Skilled migrants and sponsor registration. Applicants in this initial tier have not been asked to have sponsors, which means employers will not have to issue certificates of sponsorship. In other tiers involving employment, for example Tier 2 which has now replaced the old work permit category, sponsors will be required. The new Tier 1 will subsume eight existing immigration categories and one concession outside the Immigration Rules. These are listed at 10.7K, below. They have all become sub-categories of the Highly Skilled tier. Post-Study Work is also an important category, the government's aim being to retain the most able international graduates who have studied in the UK, who are free to seek employment without having a sponsor. But, unlike the other Highly Skilled sub-categories, it is there only to provide a bridge to highly skilled or skilled work. People with Post Study Work leave are expected to switch into another part of the points system and will only be given leave, which will be fixed at two years maximum. Once the two years is up, there will be no further leave, and if the ex-student moves into tier 1 employment or self employment, his or her time spent in Post-Study Work leave will not count towards reaching the five-year threshold needed to obtain settlement.

¹ BIA Publication, *Highly skilled migrants under the points system: Statement of Intent* (Dec/07), obtainable from the BIA website at: www.ind.homeoffice.gov.uk/6353/aboutus/tier1statementofintent.pdf. This and the following paragraphs have drawn heavily on the material in this publication, the new Immigration Rules contained in HC 321 and HC 607 and the explanatory memoranda to these rule changes.

10.7 One of the selling points of the points-based system is that the need for two applications will be replaced by a single application process, whether in or outside the UK. Applicants will have to provide documentary evidence (to be specified in guidance available before implementation) to support their claim for points. For example under the HSMP applicants were required to obtain an approval letter from the Home Office and to then make a separate application under the immigration rules for entry clearance or leave to remain. The same need for a double application applied to work permits. Under the points based system, applicants will make one application in which all the requirements will be considered. The Home Office call this the concept of one decision.¹ There will also be a single application fee for principal applicants. Fees will be set, according to the government, by balancing the need to recover the full cost of providing their services while maintaining the global competitiveness of the UK.

¹ Explanatory Memorandum to HC 321, para 7.5.

10.7A Appeal rights will be severely curtailed. Section 4 of the Immigration and Asylum Act 2006 already sets the scene, by removing the full right of

appeal for those applying from abroad to come to the UK under the points system. These restricted rights will be put in place as each points system tier is implemented, with transitional arrangements to ensure that applicants do not lose the right of appeal until each tier is fully operational. In this way appeal rights on overseas applications will be abolished in all Highly Skilled sub-categories, except where the appeal is brought on human rights or race discrimination grounds. In-country applicants will not lose their appeal rights, but, in accordance with s 19 of the UK Borders Act 2007, they will not generally be able to submit post-decision evidence in their appeals. Rights of appeal will remain for non-points system categories both in and outside the UK. However, applicants whose appeal rights are restricted will be able to seek one Administrative Review per application if they feel an error has been made in their decision. This rather feeble redress will essentially be a check that all the formal requirements of the application have been complied with. There will be no review, as we understand it, of substantial compliance and, if so, the whole scheme is likely to be a bit of a field day for lawyers seeking judicial review for their sponsoring clients, unless of course the government recognises that leave to enter or remain is a discretionary power and, therefore subject to the requirements of public law. ‘Robust’ checks of documents will not be enough if there is no proper exercise of discretion.¹

¹ Paragraph 73 of the Statement of Intent, UKBA, May 2008.

10.7B Tiers 1, 2 and part of Tier 5 have now been implemented, but not all the promised categories have been subsumed. Tier 1 was the first in line. It covers four routes of entry and stay in the UK:

- *Tier 1 (General)*: for migrants who wish to find highly skilled employment or self-employment in the UK;
- *Tier 1 (Entrepreneurs)*: for those investing in the UK by setting up or taking over, or being actively involved in the running of, a business;
- *Tier 1 (Investors)*: for high net worth individuals making a substantial financial investment in the UK;
- *Tier 1 (Post-Study Work)*: to enable international post-graduates to take up employment in the UK.

From 29 February 2008 until 30 June 2008 *Tier 1 (General)* was the only route which had been activated.¹ Initially the only applications dealt with under the points-based system were applications for leave to remain made in the UK. Then from 1 April 2008 the route was opened to applications in this category for entry clearance made in India.² In both these cases those applicants were no longer able to use the old HSMP rules respectively after 28 February and 31 March. Then from 30 June 2008 with the introduction of a further statement of changes to the Immigration Rules (HC 607) *Tier 1 (General)* was opened up to the whole world.³ At the same time, the other sub-categories of Tier 1 – *Tier 1 (Entrepreneurs)*; *Tier 1 (Investors)*; and *Tier 1 (Post-Study Work)* were put into operation on a global basis.

¹ HC 321.

² Explanatory Memorandum to HC 321 at para 7.4.

³ Explanatory Memorandum to HC 607 at para 7.5.

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Tier 1 (General)

10.7C This route replaces the old HSMP for highly skilled migrants.¹ The rule changes in HC 321 deleted the existing Immigration Rules for leave to remain as a highly skilled migrant from 29 February 2008 for in-country applications, from 1 April 2008 for applicants applying in India and from 30 June 2008 for everyone else. There are transitional arrangements for migrants who are already in the process of applying to become a highly skilled migrant at the date of these rule changes. The transitional provisions cater for migrants who have already applied for entry clearance or leave to remain as a highly skilled migrant before the date of the rules change, as well as migrants who have obtained a HSMP Approval Letter from the Home Office, but have not yet applied for entry clearance or leave to remain. We explain other changes to the HSMP at 10.120 and 10.120A below.

¹ The aim of the Tier, according to the government, is to boost the UK's economy by attracting and retaining the 'brightest and best' as workers or businesspeople. The requirements for both entry to and staying on in the UK are set at levels commensurate with that objective: Explanatory Memorandum to HC 607, para 7.

10.7D Migrants seeking to enter the UK in *Tier 1 (General)* will need entry clearance. They will need to obtain 75 points for a combination of attributes such as qualifications, age and previous earnings. Both the points awarded and the pass mark are similar to those that existed under the Immigration Rules for highly skilled migrants. Full details of the points that will be awarded for the various attributes, and the circumstances in which they will be awarded, are set out in Appendix A of the Immigration Rules. They will also need to have a knowledge of English equivalent to level C1 of the Council of Europe's Common European Framework for Language Learning.¹ Nationals of majority English-speaking countries, the list of which are set out at HC 195, Appendix B, para 2(b), will be deemed automatically to meet the language requirement. Full details appear in Appendix B of the Immigration Rules. Finally they will be required to have a sum of money specified in Appendix C of the Rules in case they fall on hard times. This goes beyond the usual requirement of maintenance and accommodation in other parts of the Rules, which do not require maintenance money up front.

¹ This is approximately equivalent to a GCSE pass at grades A–C.

10.7E Successful applicants under *Tier 1 (General)* will be given free access to the labour market, and will be able to work for an employer, or be self-employed, subject to one major exception. In general, these migrants will not be able to take a post as a doctor in training, unless they currently have leave under the HSMP or as a post-graduate doctor or dentist, who is seeking leave to remain as a *Tier 1 (General)* migrant. The same restriction will apply to those who applied under the HSMP prior to the start of the *Tier 1 (General)* category and to any dependants of migrants under the HSMP or *Tier 1 (General)*, subject to some exceptions.¹ *Tier 1 (General)* Migrants will be able to apply for settlement after five years in the UK, subject to meeting the requirements set out in the Immigration Rules.

¹ This provision is being introduced at the request of the Department of Health in order to support doctors who received their medical training in the UK to access taxpayer-funded NHS training posts. It is the Department of Health's view that this provision will help to maximise the return on the significant investment in post-graduate medical training and to secure the future supply of trained specialists: Explanatory Memorandum to HC 321, para 7.13.

Tier 1 (Entrepreneur)

10.7F This Tier is for use by business investors who wish to set up, take over, or be actively involved in, the running of a business. To qualify, an applicant will need to obtain 75 points based on much the same criteria as were used under the old business rules, which have now been deleted by HC 607. Thus they will need a minimum of £200,000 to invest in a new or existing UK business and by the time their initial leave expires they will have to show that their activities have created at least two new full-time jobs for employees settled in the UK. Full details of the points that will be awarded for their investment and business activity, and the circumstances in which they will be awarded, are set out in paras 36–41 of Appendix A of the Immigration Rules. Migrants in the Entrepreneur category will not be able to take employment outside the business or businesses they have established, joined or taken over, and will not be able to claim public funds. *Tier 1 (Entrepreneur)* migrants will be able to apply for settlement after five years in the UK, subject to meeting the requirements set out in the Immigration Rules.

Tier 1 (Investor)

10.7G This sub-category is for high net worth individuals making a substantial financial investment in the UK.¹ To qualify applicants will need to obtain 75 points against criteria similar to those that appeared in the old Investor route, which has been deleted by HC 607. Investors will need to have net assets of at least £1m, and will need to invest at least £750,000 in this country by way of UK government bonds, share capital or loan capital in active and trading UK registered companies (other than those principally engaged in property investment). Full details of the points to be awarded for their investment, and the circumstances in which they will be awarded, are set out in paras 42–50 of Appendix A of the Immigration Rules. Unlike the other categories of Tier 1 migrants, investors will not need a specific knowledge of English except when they apply for settlement nor will they need to show that they have a specific reserve of funds available to support themselves if they meet hard times. According to the government that would be unnecessary, as these people are by definition extremely wealthy. *Tier 1 (Investor)* migrants will be able to work if they wish to, except that they will not be able to take employment as a doctor in training. They will have no access to public funds. *Tier 1 (Investor)* migrants will be able to apply for settlement after five years in the UK, subject to meeting the requirements set out in the Immigration Rules.

¹ Explanatory Memorandum to HC 607 at para 7.14.

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Tier 1 (Post-Study Work)

10.7H This route is for international graduates who have studied in the UK. It replaces the two schemes, which previously catered for these people – the International Graduates Scheme and Fresh Talent: Working in Scotland. To obtain entry clearance, migrants will need to obtain 75 points on the basis of criteria relating to the qualification they have obtained and the institution they took it at. The scheme is only open to people who have obtained a degree or post-graduate diploma or certificate from a UK institution, or a Higher National Diploma from a Scottish institution. Full details of the points that will be awarded, and the circumstances in which they will be awarded, are set out in paras 51–58 of Appendix A, inserted by HC 607, into the immigration rules. Entrants under *Tier 1 (Post-Study Work)* will need a knowledge of English at the same level as under *Tier 1 (Entrepreneur)*. However, they will automatically meet this requirement by virtue of having obtained their qualification in the UK. Full details are in Appendix B of the Immigration Rules. Finally they will be required to have a sum of money specified in Appendix C of the Rules in case they fall on hard times. This goes beyond the usual requirement of maintenance and accommodation in other parts of the Rules, which do not require maintenance money up front. They will have no access to public funds.

10.7J Once admitted to the UK, *Tier 1 (Post-Study Work)* Migrants will be free to work in any job, except that they will not generally be able to work as a doctor in training. Leave for post study work will be granted for a maximum of two years, and no extensions will be allowed. Leave will not count towards settlement, but the Immigration Rules permit *Tier 1 (Post-Study Work)* migrants to switch into any other Tier 1 sub-category, or into the Work Permit route in Tier 2, subject to meeting the qualifying conditions.

Family members of Tier 1 migrants

10.7K Migrants under all sub-categories under Tier 1 will be able to be joined by their spouse, civil partner, unmarried or same sex-partner and their children under 18 at the time when they first apply for leave. The requirements that the family members will have to meet are broadly similar to those applying to family members under the rules which applied to the particular entry route which has been replaced by Tier 1. Dependants will be able to seek employment but they will not be able to switch into any points system tier other than as a dependant of a successful applicant in Tier 1. If dependants subsequently wish to apply to be in the UK in their own right, they will need to leave the UK in order to apply.¹ Spouses, civil partners and unmarried/same-sex partners will only be eligible for indefinite leave at the same time as the Tier 1 migrant if they have lived with him or her in the UK for at least two years. If they do not meet this requirement, they can obtain a further period of limited leave to bring them up to two years.

¹ See HC 395, paras 319C(h) and 319E(b). In each case entry in their own right will require an entry clearance.

Transitional provisions for deleted categories

10.7L HC 321 and HC 607 have deleted the following categories from the Immigration Rules:

- The Highly Skilled Migrant Programme including earlier deletions under HC 321 of applications made in-country and in India;
- Investors (the old route that appeared in paras 224–229 of the Immigration Rules);
- Businesspersons;
- Writers, Composers and Artists;
- International Graduates Scheme;
- Innovators;
- Fresh Talent: Working in Scotland;
- Separately, the provision for Self-Employed Lawyers, which existed as a concession outside the Immigration Rules, is also being deleted.¹

Transitional arrangements have been made to minimise the degree to which these changes disadvantage people with leave in a category that is being deleted.² First, any application made for leave to enter or remain under any of the above categories before 30 June 2008 will be considered under the Immigration Rules in force on 29 June. Secondly, migrants with leave in any of these categories will be able to stay in the UK until their leave expires, provided they continue to meet the conditions under which it was granted. After that, unless they qualify for settlement, they will need to apply for further leave either under the points-based system or in another category. Thirdly, there are the particular transition arrangements made for those under the HSMP, which we deal with at 10.115A. Fourthly the Secretary of State has decided to allow people with leave as a Self Employed Lawyer, Writer, Composer or Artist, or an Innovator to apply for further leave in that category at any time before HC 607 came into force on 30 June 2008. If they are successful, they will be granted enough extra leave to take them up to the threshold for being eligible to apply for settlement.³ Fifthly, the transitional rules provide that people with leave in the International Graduates Scheme (IGS), or its predecessor the Science and Engineering Graduates Scheme (SEGS), will be able to apply for a one-off extension in Post-Study Work to take them up to a total of two years of IGS/SEGS and Post-Study Work leave combined.⁴ Sixthly, the new rules also make arrangements for a small number of people granted six months' leave to enter under the Fresh Talent: Working in Scotland (FT:WiS) Scheme to be granted an additional period of leave so they can spend a total of two years in the UK under FT:WiS and Post-Study Work combined. However, no transitional arrangements have been introduced for people with leave in the existing Investor and Businessperson routes, as the extension tests for *Tier 1 (Investor)* and *Tier 1 (Entrepreneur)* respectively are broadly the same as those that existed in the categories that we are deleting.⁵

¹ Explanatory Memorandum to HC 607, para 7.29.

² Full details can be found at <http://www.bia.homeoffice.gov.uk/workingintheuk/temporary>.

³ Explanatory Memorandum to HC 607, para 7.34.

⁴ Explanatory Memorandum to HC 607 para 7.35.

⁵ Explanatory Memorandum to HC 607 para 7.36.

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POINTS-BASED SCHEME – TIERS 2 AND 5

10.7M More detailed plans for Tiers 2 and 5, which are implemented by amendments to HC 395 by HC 1113 as from 27 November 2008 can be found not just in the immigration rules,¹ but also on the UKBA website, where such things as a current list of shortage occupations and codes of practice for a whole gamut of jobs appear.²

¹ This and the following paragraphs have drawn heavily on the amended Immigration Rules, the Explanatory Memorandum to HC 1113 and the very detailed proposals set out in *Skilled Workers under the Points Based System – (TIER 2)* and *Skilled Workers under the Points Based System – (TIER 5) Statements of Intent* published on 6 May 2008. These can be found on the UKBA website at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/pbsdocs/>.

² These codes of practice have been drawn up based on advice from industry experts and the Migration Advisory Committee (MAC). They are the official guidance for sponsors and caseworkers and can be found on the UKBA website.

Skilled Migrant tier (Tier 2)

10.7N Broadly speaking, the Skilled Migrant tier (Tier 2) is aimed at enabling UK employers to recruit individuals from outside the European Economic Area (EEA) to fill a particular job that cannot be filled by a British or EEA worker. It will replace the existing work permit system, including the provisions that govern intra-company transfers and the employment of ministers of religion and sportspeople. From 27 November 2008 no further applications for work permits will be accepted. However, the new Rules for Tier 2 (General) and Tier 2 (Intra-Company Transferee) include transitional arrangements to minimise their impact on existing work permit holders. Provided they are working for the same employer, their job meets the Tier 2 skill level requirements and their employer has obtained a sponsor licence, these migrants will be able to extend their stay in the UK up to a total of five years without having to meet the specific Tier 2 criteria for qualifications, prospective earnings and English language.¹

¹ Explanatory Memorandum to HC 1113, para 6.13.

10.7O The main players will be the UKBA, employers who are also called sponsors, workers and two outside organisations. First, the Migration Advisory Committee (MAC) will provide advice to the government on where labour market shortages exist that can sensibly be filled by migration and which occupations should be designated as shortage occupations. Secondly, the Migration Impacts Forum (MIF) will advise the government on the impact of migration and migration policies on local services or areas. Its membership will include front-line practitioners from services across the UK, as well as representatives of employers, trade unions and others. Then there are sponsors. In order to become a sponsor, the employer will need to apply to the UKBA for a licence, supplying the specified evidence.¹ Once licensed, the sponsor will only be able to issue Certificates of Sponsorship to those they

think will qualify. Nevertheless, it will still be for UKBA to decide whether or not someone meets the points threshold. The number of certificates sponsors will be able to issue will be specified in the terms of their licence. Provisions about how a sponsor becomes a licensed sponsor and how a licensed sponsor issues a prospective migrant with a Certificate of Sponsorship are not contained in the Immigration Rules, but in guidance published by the UKBA.² Once employers have a sponsorship licence, they will be able to sponsor skilled migrants to work in the UK in four sub-categories:

- Tier 2 (General) – for skilled workers coming to do jobs in shortage occupations and jobs that cannot be filled from the resident labour market;
- Tier 2 (Intra Company Transferee) – for skilled workers moving from an overseas branch of a company to a UK branch;
- Tier 2 (Minister of Religion) – for those coming to fill vacancies as religious workers with recognised religions, including preachers or pastoral workers;
- Tier 2 (Sportsperson) for elite sportspeople or coaches who are internationally established at the highest level.

¹ As of 5 January 2009, 4,875 businesses had registered as sponsors: UKBA website, News.

² The guidance can be found at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/pbsguidance/sponsorapplicationsguidance.pdf>.

10.7P Everyone wanting to come to the UK under the points-based scheme will need prior entry clearance, for which they will need to be in possession of a Certificate of Sponsorship.¹ The mechanics are that the sponsor will give the Certificate of Sponsorship reference number to the prospective migrant who will then be able to tell the UKBA this reference number when making their application for entry clearance or leave. However, possession of the certificate does not guarantee that entry clearance will be issued. If an application, and the precise documents needed to support it are not approved by UKBA staff that application will be refused.² A new requirement not yet in the Rules is that all workers allowed to come to the UK under the Tier 2 scheme will need to obtain a biometric immigration document (BID), so that the UKBA knows exactly who they are and what they are entitled to do. But the UKBA is not the only body keeping tabs on them. Every employer who gets a sponsorship licence will need, as a condition of keeping their licence, to alert the UKBA if their foreign workers do not comply with their immigration conditions – for example, if they disappear or do not turn up for their job or course. Any sponsor that does not comply with this requirement will risk losing its licence, which means that it would have to sack all its other foreign workers.

¹ A certificate of sponsorship is an essential document for migrants seeking an entry clearance to come to the UK under Tiers 2, 3 and 5; see paras 11(c) and 16 of UKBA *Guidance for Sponsor applications – Tier 2, Tier 4 and Tier 5 of the Points Based System*.

² HC 395, para 245A.

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10.7Q Full details of the points that will be awarded and the circumstances in which they will be awarded are set out in HC 395, paras 59–100 of the amended Immigration Rules, Appendix A. Some of the key points under Appendix A are that:

- All jobs, other than Intra-Company Transfers or jobs that appear on the shortage occupation list published by the government today, will be required to meet the resident labour market test (RLMT) before a migrant can be recruited.¹
- Unless the job is in a shortage occupation, migrants in the General and Intra-Company Transfer subcategories of Tier 2 will need to score a minimum number of points for a combination of their qualifications and their prospective earnings in the UK in order to qualify for admission.
- To qualify a Certificate of Sponsorship must be for a job which is at NVQ3 skill level or above if it is to be considered for this part of the tier. The UKBA publish a list of occupations which are at or above NVQ level 3 and those which fall below this standard. The lists and guidance are to be drawn up with advice from the Migration Advisory Committee (MAC).
- Where the job is advertised the salary offered must be at or above the ‘appropriate rate’ for that job so as to ensure there is no undercutting of the domestic labour market and that there is a genuine vacancy and the migrant must then be paid at or above that rate.²
- The shortage occupation list was compiled after impartial advice from the MAC on those parts of the labour market where there are gaps that can sensibly be filled by migration. The list is published on the UKBA website.³
- Migrants will need to obtain 10 points under HC 395, paras 4–6 of Appendix B which will require them to demonstrate English language competence to a basic user standard.⁴ However, this requirement will only apply to Tier 2 (Intra-company transfer) migrants if they wish to stay beyond three years. Full details of the points that will be awarded and the circumstances in which they will be awarded are set out in HC 395, paras 4–6 of Appendix B.
- Migrants will also need to obtain 10 points under HC 395, Appendix C, which is a maintenance requirement, showing that they have the ability to support themselves for the first month they are here.⁵ Alternatively, a migrant with an A-rated sponsor⁶ will be deemed to meet the maintenance requirement if the sponsor gives a written undertaking that it will, if necessary, maintain and accommodate the migrant up to the end of his or her first month of employment.
- All Tier 2 migrants will be able to be accompanied by their dependants (spouse/partner and children under 18). Under Appendix E, £533 will need to be available to support each dependant who will be joining the migrant in the UK. Full details are set out in HC 395, Appendix E.
- Under the rule changes Tier 2 migrants will be able to apply for settlement after five years in the UK, subject to meeting the requirements set out in the Immigration Rules at the time they apply for it.

- ¹ The details of the RLMT can be found on the UKBA's website at http://www.ukba.homeoffice.gov.uk/employers/points/sponsoringmigrants/employingmigrants/resident_labour_market_test. It generally requires the job to have been advertised so as to reach the resident labour force in the UK and the EEA for at least two weeks. Only if the employer cannot fill the job in this way will he or she be allowed to employ a migrant.
- ² The salary is also be used to determine the number of points the migrant receives for 'prospective earnings' on the attributes table. This test will be conducted using the information available from the Annual Survey of Hours and Earnings (ASHE), published by the Office for National Statistics. Any occupation not listed on the Annual Survey of Hours and Earnings may be checked using the appropriate minimum salary figures available on 'Jobs4U', a government-maintained website.
- ³ The MAC's work plan is available on the UKBA's website: www.ukba.homeoffice.gov.uk/aboutus/workingwithus/indbodies/mac/.
- ⁴ Applicants will need to prove their competence in English language by proving they have (i) passed a test in English equivalent to the appropriate level, (ii) come from a majority English speaking country: Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, New Zealand, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago, the USA or (iii) have taken a degree taught in English (verified using National Academic Recognition Information Centre data).
- ⁵ Subject to transitional arrangements they will need to show that they have £800 available to support themselves.
- ⁶ An A-rated sponsor is a sponsor whom the UKBA is satisfied is fully complying with its sponsorship duties.

Tier 2 (Intra Company Transfers)

10.7R Intra company transfers are for employees of multinational companies being transferred by their employer overseas to a skilled post in a UK-based branch of the company. No Resident Labour Market Test will be necessary. Overseas staff coming to the UK on intra-company transfers must have been working overseas for the sponsoring company for at least the previous 6 months, and while in the UK must earn a salary or remunerative package (including specific permitted allowances) appropriate for that job in the UK. A sponsor seeking to be authorised to issue Certificates of Sponsorship under the intra-company transfer category must confirm at the time of their licence application that they will comply with the above set of criteria.

Tier 2 (Minister of Religion)

10.7S This route is for those coming to fill vacancies as religious workers with recognised religions. This will include preachers and those who perform a pastoral role. It replaces the pre-existing arrangements for Ministers of Religion and missionaries. Migrants coming to work temporarily in the UK as a religious worker in a non-pastoral role, where the duties include performing religious rites but not preaching to a congregation will still be able to come, as they were before the points-based system, but they will come within Tier 5. Those wishing to recruit someone in a religious capacity will be required to apply to the UKBA for a licence as a sponsor under this tier. They will need, among other requirements, to provide evidence that they are a bona fide religious institution, be a registered, excepted or exempt UK charity according

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to the relevant UK charity legislation in force in its part of the UK. In Northern Ireland the organisation must have obtained charitable status for tax purposes from HM Revenue and Customs. They will also need to provide an undertaking to support or accommodate the migrant, confirm that they have undertaken a Resident Labour Market Test for the role, to ensure the migrant will be filling a genuine vacancy that cannot be filled with a suitably qualified member of the resident labour force, having advertised the post in Job Centre Plus, or as agreed in their Code of Practice, for at least two weeks. They will also be expected to show maintenance funds for themselves plus additional funds for any dependants. Religious workers will be required to meet a higher level of English than other Tier 2 migrants, equivalent to the Council of Europe level B2, a test on approximately the same level that those seeking entry as ministers of religion must demonstrate under the rules operating before the introduction of the points-based scheme.

Tier 2 (Sportsperson)

10.7T This route is for elite sportspeople and coaches who are internationally established at the highest level, whose employment will make a significant contribution to the development of their sport at the highest level in the UK and who intend to base themselves in the UK. They will in general have to meet the same English language ability and maintenance requirements as other Tier 2 (General) migrants. To qualify they need to be sponsored by a club (or equivalent) licensed by the UKBA to issue Certificates of Sponsorship under this category. Sponsoring clubs will generally need approval from the relevant Governing Body for the sport. A concession is made for footballers who do not immediately have to satisfy the English language test, but will have to do so after 12 months.

Temporary workers and youth mobility – (Tier 5)

10.7U Tier 5 of the points-based system provides two routes for people to come to the UK and work temporarily: a youth mobility scheme, and a temporary workers route.

Tier 5 (Youth Mobility)

10.7V The Youth Mobility Scheme is intended to allow young nationals of participating countries to experience life in the UK for up to two years, during which they will have free access to the labour market (with minor restrictions). It replaces the existing Working Holidaymaker route, and the Japan Youth Exchange Scheme and British Universities North America Club (BUNAC) concessions. In order to qualify, a migrant will need to be a national of one of the following four countries listed in Appendix G: Australia; Canada; Japan; New Zealand; or a British Overseas Citizen, British Overseas

Territories Citizen or British National (Overseas), as defined by the British Nationality Act 1981. These countries have all entered into reciprocal arrangements with the UK to allow at least 1,000 young UK nationals per year to visit and work in their countries for at least 12 months. They also have effective arrangements with the UK allowing us to return their nationals to them, and, according to the government, their nationals pose a low risk of abusing of the UK's immigration controls.

10.7W All participants in the Youth Mobility Scheme must obtain 40 points under the amended HC 395, paras 101–104 of Appendix A. Full details of the available points and the circumstances in which they will be awarded are set out in Appendix A. Participants who are nationals of the countries listed in Appendix G must be sponsored by their governments. But this sponsorship will be deemed to have taken place if they have a national passport. This extremely generous rule is only in place because the government considers that these countries pose a particularly low immigration risk. Each country listed in Annex G has an annual allocation of places on the scheme, which will be notified to the authorities of the country concerned. Where the UK has established reciprocal youth mobility arrangements with a country, the allocation will be set at a figure equal to the number of UK nationals who went to that country in the previous year under the reciprocal scheme in question. However, the minimum allocation for all countries will be 1,000 places. If a country has exceeded its allocation then the UKBA will not accept any further applications from its nationals under the Youth Mobility Scheme. There will be no annual allocation for British Overseas Citizens, British Dependent Territories Citizens or British Nationals (Overseas).

10.7X All participants will need to obtain 10 points under paras 6–7 of Appendix C to show that they can support themselves, and they will, therefore, be required to have savings of at least £1,600. They will need to be aged between 18 and 30. Under the scheme no dependants are allowed (though there is nothing to stop the spouse or partner of a participant also applying for entry clearance under the scheme and accompanying him/her, if eligible; in such a case the couple would not be allowed to bring any children. Leave to enter will be granted for two years, and each participant will be able to work for as much of that period as they wish. Participants will not be able to extend their stay in this route or apply for settlement, and will not be able to switch into any other work or study route. No-one will be allowed be allowed to come to the UK more than once under this route. It follows from this that anyone who has previously spent time here under the Youth Mobility Scheme, or as a Working Holidaymaker, will not be eligible.

Tier 5 (Temporary Workers)

10.7Y Tier 5 (Temporary Workers) allows certain types of temporary worker to come to the UK for cultural, charitable, religious or international objectives. This Tier covers the following subcategories¹

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- *Creative and Sporting*: for people coming to work or perform as sportspeople, entertainers or creative artists;
- *Charity workers*: for people coming to do temporary and voluntary work for a charity;
- *Religious*: for people coming to work temporarily in a religious role;
- *Government Authorised Exchange*: for migrants coming through schemes aimed at sharing knowledge, experience and best practice. All such schemes must be approved by a government department;
- *International Agreement*: for migrants coming to the UK to provide a service in circumstances covered by an international treaty to which the UK is party.² This includes private servants in diplomatic households.³

The UKBA will be removing, and in some respects subsuming, a number of existing immigration routes. These will include the following categories:

- Some work permits in the creative and sporting sector;
- Exchange teachers and language assistants;
- General Agreement on Trades in Services (GATS);
- International Association for the Exchange of Students of Technical Experience (IAESTE);
- International Fire Fighter Fellowship;
- EU Leonardo da Vinci Programme;
- Government Authorised Exchange;
- Rudolf Steiner;
- Training and Work Experience Scheme;
- China Graduate Work Experience Programme;
- Vander Elst;
- Non-pastoral religious workers;
- Visiting religious workers.

In fact the schemes which closed on 26 November 2008 were: Au pairs; Gap year; Japan Youth Exchange Scheme; Visiting religious workers and religious workers in non-pastoral roles; Overseas government employees; Voluntary workers; and Working holidaymakers.

¹ Full details are set out in guidance published by the UKBA. The guidance can be found at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/pbsguidance/>.

² This includes migrants under contract to do work that is covered under international law, including the General Agreement on Trade in Services (GATS); similar agreements between the United Kingdom and another country; employees of overseas governments and international organisations; and private servants in diplomatic households. Those already in the UK under the international agreement category can extend their stay if they have been in the UK for less than 24 months, which is the maximum time they are allowed to stay. The one exception is private servants in diplomatic households and employees of overseas governments and international organisations only, who can apply for an extension for a maximum of 12 months at a time, up to a total of six years.

³ Private servants working in the United Kingdom on or before 26 November 2008 have been subject to transitional arrangements. If they had applications made on or before 26 November 2006 and approved they became eligible for a one-off grant of leave of up to five years, which is the current threshold for settlement. This provision has now been

extended for a further 18 months until 26 May 2010. Those applying after 27 November 2008 must apply under the new Tier 5 (temporary workers – international agreement sub-category) of the PBS, and, if successful, they may be granted further extensions for periods of up to 12 months at a time, up to a total of six years, and they can apply for settlement when they reach the required threshold. This change will be reflected in the Immigration Rules in March 2009.

10.8 Under the Tier 5 (Temporary Worker) route all migrants will need entry clearance unless they are coming for three months or less in the creative and sporting subcategory and are not visa nationals¹. All migrants will need to obtain 30 points under Appendix A. Full details of the available points and the circumstances in which they will be awarded are set out in HC 395, paras 105–111 of Appendix A. Amongst other things, applicants will need to have a sponsor who has been licensed by the UKBA. In addition they will need to obtain 10 points under HC 395 Appendix C to show that they can support themselves until they begin receiving an income, and they will, therefore, be required to have savings of at least £800. Full details of the available points and the circumstances in which they will be awarded are set out in HC 395, paras 8–9 of Appendix C. Migrants with an A-rated sponsor will be deemed to meet this requirement if the sponsor certifies that they will not claim public funds whilst in the UK. The maximum stay will generally be 12 months if the Certificate of Sponsorship was issued in the creative and sporting or charity workers subcategories, and two years otherwise. However, people working in the creative sector will be able to apply to stay for a further 12 months once they are in the UK, bringing their total stay up to two years. Servants of diplomats, and employees of overseas governments will, if entering under the International Agreement subcategory, be able to apply for annual extensions up to a maximum of six years. Tier 5 (Temporary Worker) migrants will be able to be accompanied by their dependants (spouse/partner and children under 18), but under HC 395, Appendix E, £533 will need to be available to support each dependant who will be joining them in the UK. Full details are set out in HC 395, Appendix E. This is a route for temporary stay and it will not be possible under the rules for anyone within this category of entry and stay other than private servants of diplomats and employees of overseas governments and international organisations. Switching is not allowed into or out of the international agreement category.

¹ Countries whose nationals need visas to come to the UK for any purpose are listed at HC 395, Appendix 1.

WORKERS (1): NON-SCHEME BASED EMPLOYEES

10.9 The main categories of non-scheme based employment derived from both the Immigration Rules and Immigration Directorate Instructions (IDI) are:

- seasonal agricultural workers (who, however, need an IED);¹
- exchange teachers;
- overseas journalists and broadcasters; sole representatives;
- private servants in diplomatic households;

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- domestic workers;
- overseas government employees;
- ministers of religion, missionaries and members of religious orders;
- visiting religious workers and religious workers in non-pastoral roles;
- operational ground staff of overseas airlines;
- overseas nurses programme;
- Commonwealth citizens with grandparental connections;
- crew members.

Generally, these categories used to be described as the 'permit-free' categories² (meaning free of the need to obtain a work permit). Apart from seasonal agricultural workers and crew members, persons in these capacities, may be accompanied or joined in the UK by their spouse, civil partner or unmarried partner and children,³ and in categories leading to settlement, these dependants will qualify for indefinite leave to remain at the same time as the principal.⁴ There are no restrictions on the spouse, civil partner or unmarried partner or children taking employment. However, settlement may only be obtained in the following categories of non-scheme based employment:

- overseas journalists and broadcasters;⁵
- sole representatives;⁶
- private servants in diplomatic households;⁷
- domestic workers;⁸
- overseas government employees;⁹
- ministers of religion, missionaries and members of religious orders;¹⁰
- operational ground staff of overseas airlines;¹¹
- overseas nurses programme;¹²
- Commonwealth citizens with grandparental connections.¹³

¹ See 10.3 above.

² HC 251, paras 38–40.

³ HC 395, paras 194–199 (spouses and children), 295J–K, inserted by Cm 4851 (unmarried partners); note that there is no provision for the admission of unmarried partners of exchange teachers.

⁴ HC 395, paras 287, 295G, 298.

⁵ HC 395, para 142(i), as amended by HC 1016.

⁶ HC 395, para 150(i), as amended by HC 1016.

⁷ HC 395, para 158(i), as amended by HC 1016.

⁸ HC 395, para 159G(i), as amended by HC 1016.

⁹ HC 395, para 167(i), as amended by HC 1016.

¹⁰ HC 395, para 176(i), as amended by HC 1016.

¹¹ HC 395, para 184(i), as amended by HC 1016.

¹² HC 395, paras 69N and 69Q, as amended by HC 645 from 30 November 2005.

¹³ HC 395, para 192(ii), as amended by HC 1016.

Seasonal farm work

10.10 SAWS is unaffected so far by the points-based system. But from 1 January 2008, the SAWS has applied to Romanian and Bulgarian nationals only. The scheme allows them to take on seasonal employment on farms in the UK. The Seasonal Agricultural Workers Scheme (SAWS) was amended¹ in the light of the policy proposals set out in the 2002 Home Office white paper –

Secure Borders, Safe Haven: Integration with Diversity in Modern Britain. The scheme which used to exist until late 2003 provided (under the then Immigration Rules) that full time students aged between 18 and 25 could come to do seasonal agricultural work in the UK. The idea was that they would combine farm work with a short visit.² Following the review of the scheme, the upper age limit was removed (although not the requirement that recruits be students), and SAWS is now quota driven. The overall quota for 2007 was 16,250, of which 40% (6,500) was reserved for citizens of Bulgaria and Romania. The remaining 60% (9,750) were earmarked for students from non-EEA countries. Originally intended for persons from outside the European Economic Area (EEA), it is planned to be earmarked for citizens of Bulgaria and Romania exclusively after*1 January 2008.³ Each quota runs for a calendar year from January to December. SAWS participants are permitted to work for up to a maximum of six months.⁴

¹ HC 395, paras 104–109 as amended by HC 538. For the inter-relationship between this scheme and the sector-based scheme work permit under HC 395 para 135I–K.

² Under HC 395, para 44 any period spent in farm work was and is still to be counted as a visit. Thus if four months is spent in farm work, up to two can be spent as a tourist.

³ See the work Permits UK website: www.workpermit.com/uk/saws.htm.

⁴ HC 395, para 105.

Overseas journalists and broadcasters

10.12A Representatives of overseas media organisations have now been subsumed into the Tier 2 (General) category as from 27 November 2008. HC 395, paras 136–141 have been deleted except insofar as relevant to paras 142 and 143, in order to ensure that those already in the UK under the old rules can qualify for settlement. The deleted rules are now contained in HC 395, Appendix F.

Sole representatives

10.15 This category is unchanged and the existing Immigration Rules remain in force. Representatives of overseas firms which have no branch, subsidiary or other representative in the UK and have their headquarters and principal place of business outside the UK may qualify for an immigration status as such, and so will not require a work permit. They will need to demonstrate that they have been recruited and taken on as employees outside the UK; are senior employees with full authority to take operational decisions and can set up and operate a registered branch or wholly-owned subsidiary; will be employed full-time as sole representatives; do not intend to take employment except within the terms of the requirements for leave to enter as sole representatives; are not majority shareholders in the overseas firm; and can satisfy the maintenance and accommodation provisions of the Immigration Rules.¹

¹ HC 395, para 144.

Private servants in diplomatic households¹

10.19A Domestic servants in this category have been subsumed into the international agreement category of Tier 5 (Temporary Workers). HC 395, paras 152–157 have been deleted except insofar as relevant to paras 158 and 159 which allow for transitional measures to ensure that those admitted in this category under the old rules can qualify for settlement. The deleted rules are now contained under HC 395, Appendix F.

Domestic workers

10.22 This category has not so far been amended by the points-based system. The Rules regarding private servants in diplomatic households must also be distinguished from the former concessionary arrangements, which were outside the Immigration Rules, whereby visitors or those coming in a category which would lead to settlement could bring their domestic staff with them to the UK.¹ Under this former concession, from July 1998, domestic workers were permitted entry with their employer provided they had worked for that employer for 12 months before arrival and would be undertaking specific work at a level exceeding the International Labour Organisation's (ILO) basic definition of domestic work.² After various administrative changes in 2001, the concession was incorporated into the Immigration Rules with effect from 18 September 2002. Between 23 July 1998 and 23 October 1999, the Home Office operated a regularisation scheme for overstaying domestic workers, who had an initial entry clearance as a domestic worker and had fled their original employer. Subsequently, the Home Office confirmed that it would consider any application not made within the regularisation scheme deadline on a case by case basis.³ They also indicated that a domestic worker who was granted an initial 12 months' leave under the regularisation programme and who subsequently applied for indefinite leave to remain, could count his or her continuous domestic employment prior to the date of regularisation as part of the four-year qualifying period for settlement then in operation.⁴ Furthermore, within the regularisation process, where the worker had fled from a domestic household as a result of abuse or exploitation and had gone into other domestic work, but not in a private household, that other work could count towards the four years needed for indefinite leave, but only where the initial regularisation was on that basis.⁵

¹ For a potted history of the early scheme and the changes made to it in 1998 and 2001, see IDI (Dec/02), Employment, Ch 5, s 12, para 1.1.

² For details, see 5th edition at 10.14.

³ Letters from Home Office to CMS Cameron McKenna 1 February 2000.

⁴ Two Home Office faxes of 15 January 2001 to Winstanley-Burgess. The qualification period for settlement is now five, not four years: HC 395, para 159H, as amended by HC 1016 as from 3 April 2006.

⁵ IDI (Dec/02), Employment, Ch 5, s 12, para 1.2 and Annex 6B. Now the position of overseas domestic workers is dealt with in Ch 5, s 12 (last updated December 2006).

Ministers of religion, missionaries and members of religious orders

10.25A This category has been replaced by Tier 2 (Ministers of Religion) of the points-based system as from 27 November 2008. More details are at 10.7S. HC 395, paras 170–175 have been deleted except insofar as relevant to paras 176 and 177 which allows for transitional arrangements for settlement of those admitted under the old rules. The deleted rules are contained in HC 395, Appendix F. Migrants applying in the Minister of Religion who currently have leave as a Minister of Religion under the old rules will need to have a licensed sponsor but will not need to meet the English language or maintenance requirements.¹

¹ Explanatory Memorandum to HC 1113, para 6.14.

Operational ground staff of overseas airlines

10.33A This category has been replaced by Tier 2 (General) of the points-based system as from 27 November 2008. More details are at 10.7N–10.7Q. HC 395, paras 178–183 have been deleted except insofar as relevant to paras 184 and 185 which allows for transitional arrangements for ground staff already admitted under the old rules to attain settlement. The deleted rules are contained in HC 395, Appendix F.

Overseas Nurses Programme

10.34A Overseas qualified nurses and midwives (with a job offer) have been covered by Tier 2 (General) of the points-based system as from 27 November 2008. More details are at 10.7N–10.7Q. HC 395, paras 69M–69O have been deleted except insofar as relevant to paragraph 69P (which deals with an extension of stay as an overseas qualified nurse or midwife). This allows for those already in the old category to obtain their registration and to then move into full employment as an overseas nurse or midwife. The deleted rules are now contained in HC 395, Appendix F.

Non-scheme based categories outside the Immigration Rules

10.37A A number of these categories have now been brought within the points-based system. Self-employed lawyers are now covered as a highly skilled worker under Tier 1 (General) as from 30 June 2008. Sports people or entertainers coming to the UK for less than 12 months may fall into the category of Creative and sporting workers under Tier 5 (Temporary worker) as from 27 November 2008, but not, it would seem from the UKBA website, athletes for the Olympics (so the UKBA does have a sense of humour and are clearly well prepared for 2012!). The China graduate work experience scheme will now come under the category of Government authorised exchange workers under Tier 5 (Temporary worker), sponsored by the Department for

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Innovation, Universities and Skills. Voluntary Workers will come under the category of Charity Workers under Tier 5 (Temporary Worker) as from 27 November 2008. Gap year and Japan: Youth Exchange Scheme, like the two schemes covered by the Rules – au pairs and working holiday makers – will come into the Youth Mobility Scheme (Tier 5) but only if their country participates in it.

10.38 There are a number of other categories of persons who may be admitted for work without a work permit, which are listed in the IDI.¹ Most are temporary, such as research assistants to MPs (who are normally overseas students learning about government and politics before resuming studies or entering a career),² sportspersons,³ entertainers,⁴ film actors, producers, directors and technicians on location,⁵ off-shore workers,⁶ overseas insurance company representatives,⁷ workers for the Jewish Agency⁸ and certain exchange and placement students.⁹ Temporary carers of a sick relative or friend are also listed in this miscellaneous category.¹⁰ Workers qualified in Rudolf Steiner educational methods coming to work at Camphill communities may be admitted with a view to settlement.¹¹

¹ Currently IDI, Ch 17, last updated at time of going to press on 24 Sep/08. The section headings are as follows: Bunac students, carers, entertainers, off-shore workers, other permit free categories, research assistants to MPs, Rudolph Steiner establishments, sportsmen and women, voluntary workers from overseas, gap year entrants for work in schools, Japan Youth Exchange Scheme and concessionary leave outside the rules for teachers with leave as working holidaymakers.

² IDI (Sep/04), Ch 17, s 6. They must satisfy the maintenance and accommodation requirement, with not more than reasonable expenses paid from the UK source. They may be granted up to 12 months' leave.

³ IDI (Aug/01), Ch 17, s 8. The IDI are fairly complicated. A permit-free concession enables professional or amateur sportspersons to enter for sporting events such as tournaments and championships for up to six months, provided they satisfy the maintenance and accommodation requirements and can meet the cost of the onward or return journey. Polo grooms and personal coaches may be admitted with them for the same period. But sportspersons need work permits if they are based in the UK for a whole season or are coming to join a British professional team or to give regular coaching, or for over six months. See 10.50 below.

⁴ IDI (Jul/04), Ch 17, s 3. Those coming for specific types of events, including charity concerts, Arts festivals and religious occasions may be admitted under the concession, provided they pose no threat to the domestic labour force, are not using the engagement to establish themselves here and do not intend to remain for more than six months. A definitive list of festivals and events covered by the concession can be found at IDI (Jun/04), Ch 17, s3, para 5.

⁵ IDI, Ch 17, s 3, para 12.

⁶ IDI (Sep/04), Ch 17, s 4. Entry clearance is not mandatory and no work permit is required if no part of the work is on-shore. Switching is permitted but settlement should normally be refused.

⁷ IDI (Oct/01), Ch 17, s 5, para 1 The processing of the policy must take place overseas. Leave may be granted for 12 months at a time up to three years.

⁸ IDI Ch 17, s 5, para 2. Leave may be granted for a maximum of 12 months. The Jewish Agency in Israel exists to provide information about Israel and to encourage Jews to emigrate there. The London office is at Balfour House, 741 High Road, Finchley, London N12 0BQ. A person coming to the United Kingdom on behalf of the Jewish Agency would be expected to work in the office of the Agency, lecturing, providing information about Israel and encouraging Jews to emigrate to Israel. A person sent by the Agency for employment with another Jewish organisation does not benefit from the concession.

- ⁹ IDI Ch 17, s 5, para 3 (International Association for Exchange of Students of Technical Experience): placements of up to three months with UK companies and local authorities; British Universities North America Club (BUNAC) (IDI Jun 02, Ch 17, s 1): see chapter 9 above.
- ¹⁰ IDI (Jun/01), Ch 17, s 2.
- ¹¹ IDI (Sep/04), Ch 17, s 7. A list of some 70 establishments is given at Annex A. No work permit or entry clearance is required, and settlement may be achieved, but there is no switching into this category. Leave is granted for 12 months at a time. There is also provision made for trainees, either as volunteers or under TWES.

Crew members

10.39 This is unaffected by the new points-based system. Leave to enter may be given to crew members of ships, aircraft, hovercraft, hydrofoils or international train services to enable them to join their vessel, for hospital treatment, repatriation or transfer to another vessel, and so forth,¹ if the crew members concerned are not eligible for entry without leave.² The period of leave given will only be sufficient for the specific purpose and there is a presumption against extension,³ unless the crew member is married to a person present and settled in the UK and meets the requirements for an extension of stay as a spouse under the Immigration Rules.⁴

¹ IDI Ch 16, s 1 (seamen); IDI (Sep/04), Ch 16, s 2 (aircrews) (revised 24 Sep/08).

² See chapter 6 above.

³ IDI, Ch 16, s 1 (seamen); IDI, Ch 16, s 2 (aircrews).

⁴ HC 395, para 324.

Persons with UK ancestry

10.40 The new points-based system does not apply and these rules remain in force. A Commonwealth citizen, one of whose grandparents was born in the UK, may come to the UK for the purpose of living and working here, but must have an entry clearance for that purpose.¹ Upon proof that one of his or her grandparents was born in the UK,² a Commonwealth citizen aged 17 or over who wishes to seek or take employment³ in the UK and can satisfy the maintenance and accommodation requirements will be granted an entry clearance for that purpose. On arrival, such a person should be admitted for a period of five years.⁴ There is no need to have a specific job to come to. An intention to seek employment and the ability to perform it⁵ may suffice.⁶ To prove UK ancestry it will usually be necessary to obtain a certified copy of the grandparent's birth certificate and all necessary marriage and birth certificates to show the connection.⁷ An adoptive relationship qualifies under the rule.⁸ The word 'grandparents' in HC 395, para 186 refers to both maternal and paternal grandparents. The Immigration Rules expressly provide that the 'parent' of an illegitimate child is not just the mother but includes the father where he is proved to be the father,⁹ reversing the practice that resulted from Tribunal and Court of Appeal authority to the contrary.¹⁰

¹ HC 395, paras 186–193. The requirement of Commonwealth citizenship only needs to be satisfied as of the date of application under the UK ancestry category; compare Commonwealth citizens claiming the right of abode in the UK: see chapter 2 above.

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- ² Or the Channel Islands, the Isle of Man or (before 31 March 1922) the Republic of Ireland or on board a British registered ship or aircraft: IDI (Dec/04), Ch 5, s 8, para 3.2.
- ³ Employment embraces self-employment: HC 395, para 6.
- ⁴ HC 395, para 187, as amended by HC 1016 from 3 April 2006. Initial admission will be for up to five years, not four years as before.¹ This mirrors a wider change in the Immigration Rules as part of the government's 'Five Year Strategy for Asylum & Immigration', requiring those in employment routes, leading to settlement, to spend five years working in the UK before they can apply for settlement.
- ⁵ Ability in terms of health: IDI (Dec/04), Ch 5, s 8, para 3. 4
- ⁶ Entry clearance officers will only refuse an application if they have reason to believe that there is no realistic prospect of the applicant obtaining employment and that he or she may have recourse to public funds: IDI, Ch 5, s 8, para 3.4.
- ⁷ The word 'usually' permits an entry clearance officer to accept alternate evidence of the grandparent's birth in the UK, such as a baptismal certificate or other official records.
- ⁸ IDI, Ch 5, s 8, para 3.3.
- ⁹ HC 395, para 6.
- ¹⁰ *C (an infant) v Entry Clearance Officer, Hong Kong* [1976] Imm AR 165, IAT; *R v Secretary of State for the Home Department, ex p Crew* [1982] Imm AR 94, CA.

WORKERS (2): WORK PERMIT EMPLOYEES

Work permit origins and the different types of permit currently available

10.42A The work permit scheme has been replaced by Tier 2 (General) and Tier 2 (Intra-Company Transfers). This means that from 27 November 2008 no further applications for work permits have been accepted. The UKBA will, however, process all applications for work permits made before that date, and will continue to consider all such applications for entry clearance, leave to enter and leave to remain for people with work permits under the existing Immigration Rules. The new Rules for Tier 2 (General) and Tier 2 (Intra-Company Transfers) include transitional arrangements to minimise their impact on existing work permit holders. Provided they are working for the same employer, their job meets the UKBA skill level requirements and their employer has obtained a sponsor licence, these workers will be able to extend their stay in the UK up to a total of five years without having to meet the specific Tier 2 criteria for qualifications, prospective earnings, English language and knowledge of life in Britain. For more details, see 10.7Q and 10.7R.

SECTORS-BASED SCHEME

10.71 This scheme has not been abolished or replaced by the points-based system and is still in place, but for how long? The Sectors-Based Scheme (SBS) is a new part of the work permit scheme introduced on 30 May 2003 as part of the government's managed migration programme announced in the 2002 Home Office White Paper *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*. It provides for Work Permits UK to issue work permits for certain sector-specific employment.¹ The scheme is quota limited² and is available to non-European nationals aged between 18 and 30.³ Apart from the level of qualifications of the employee, the same criteria that apply to

an employer applying for a main scheme work permit apply to an employer applying for a sector-based scheme work permit: the employer must be UK-based, the employee must be filling a genuine vacancy; pay and conditions must be equal to those given resident employees; the employment must be full-time; the employee must have no significant shareholding in the business or a connected business; there must be no suitable resident workers to do the work and there are similar advertising requirements.⁴ In addition, the employer must make suitable arrangements for accommodating the worker under the scheme, and the employee must speak adequate English.⁵ The maximum permission that can be gained in respect of each work permit is 12 months, at the end of which the worker is expected to leave the UK,⁶ but may have a further sector-based scheme work permit after a gap of at least two months. This is to ensure that no one with a succession of sector-based scheme work permits can ever apply for indefinite leave to remain. There is no provision for the admission of dependants. Sector-based workers may take supplementary employment in the same sector, not exceeding 20 hours per week.⁷ Between 30 May 2003 and 1 October 2004 it was possible to extend the leave given by a sector-based scheme work permit into full employment provided the employee had obtained an immigration employment document other than one issued under the Sectors-Based Scheme and the main requirements of the work permit scheme were met.⁸ After October 2004, that is no longer possible.⁹

¹ Specifically in hospitality and food manufacture, the full details of which can be seen at: www.workingintheuk.gov.uk.

² Participants on the SBS must be aged between 18 and 30. Although this requirement is currently one of the criteria in the work permit guidance, it was only recently incorporated into the Immigration Rules (HC 645, para 135I(ii), as substituted by HC 645, para 15). This amendment to the rules is intended to ensure that decisions made by Work Permits (UK) caseworkers and entry clearance officers are consistent. Such consistency was not much in evidence in the only reported decision on the working of the scheme. In *AA (Bangladesh)* [2006] UKAIT 00026, the Tribunal was concerned with refusals of entry clearance after Work Permits UK had approved the issue of work permits. They held that entry clearance applications cannot properly be refused on the basis of generalities that may originate from a disapproval of the scheme and a suspicion of abuse. Assumptions based on poverty were of no relevance. How long the scheme will last is a matter of some conjecture. However, following a review of the scheme, the government announced in June 2005 that the SBS would cease operating in the hospitality sector, but would continue until June 2006 in the food-processing sector. The scheme was introduced on 1 May 2003 and provided for the issuance of work permits for low skilled vacancies in the hospitality and the food-processing sectors.

³ An intention to leave the UK at the end of approved employment has to be shown: HC 395, para 135I(vi).

⁴ See Sectors-based scheme notes, paras 11, 16, 24, 42–48. Jobs must be advertised for four weeks in a JobCentre, JobCentrePlus or Job and Employment Office and in EURES: para 43. The information required about responses is the same as for the main scheme, see 10.54–10.55.

⁵ Sectors-based scheme notes, para 24, 41.

⁶ HC 395, paras 135J, 135L, inserted by HC 464.

⁷ Sectors-based scheme notes, 'supplementary employment' para 71.

⁸ HC 395, para 131C, inserted by Cmd 5829 on 30 May/03.

⁹ See HC 395, paras 135I(vi) and 135L(iv). The maximum period such a worker can stay in sector based employment is 12 months.

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GATS PERMITS

10.72 As from 27 November 2008 those seeking to take advantage of this scheme will have to apply as an International agreement worker under Tier 5 (Temporary Worker). More details are at 10.7Y. The GATS agreement scheme is a concessionary arrangement within the work permit rules, enabling those whose employer does not have a commercial presence within the EU to work in the UK on a service contract awarded to the employer by a UK-based organisation.¹ The scheme applies only to organisations based in signatory States to the World Trade Organisation (WTO).² Permits are available to workers on contracts for periods not exceeding three months, or for periods of three months in any one year, in the fields of legal services, accountancy, book keeping, tax advice services, architecture, engineering, urban planning, advertising, management consultancy, technical testing and analysis and site investigation.³ Detailed guidance is contained in GATS A notes (for overseas employers) and GATS B notes (for UK contractors).

¹ See GATS A notes, para 2.

² GATS A notes, para 4.

³ GATS A notes, paras 6, 8 and 17.

STUDENT INTERNSHIPS

10.73 *This paragraph has been deleted.*

THE TRAINING AND WORK EXPERIENCE SCHEME (TWES)

Introduction and history

10.73A This category was abolished on 27 November 2008 and has not been replaced. The only schemes available under the new points-based system are for government authorised exchange workers – Tier 5 (Temporary worker) – but only if they have a sponsoring United Kingdom government department.

BUSINESS AND THE SELF-EMPLOYED

Introduction and history

10.83A This category has been replaced by Tier 1 (Entrepreneur) of the points-based system as from 30 June 2008. More details are at 10.7F. Although HC 395, paras 232–237 have been deleted except insofar as relevant to para 238 (which deals with settlement of existing investors), they are still applicable under transitional arrangements and are reproduced in HC 395, Appendix F.

Writers, composers and artists

10.108A This category has been replaced by Tier 1 (General) of the points-based system as from 30 June 2008. More details are at 10.7C–10.7E. Although HC 395, paras 232–237 have been deleted except insofar as relevant to para 238 (which deals with settlement of existing investors), they are still applicable under transitional arrangements and are reproduced in HC 395, Appendix F.

THE NEW BRAINS OF BRITAIN

Innovators

10.112A This category has been replaced by Tier 1 (General) of the points-based system as from 30 June 2008. More details are at 10.7C–10.7E. Although HC 395, paras 210A–210F have been deleted except insofar as relevant to para 210G (which deals with settlement of existing innovators), they are still applicable under transitional arrangements and are reproduced in HC 395, Appendix F.

THE HIGHLY SKILLED MIGRANT PROGRAMME (HSMP)

10.115A This category has been replaced by Tier 1 (General) of the points-based system as from 30 June 2008. More details are at 10.7C–10.7E. Although HC 395, paras 135A–135F have been deleted, they are still applicable under transitional arrangements and are reproduced in HC 395, Appendix F. Paragraphs 135G–135HA (indefinite leave) are still in force. If an applicant has made an application in India for entry clearance on or after 1 April 2008, made an application in the UK for leave to remain on or after 29 February 2008, or made an application other than in India after 30 June 2008 for entry clearance the applicant will automatically be awarded 75 points under HC 395, Appendix A and 10 points under Appendix B.¹

¹ HC 395, para 245F, inserted by HC 321 and amended by HC 1113.

10.120 These changes have been a cause for concern for existing HSMP participants, who came to Britain with their families, expecting to obtain indefinite leave after four, not five years, and not expecting to be faced with new and tougher criteria to achieve their commitment to make Britain their main home – one of the original aims of the scheme.¹ As a result many of them would fail to qualify for the settlement which they had been promised. So they formed a company and brought proceedings alleging broken expectations and unfairness in *R (on the application of HSMP Forum Ltd) v Secretary of State for the Home Department*.² They were successful. As a result the Secretary of State was forced to back track and make new arrangements to allow those whose legitimate expectations had been disappointed to regain the opportunities taken away by the November 2006 rule changes. Details of them can be found in the ‘working in the UK’ section of the UKBA website.

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However, it should be noted that, although those who joined the Highly Skilled Migrant Programme (HSMP) prior to 7 November 2006 were covered by the judgment, those who joined the HSMP under the arrangements in place from 5 December 2006 were not. One significant change was that where HSMP migrants were working for an employer, they could switch to work permit employment. Normally this would mean that they would have to wait for another 5 years before qualifying for indefinite leave and would not be able to count their period under the HSMP. This would not be consistent with the judgment. So HC 321 has changed the rules (HC 395, para 134) to provide that time previously spent here as a Highly Skilled Migrant will count towards settlement in the work permit category.

- ¹ In the Guidance notes to the original Immigration Rules it was specifically stated that individuals would be asked to provide a 'written undertaking' that they would make the UK their main home: HSMP 1 Guidance Notes, version 06/06, para 2, quoted by the Joint Committee on Human Rights *Highly skilled migrants: Change to the Immigration Rules*, 20th Report of Session 2006–07, at para 7. As a result, thousands of highly skilled people relocated their homes, families, jobs and businesses to the UK: as above, para 2. According to the Committee, it is estimated that about 20,000 people came to the UK under HSMP between January 2002 and March 2007 and that as many as 6,000 may not be eligible to stay under the new rules when their current leave expires: letter from the Committee to the government 21 March 2007, printed at Appendix 1 of their report.
- ² [2008] EWHC 664 (Admin), [2008] All ER (D) 96 (Apr).

10.120A The HSMP has now been replaced by Tier 1 (General). HC 321 and 607 delete the existing Immigration Rules for leave to remain as a Highly Skilled Migrant (as from 29 February 2008) for those applying in the UK; as from 1 April 2008 for applicants applying in India; and as from 30 June 2008 for the rest. There are transitional arrangements, set out in HC 245F as inserted and amended by HC 321 and 607, for migrants who are already in the process of applying to become a Highly Skilled Migrant at the various dates referred to above. The transitional provisions cater for migrants who have already applied for entry clearance or leave to remain as a Highly Skilled Migrant before the date of the rule change, as well as migrants who have obtained a Highly Skilled Migrant Programme Approval letter from the Home Office, but have not yet applied for entry clearance or leave to remain. Transitional provisions for self-employed Highly Skilled Migrants (previously a concession outside the Immigration Rules), who do not meet the requirements for Tier 1 (General), have now been added to the Immigration Rules under HC 321. For an outline of Tier 1 (General) see 10.2B ff above.

INTERNATIONAL GRADUATES SCHEME (IGS) AND SCIENCE AND ENGINEERING GRADUATE SCHEME (SEGS)

10.120B This category has been replaced by Tier 1 (Post Study Work) of the points-based system as from 30 June 2008. More details are at 10.7H and 10.7J. HC 395, paras 135O–135T have been deleted and not replaced. However, those whose 24 months have not expired have been able to move to

other categories of employment until 27 November 2008 and will be able to switch to Tier 2 categories after that date. Any new entrants must enter under the new points-based system.

Fresh Talent: Working in Scotland scheme

10.122A This category has been replaced by Tier 1 (Post Study Work) of the points-based system as from 30 June 2008. More details are at 10.7H and 10.7J. HC 395, paras 143A–143F have been deleted and not replaced. However, those whose 24 months have not expired have been able to move to other categories of employment until November 27 2008 and will be able to switch to Tier 2 categories after that date. Any new entrants must enter under the new points-based system.

INVESTMENT AND SELF-SUFFICIENCY

Investors

10.123A This category has been replaced by Tier 1 (Investors) of the points-based system as from 2008. More details are at 10.7G. Although HC 395, paras 224–229 have been deleted except insofar as relevant to para 230 (which deals with settlement of existing investors), they are still applicable under transitional arrangements and are reproduced in HC 395, Appendix 7.

Retired persons of independent means

10.127A This category has been replaced by Tier 1 (Investors) of the points-based system as from 2008. More details are at 10.7G. HC 395, paras 263–65 (entry) have been deleted and not replaced. Entrants will have to qualify under Tier 1 (Investors). However, under transitional arrangements for those already in this category when the points-based system came into force, extensions of stay taking the person up to 5 years' residence can be given under para 266 followed by indefinite leave if the person fulfils the requirements under para 269.

Family members of business, self-employed, investors and retired people

10.132A Although the procedure for applying may be different under the points-based system, the requirements for entry and stay of family members remain very much the same as before. The Rules are contained in HC 395, paras 319A–319K and Appendix E. They cover the spouse, civil partner, unmarried or same-sex partner and children under 18 of *Tier 1 Migrants*, *Tier 2 Migrants* and *Tier 5 (Temporary Worker) Migrants*. The age requirements and prohibited relationships set out in paras 277–280 of the Rules apply to spouses; the age restrictions in para 277 and 295AA to civil partners and unmarried and same-sex partners, respectively. Family members seeking

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settlement must have sufficient knowledge of English and life in Britain. In applications where the specified documents are not provided, the applicant will not meet the requirement for which the specified documents are required as evidence (para 319K). Once again procedural compliance is the name of the game.

SWITCHING

10.134 *This paragraph has been deleted.*

Chapter 11

FAMILIES, PARTNERS AND CHILDREN

INTRODUCTION

11.1 This chapter examines how legislation, the Immigration Rules and current concessions and policies apply to families, partners and children. It will deal with immigration law related to marriage and civil partnership, engagement, unmarried partners and same-sex relationships, family reunion, adoption and unaccompanied (or separated) children. It will also consider the interaction between family and immigration law and the relevant, applicable family law provisions on the validity of marriage, on overseas divorce, adoption and domicile. At the time of writing, the government has raised the age for spouse/and partnership sponsors to the age of 21, not 18 as the rules previously provided.¹ While the government has changed the rules to withhold indefinite leave to remain from family applicants who do not meet required English language fluency; a consultation paper suggests that English language may be a requirement for entry not simply settlement.

¹ HC 395, para 277.

11.1A There have been a number of important recent developments giving effect to the UK's obligations to children, vulnerable persons and families. On the 22 September 2008, just prior to the UK government's appearance before the UN Committee on the Rights of the Child, the UK government announced that it would lift the immigration and children in custody reservations to the UN Convention on the Rights of the Child – thus increasing the value of the Convention as an aid to interpretation in children's cases.¹ Section 21 of the UK Borders Act 2007 (which came into force on 6 January 2009) introduced a statutory Code of Practice on keeping children safe from harm.² During the passage of the Children and Young Persons Act 2008, the House of Lords voted in favour of the UKBA's being subject to a duty equivalent to that in s 11 of the Children Act 2004 and the government made a commitment to give effect to this. Clause 51 of the Borders, Citizenship and Immigration Bill currently before Parliament is intended to fulfil this commitment. Minister of State Phil Woolas MP is quoted as stating 'It is right that the UK Border Agency is judged by the same standards as every other authority that deals with children.'³ The Code of Practice was issued on 6 January 2009.⁴ While a welcome commitment, the Code focuses on safeguarding and will require amendment to incorporate the promised commitment to promoting children's welfare, which is required of all agencies subject to s 11 of the Children Act 2004.⁷ There have been a number of important judgments dealing with Article 8 family life claims. These are discussed in chapter 8. In one such case, *EM (Lebanon) v Secretary of State for the Home Department*¹ (concerning a flagrant breach of family life rights from the inevitable removal on return of a young boy from his mother's care, with only the possibility of supervised visits

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between them), the House of Lords accepted the effect of return would be to destroy the family life of the appellant mother and son as it is now lived. The Lords heard separate representations from, and concerning, the child and emphasised the importance of ascertaining and communicating to the court the views of an affected child.

The trafficking of women and children for the purposes of prostitution and domestic servitude continues to be an issue of international and domestic concern. On 17 December 2008, the government ratified the Council of Europe Convention Against Human Trafficking and confirmed that the Convention will become binding in the UK on 1 April 2009.⁶

¹ The reservations were to Articles 22 and 37 of UNCRC. See Press Release Department of Children, Schools and Families, 22 September 2008, www.dcsf.gov.uk.

² Section 21(1) states: 'The Secretary of State shall issue a code of practice designed to ensure that in exercising functions in the United Kingdom the Border and Immigration Agency takes appropriate steps to ensure that while children are in the United Kingdom they are safe from harm.' Under s 21(2) the Agency shall have regard to the code in the exercise of its functions, and take appropriate steps to ensure that persons with whom it makes arrangements for the provision of services have regard to the code. Under s 21(5) the Agency means immigration officers and other officials of the Secretary of State, and the Secretary of State, in respect of functions relating to immigration, asylum or nationality. The provision and the Code of Practice came into force on 6 January 2009: UK Borders Act 2007 (Code of Practice on Children) Order 2008, SI 2008/3158, art 2(a); the UK Borders Act 2007 (Commencement No 5) Order 2008, SI 2008/3136, art 2(a). See HO Bulletins 'Keeping Children Safe' which outline developments and policies on this issue.

³ See: UK Border Agency commits to keep children safe from harm, UK Border Agency www.ukba.homeoffice.gov.uk/sitecontent/keepingchildrensafefromharm, Press Release, 6 January 2009.

⁴ The UK Borders Act 2007 (Code of Practice on Children) Order 2008, SI 2008/3158.

⁵ The Code is accessible on the UKBA website. For a helpful critique of the Code and its limitations – see the ILPA Submission to Joint Committee on Human Rights: Inquiry on Children's Rights, February 2009 and the UKBA Consultation on the Code April 2008 – on the ILPA website <http://www.ilpa.org.uk/>.

⁶ [2008] UKHL 64, [2008] 3 WLR 931.

⁷ Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report (Warsaw, 16.V.2005), Council of Europe Treaty Series – No 197. See also the UK Action Plan on Tackling Human Trafficking (Home Office website).

11.2 This chapter also deals with the statutory enactment of a new family status of civil partnerships and its ramifications in immigration law. The Civil Partnership Act 2004 finally came into force on 5 December 2005. Civil partnerships are a new legal relationship which can be registered by two people of the same sex and give couples legal recognition for their relationship. It is a long and detailed Act, which incorporates civil partnerships into many areas of law. Its scope is much beyond the subject matter of this work. But the Act also makes changes to immigration law, which we describe in this chapter. From 5 December 2005, the Immigration Rules have been amended so as to put civil partners on precisely the same footing as spouses for immigration purposes. The 96 or so rule amendments made by HC 582¹ and HC 1016² are to ensure that civil partners and proposed civil partners are afforded the same treatment as spouses and fiancés throughout. In this chapter we highlight the main changes.³ The second major change has been in the field of inter country adoptions. The Adoption and Children Act 2002 (the 2002 Act) came into force on 30 December 2005 and replaced most of the Adoption

(Intercountry Aspects) Act 1999 which had previously governed this area.⁴ The Children and Adoption Act 2006 also received Royal Assent on 21 June 2006. It contains a number of provisions about inter-country adoption, including a statutory framework for the suspension of inter country adoption from specified countries where there are concerns about adoption practices in that country and increases the restrictions on bringing recently adopted children into the UK. These new provisions came into force on 2 August 2007⁵. Recently the Family Division has had to consider the immigration, nationality and family law provisions arising from international surrogacy arrangements and the children born abroad to British commissioning parties under such arrangements.⁶

¹ The main amendments came into effect on 5 December 2005.

² HC 1016, para 25, taking effect on 3 April 2006. The main changes to the Immigration Rules to include provision for civil partners came into effect on 5 December 2005. Due to an oversight, the term 'proposed civil partner' was not included in para 284(i). In practice, applications have not been penalised because this term was not included, but this amendment now brings 'proposed civil partners' in line with 'fiancés'. New IDI are at Ch 8, s 2 and Annexes H and K (Mar/06). Annex H contains a list of recognised foreign civil partnerships.

³ As from 5 December 2005, HC 582 and HC 1016 incorporate civil partners and civil partnerships into the definitions of 'a parent' and 'sponsor' in HC 395, para 6. Where 'spouse' appears in the rules, the words 'civil partner' is added. The same goes for references to 'marriage' and 'wedding'. In each case 'civil partnership' is added. Thus in the overview of the rules, we find that civil partners are afforded the same treatment as spouses in relation to bereavement (HC 395, para 287(b), as amended by HC 582, para 24(g), IDI, Ch 8, s 2, para 5), access to children of former partnerships (HC 395, para 248A(vii), as amended by HC 582, para 15), admission as the partner of a refugee (HC 395, paras 352A–F, as amended by HC 582, paras 37 and 38), and rules on public funds (HC 395, para 6A, the definition of 'sponsor' having been amended by HC 582, para 1(c)). The downside is that they are also subject to the same restrictions on varying their leave after entering into a civil partnership if on the last admission they were granted leave of less than six months (HC 395, para 284(i), as amended by HC 582, para 24). See also *FB (HC 395, para 284: 'six months') Bangladesh* [2006] UKAIT 00030 (16 March 2006); and 11.69 below).

⁴ The Adoption (Intercountry Aspects) Act 1999, save for sections 1, 2 and 7 and Schedule 1 has been replaced by Chapter 6 of the Adoption and Children Act 2002. The 2002 Act also amended the inter-country adoption provisions in the Adoption Act 1976.

⁵ See the Special Restrictions on Adoptions from Abroad (Cambodia) Order 2008, SI 2008/1808; Special Restrictions on Adoptions from Abroad (Guatemala) Order 2008, SI 2008/1809; and the Adoption and Children (Scotland) Act 2007, ss 58–66.

⁶ *X & Y (Foreign Surrogacy)*, *Re* [2008] EWHC 3030 (Fam), [2009] Fam Law 115. See also *Re G* [2007] EWHC 2814 (Fam), [2008] Fam Law 95 which concerned a non-commercial surrogacy arranged by a Turkish couple in the UK who were faced with difficulties obtaining family orders recognising their parentage and permitting them to remove the child from the UK to Turkey.

11.3 It will be necessary to cross-refer to other chapters in this book for further information on how the law applies in certain more specific circumstances. For example, the law relating to family reunion for refugees is dealt with at 12.179ff, the law concerning Article 8 family life claims is dealt with in chapter 8 and the law relating to family members of EEA nationals is considered at 7.88ff.¹ The law relating to family members of EEA nationals assumes increasing importance for immigration practitioners as the Immigration (European Economic Area) Regulations 2006² (the EEA Regulations) fail properly to implement the 2004 Directive 2004/38/EC so as to give effect to free movement rights of European nationals via the admission of their family

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members.³ In response to the ECJ judgment in *Metock* the UKBA has now amended its European casework Instructions on the issue of EEA family permits and residence cards for non-EEA national family members.⁴

¹ See *R v Immigration Appeal Tribunal and Surinder Singh, ex p Secretary of State for the Home Department* [1992] Imm AR 565, [1992] 3 All ER 798 at 7.64 above.

² SI 1003/2006.

³ See *Carpenter v Secretary of State for the Home Department*: C-60/00 [2002] 2 CMLR 64, [2002] INLR 439; *Metock v Minister for Justice, Equality and Law Reform*: C-127/08 [2009] All ER (EC) 40, [2008] 3 CMLR 1167, [2008] 3 FCR 425 which held that under the Citizens' Directive family members who are nationals of non-member countries have rights to move and reside in the Member State to which the union citizen had moved regardless of whether the family member had previously been lawfully resident in another Member State.

⁴ UKBA European caseworking Instructions, Chs 1, 2, 3 and 5 and the UK Visas Entry Clearance Instructions, Ch 21.

11.4 The Immigration Rules were amended on the coming into force of the Human Rights Act 1998 on 2 October 2001 to bring them into line with ECHR obligations,¹ particularly those regarding the right to respect for family and private life. As stated in earlier editions, a number of extra-rules concessions affecting unmarried partners (heterosexual or same-sex),² bereaved spouses³ and the children of fiancé(e)s⁴ were brought within the rules, as was the admission of children for adoption.⁵ The rules allowing former spouses to enter for access to children of a former marriage, which were heavily criticised in past editions, were rewritten to allow for work and settlement rights for contact parents,⁶ although there is still no right of entry for primary carers of settled children. The admission of spouses and children of refugees was also brought within the rules.⁷ The rules on public funds were amended in line with the former policy, allowing the UK-settled party to claim in his or her own right so long as the arrival of the family member does not result in additional recourse to public funds.⁸ However, other rule changes which require children to be supported by their sponsoring parent or relative⁹ appear to entrench Home Office opposition to long-term third-party support of children and other family members.¹⁰ The Tribunal and the Court of Appeal have ruled that HC 395, paras 281, 297 and 317 disallow reliance on third-party support.¹¹ The courts and Tribunal have considered and discounted arguments that the strict application of the maintenance rule, including the barriers to third-party support may be discriminatory in the enjoyment of their family life contrary to Articles 8 and 14 of the ECHR.¹² In the previous edition, we detailed how persons who are not EEA citizens and who are subject to immigration control face severe restrictions on their rights to marry in the UK and may have to obtain permission from the Secretary of State before registering their intention to marry here.¹³ On 30 July 2008 the House of Lords in *R (on the application of Baiai) v Secretary of State for the Home Department*¹⁴ broadly agreed with the Court of Appeal that the scheme was unlawful. The House of Lords found it incompatible with the ECHR except on discrimination grounds arising from the different treatment of marriages solemnised in the Anglican church. Rather than finding the whole scheme incompatible the Lords held that permission to marry should not be withheld if the marriage was not one of convenience and that conditions such as a fee should not unreasonably inhibit the right to marry under Article 12

ECHR. The government has had to revise these arrangements following a successful court challenge. We examine these changes below.

- ¹ By Cm 4851.
- ² HC 395, as amended, paras 295A–L.
- ³ HC 395, as amended, para 287(b); bereaved unmarried partners are included at para 295M.
- ⁴ HC 395, as amended, paras 303A–F.
- ⁵ HC 395, as amended, paras 316A–C.
- ⁶ HC 395, as amended, paras 246–248F.
- ⁷ HC 395, as amended, paras 352A–F.
- ⁸ HC 395, as amended, para 6A.
- ⁹ HC 395, as amended, paras 297(v), 298(v), 301(v), 310(v), 311(v), 314(v), 317(v).
- ¹⁰ *R v Secretary of State for the Home Department, ex p Ali* [2000] INLR 89. See concerning the criticism of the purposive approach to the Rules utilised in this (the Arman Ali) case – *AM (Ethiopia) v Entry Clearance Officer* [2008] EWCA Civ 1082, [2008] All ER (D) 150 (Oct) at paras 35–38.
- ¹¹ See *AM (Ethiopia) v Entry Clearance Officer* [2008] EWCA Civ 1082, [2008] All ER (D) 150 (Oct); *AM (3rd party support not permitted R281 (v)) Ethiopia* [2007] UKAIT 00058 (21 June 2007), *VS (Para 317(iii), no 3rd party support) Sri Lanka* [2007] UKAIT 00069 (30 July 2007) whose reasoning was endorsed by the Court of Appeal in *MW (Liberia) v Secretary of State for the Home Department* [2007] EWCA Civ 1376, [2007] All ER (D) 340 (Dec). The Court in *MW* stated: ‘... what the rule says is clear: the child is required to be maintained by the parent or relative she is seeking to join without recourse to public funds. If she is to be maintained by anyone else the requirement is not met. Securing maintenance from some third party is not “maintenance by the parent”. ... if the support is being or is to be given by the third parties to the parent to enable the child to be maintained, ...[c]an it then be said that the parent is maintaining the child? I think the simple answer to this question is no. In reality it is the third parties who are doing so. The parent ... is merely acting as a conduit between the donor and the child. This will be the case wherever the applicant is relying on support of the kind on offer in this case which was of voluntary and genuine gifts to the parent by a number of people.’ The Court accepted ‘that money received by a parent under a deed of covenant or court order for maintenance might qualify if it could be shown that the legal obligation to pay it was being or was likely to be met’.
- ¹² See comments on the asserted discrimination claim by Sedley LJ in *VS (Sri Lanka) v Entry Clearance Officer* [2008] EWCA Civ 217; and by DP Mr Ockelton in *NM (Disability discrimination) Iraq* [2008] UKAIT 00026 (25 March 2008) The Tribunal determination in *MK (Adequacy of maintenance – disabled sponsor) Somalia* [2007] UKAIT 00028 actually makes it harder for disabled sponsors to be reunited with their families. See: *AM (3rd party support not permitted R281 (v)) Ethiopia*, *MK (Somalia) v ECO* [2007] All ER (D) 443, *HI (Uganda) v ECO* [2007] All ER (D) 419.
- ¹³ Asylum and Immigration (Treatment of Claimants, etc) Act 2004, ss 19–25, in force 1 February 2005. See 11.68 below.
- ¹⁴ [2008] UKHL 53, [2008] 3 WLR 549, [2008] 3 All ER 1094.

11.5 On 9 December 2008 the Minister for Borders and Immigration announced the withdrawal of DP5/96 the ‘Seven Year Child Concession’ stating that the original purpose of the concession had been overtaken by the Human Rights Act 1998. The Minister acknowledged that a child’s residence in the UK will continue to be an important relevant factor in removal decisions.¹ The history and substance of concessions DP3/96² and DP2/93 have been fully explicated by the AIT.³ Government practice had been to apply these concessions strictly, and to require those, who have failed to obtain entry clearance prior to arrival, to return home to obtain one.⁴ This practice is likely to be modified in the light of the guidance on Article 8 family life claims in the Court of Appeal⁵ and in the judgments of the House of Lords in *Chikwamba v Secretary of State for the Home Department*;⁶ *EB Kosovo*

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(FC) *v Secretary of State for the Home Department*⁷ and *Betts v Secretary of State for the Home Department*.⁸ As but one example of the effect of this guidance on family claims see *JG (Jamaica) v Secretary of State for the Home Department*.⁹ 'Extra-rules' policies are relevant factors in the 'fair balance' evaluation for an Article 8 claim, and the courts have stated that in the context of that evaluation the question of the application of such a policy to an individual case is a matter for the Tribunal and not simply a matter for review of a decision of the Secretary of State.¹⁰ The former concession allowing the settlement of spouses and partners who have suffered domestic violence in their probationary period is now in the Rules. The former under 12s concession was withdrawn on 29 March 2003 and has not been replaced.¹¹

¹ The terms and effect of the DP5/96 policy have been considered in a number of cases (see fn 4 below) and the policy will continue to apply to cases decided before its withdrawal. See on the application of the policy to children without parents *NF (Ghana) v Secretary of State for the Home Department* [2008] EWCA Civ 906, [2008] All ER (D) 409 (Jul) and *R (on the application of A) v Secretary of State for the Home Department* [2008] EWHC 2844 (Admin), [2009] 1 FLR 531.

² See *BP (DP3/96, Unmarried Partners) Macedonia* [2008] UKAIT 00045 (28 February 2008). DP3/96 applies to cases where the person has been married or in a civil partnership for two years or more prior to enforcement. The Operational Enforcement Manual (OEM) Chapter 36 applies the same factors to unmarried partners. See also the case note on IA/00429/05 in the ILPA mailing 2008.04.36, *BP (DP3/96, Unmarried Partners) Macedonia* [2008] UKAIT 00045.

³ *DP69/99* (formerly DP5/96). See 11.124 below, DP3/96, DP4/96. See *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302, [2007] All ER (D) 97 (Dec) in which the Court stated: 'the tribunal will be considering not returning someone to his or her country of origin but forcing someone lawfully settled here to choose between losing his family or migrating with them to a country which may not be not his own. ... In substance, albeit not in form, [the spouse] was a party to the proceedings. It was as much his marriage as the appellant's which was in jeopardy, and it was the impact of removal on him rather than on her which, given the lapse of years since the marriage, was now critical. From Strasbourg's point of view, his Convention rights were as fully engaged as hers. He was entitled to something better than the cavalier treatment he received not only from the Home Office but, I regret to say, from the AIT. It cannot be permissible to give less than detailed and anxious consideration to the situation of a British citizen who has lived here all his life before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact' (at paras 19 and 20 per Sedley LJ). See also 11.75 below.

⁴ See eg *R v Secretary of State for the Home Department, ex p Zighem* [1996] Imm AR 194; *R v Secretary of State for the Home Department, ex p Gangadeen* [1998] INLR 206; *R v Secretary of State for the Home Department, ex p Kebbeh* (CO 1269/98) (30 April 1999, unreported); *Patel v Secretary of State for the Home Department, Ahmed v Secretary of State for the Home Department* [1998] INLR 570, CA; *R (on the application of Isiko) v Secretary of State for the Home Department* [2001] 1 FCR 633, CA; *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840. See, on whether there are insurmountable obstacles to the making of an entry clearance application from abroad: *MS (Inability to make entry clearance application) Somalia* [2005] UKIAT 00003 (17 January 2005, unreported), *AB and ors (Risk, Return, Israel Check Points) Palestine* CG [2005] UKIAT 00046 (1 February 2005, unreported), *KJ (Entry Clearance Proportionality) Iraq* CG [2005] UKIAT 00066 (10 March 2005, unreported).

⁵ In *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5, [2009] All ER (D) 92 (Jan), Sedley LJ (for the Court) noted at para 42:

'EB (Kosovo) now confirms that the material question in gauging the proportionality of a removal or deportation which will or may break up a family unless the family itself decamps is not whether there is an insuperable obstacle to this happening but whether it is reasonable to expect the family to leave with the appellant. It is to be hoped that reliance on what was a misreading of *Mahmood*,

as this court had already explained in *LM (DRC)* [2008] EWCA Civ 325 (and as Collins J had previously done in *Bakir* [2002] UKIAT 01176, § 9), will now cease’.

⁶ [2008] UKHL 40, [2008] 1 WLR 1420, [2009] 1 All ER 363.

⁷ [2008] UKHL 41, [2008] 3 WLR 178, [2008] 4 All ER 28.

⁸ [2008] UKHL 39, [2008] 3 WLR 166.

⁹ [2008] EWCA Civ 1032.

¹⁰ See *R (on the application of Tozhlukaya) v Secretary of State for the Home Department* [2006] EWCA Civ 379, [2006] All ER (D) 155 (Apr); *Baig v Secretary of State for the Home Department* [2005] EWCA Civ 1246, [2006] All ER (D) 155 (Apr). The Tribunal has stated that if claimants fail to establish that their human rights compel the remedy they seek, but are able to show that there was at the date of the decision a policy in force that governed their case but was not taken into account, they may win an appeal on the ground that the decision, having been made not in accordance with published policy, was ‘otherwise not in accordance with the law’ within the meaning of section 84(1)(e) of the Adoption and Children Act 2002. If the policy was taken into account and claimants can show that the terms of the policy and the facts of their case are such that there was no option open to the decision-maker other than to grant them the remedy they seek, their appeal should be allowed with a direction. But where within the terms of the policy the benefit to the appellant depends on the exercise of a discretion outside the Immigration Rules, the Tribunal has no power to substitute its own decision for that of the decision-maker (*AG (Policies; executive discretions; Tribunal’s powers) Kosovo* [2007] UKAIT 00082 (7 August 2007)).

¹¹ IDI, Ch 8, s 3, Annex M, para 12.

11.6 As stated, the law relating to inter-country adoption was radically reformed in 1999 and has been further revised in the Adoption and Children Act 2002 and the Children and Adoption Act 2006. As stated, the Family Division has given guidance on the legal issues concerning children born as a result of international surrogacy arrangements.¹ There have been many changes to the way in which children’s applications are processed, and further changes are proposed. Certain of the core protections for unaccompanied child applicants have been eroded. As these changes mean that the Home Office will interview more child applicants, practitioners will need to be familiar with expert evaluations on the competence and veracity of children and safeguards and presumptions concerning young people’s evidence. There are now more age dispute challenges involving young applicants and the Court of Appeal has considered the arrangements for making age assessments.² These disputes can involve the Home Office and social services departments. There is also growing concern at Home Office practices returning unaccompanied and trafficked children before, at, or soon after they become 18.³ Social services are increasingly involved with children and families at risk of removal. Chapter 13 deals with the support services for children and parents. As stated, there continue to be a number of important cases defining the extent to which those wishing to remain in or enter the UK can rely upon Article 8 of the ECHR. Certain of these cases are noted in this chapter but are discussed in more detail in chapter 8.

¹ See *X & Y (Foreign Surrogacy)*, *Re* [2008] EWHC 3030 (Fam), [2009] Fam Law 115.

² See Heaven Crawley, ‘When is a Child not a Child? Asylum, Age Disputes and the Process of Age Assessment’, ILPA 2007. See *R (on the application of A) v London Borough of Croydon* [2008] EWCA Civ 1445, [2009] 1 FCR 317.

³ The ‘Children’s Champion’ at the UKBA has stated that the Agency has visited Pakistan, Afghanistan and Bangladesh to assess their reception arrangements for returned children. Letter Jeremy Oppenheim to the ILPA, 9 October 2008, ILPA October mailing. The Court of Appeal in *CL (Vietnam) v Secretary of State for the Home Department* [2008] EWCA Civ 1551, (2009) Times, 7 January has confirmed that the question whether reception

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arrangements for children are 'adequate' is a question for the AIT not simply the Secretary of State – stating: that it would be difficult for a decision-maker to carry out a proper assessment of the effect of removal on the child's right to a private life without considering the circumstances (including the adequacy of reception and care arrangements) which would await that child upon removal: 'If they were inadequate, there might be serious consequences for the child's physical and mental well being.'

THE INTER-RELATIONSHIP BETWEEN FAMILY AND IMMIGRATION LAW

11.11 Not only do family and immigration jurisdictions deal with the same families, they are also linked by their shared association with bilateral, European and international instruments governing the international movement of children in transnational adoptions, abductions and cross-jurisdictional family orders and contacts.¹ In the same way that states have sought to harmonise their immigration control arrangements, states have also made agreements for comity and mutual recognition and enforcement of family orders.² Recent examples include the Immigration Rules for adopted or prospective adoptive children, which incorporate the Hague Convention protections for transnational adoptions.³ Arrangements to obtain passports, and Immigration Rules requiring appropriate parental or other consent for children's applications for entry clearance or for variation of leave, are framed to deter and prevent child abduction.⁴ And to achieve consistency with family and human rights provisions favouring contact between children and their parents, the Immigration Rules now make provision for parents who may not be the main carers to remain in the UK for the purpose of contact and an active role in the child's upbringing.⁵ One major difference between family and immigration law in the application of a relevant international human rights treaty arose out of the UN Convention on the Rights of the Child as a result of a UK reservation concerning immigration decision-making. The Secretary of State has announced her intention to withdraw this reservation. It follows that the two jurisdictions will now jointly be bound by Convention obligations.⁶

¹ For example: Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters of 28 May 1968, European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children 1980, European Convention on the Exercise of Children's Rights 1996, Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoption 1965, Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993, Hague Convention on the Civil Aspects of International Child Abduction 1980. See also: Lowe, Everall et al *International Movement of Children* (2004) Jordan Publishing.

² See for example on international child contact, *Re G (Foreign Contact Order: Enforcement)* [2003] EWCA Civ 1607, [2004] 1 WLR 521; *Re A (Foreign Contact order: jurisdiction)* [2003] EWHC 2911 (Fam), [2004] 1 All ER 912; Council Regulation (EC) No 1347/2000 (on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses) as well as the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1980 Luxembourg Convention (commonly referred to as 'the European Convention'). The two Conventions were given effect in UK domestic law by the Child Abduction and Custody Act 1985. The government has consulted on whether the UK should sign and ratify the Council of Europe Convention on Contact Concerning Children. See Department for Constitutional Affairs *Consultation Paper on the Council of Europe Convention on Contact Concerning Children* CP 02/04, 28 May 2004.

- ³ The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 is incorporated in The Adoption and Children Act 2002, the Adoption (Bringing Children into the United Kingdom) Regulations 2003 and the Immigration Rules HC 395, para 310.
- ⁴ See for example HC 395, para 320(16), 322(11), UK Passport Agency guidelines on passport issue to children, reproduced at [1994] Fam Law 651, and Diplomatic Service Procedures (DSP), Entry Clearance Vol 1, General Instructions Feb 04, Ch 14, para 14.5, stating that entry clearance officers should take care to ensure that the issue of a settlement entry clearance to the child will not contravene the terms of the custody order (at www.ukvisas.gov.uk). See also: OM (*Children: settlement – cross border movement*) [2005] UKAIT 177 regarding the entry of children under para 322(9) of HC 395, and FO (*Children: settlement, OM distinguished*) *Nigeria* [2006] UKAIT 00089 (4 December 2006) which held that OM has no general application to HC 395, paras 296–316 about the settlement of children. See also *Hamilton Jones v David & Snape (A firm)* [2003] EWHC 3147, [2004] 1 All ER 657, a claim for damages against a solicitor's firm which negligently failed to re-register a child at risk of removal with the UK Passport Agency.
- ⁵ HC 395, paras 246–248F.
- ⁶ The reservations were to Articles 22 and 37 of UNCRC. See Press Release Department of Children, Schools and Families, 22 September 2008, www.dcsf.gov.uk. See para 11.1A on the Children's Code. Section 21 of the UK Borders Act 2007 (which came into force on 6 January 2009) introduced a statutory Code of Practice on keeping children safe from harm. The Code confirms that children's best interests are a primary consideration. When the UK ratified the Children's Convention it reserved the right to apply legislation relating to entry into, stay in and departure from the UK of those who did not have the right under the law of the UK to enter and remain in the UK and to the acquisition and possession of citizenship in a manner which did not necessarily comply with the Convention. See *R v Secretary of State for the Home Department, ex p Gangadeen and Jurawan*, *R v Secretary of State for the Home Department, ex p Khan* [1998] INLR 206, [1988] 1 FLR, [1998] Imm AR 106, [1997] EWCA Civ 2799; *Patel v Secretary of State for the Home Department, Ahmed v Secretary of State for the Home Department* [1998] EWHC Admin 453, [1999] Imm AR 22. Although the UK reservation covered entry, stay and removal decisions, even then the important Convention principles concerning representation and participation by children in judicial and administrative cases affecting them (Art 12) arguably applied in funding decisions by the Legal Services Commission in immigration cases involving children. Note that a core principle of the Children's Rights Convention, namely that the best interests of a child should be a primary consideration when implementing the Directive is an explicit requirement in the Council Directive 2004/83 EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, see 12.3 above. Note also the new Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community signed by Member States includes the protection of children's rights in the objectives of the European Union (Article 2).

11.12 In these intersecting family and immigration cases, courts and immigration authorities are required to evaluate varied family customs and arrangements when they have to decide on the validity of marriages, divorces or adoptions as well as whether there is established family life and grounds to remove or return children to another jurisdiction. These judgements are made by reference to 'the diversity of forms' that the family takes in 'our multi-cultural and pluralistic society'.¹ In recent judgements concerning the return and entry of children the courts have emphasised the need for sensitivity and respect to be shown to family arrangements in different cultures and jurisdictions.² In *Singh v Entry Clearance Officer, New Delhi*³ the issue was whether there was a 'family life' between parents and their adoptive child where the adoption was valid under Indian law but not recognised in English law, the Court of Appeal noted:⁴

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‘it is important in this type of case, even if the adoption is not one that our law recognises, to have regard not merely to the fact of the adoption but also to all the personal, emotional and psychological, as well as the social, cultural and religious, consequences that flow from it.’

A consideration of varied family customs most frequently arises for consideration in family cases alleging unlawful parental abduction or retention of children. In such cases different principles apply if the child’s home State is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction.⁵ In *Re J (a child)*,⁶ which concerned a non-Convention custody dispute, Baroness Hale giving judgment for the House of Lords, noted that:

‘It would be wrong to say that the future of every child who is within the jurisdiction of our courts should be decided according to a conception of child welfare which exactly corresponds to that which is current here. In a world which values difference, one culture is not inevitably to be preferred to another. Indeed, we do not have any fixed concept of what will be in the best interests of the individual child.’⁷

However, the Committee noted that it was a relevant, and it may be a decisive factor in a decision to decide a custody dispute in the UK rather than direct the child’s summary return if the courts in the child’s home country have no choice but to do as the father wishes, so that the mother cannot ask them to decide, with an open mind, whether the child will be better off living here or there.⁸ In an immigration context, the House of Lords recently considered whether the removal of a mother and child to Lebanon where she would she would automatically lose custody of her child and her prospects of maintaining contact with her child were limited, the removal was a flagrant denial of rights to equal treatment in the enjoyment of the ‘elementary’ right to care for one’s own child and corresponding right of the child to be cared for by his mother. The House of Lords held that the effect of removal to Lebanon was that the mother and child’s rights to respect for their family life would not only be flagrantly violated but would also be completely denied and nullified. In no meaningful sense could occasional supervised visits by the mother even if ordered (and there is no guarantee that they would be ordered), be described as family life. The effect of return would be to destroy the family life of the mother and child as it is now lived. Their Lordships differed concerning whether the flagrancy was established because of Lebanon’s discriminatory custody regime or simply the exceptional nature of the case facts.

¹ In *Singh v Entry Clearance Officer, New Delhi* [2004] EWCA Civ 1075, [2004] INLR 515 Munby J noted that ‘the Strasbourg court has never sought to identify any minimum requirements that must be shown if family life is to be held to exist. That is because there are none. In my judgment there is no single factor whose existence is crucial to the existence of family life, either in the abstract or even in the context of any particular type of family relationship’ (at para 72).

² In *Re E (Abduction: Non-Convention Country)* [1999] 2 FLR 642 at 647 Thorpe LJ stated that States should respect the ‘variety of concepts of child welfare derived from differing cultures and traditions’ and ‘a recognition of this reality must inform judicial policy’. But note that in *SK (‘Adoption’ not recognised in UK) India* [2006] UKAIT 00068 (1 September 2006), a case in which the principled observations in *Singh* above went unheeded, the Tribunal sought to limit the significance of *Singh* in the immigration context. The Tribunal noted: ‘The [*Singh*] case has, therefore, nothing to say about whether interference with family life would be proportionate. There is no consideration of the Immigration Rules (including para 309A, which postdates the original decision in *Singh*’s case) as a whole,

and no consideration of the consequences of the proposed admission of a child who would be regarded as the child of the sponsors for immigration law purposes but not for other purposes⁷. In our view the Tribunal's narrow reading of *Singh* is wholly inappropriate. The rules permit the entry of de facto adopted children whose sponsors are parents for immigration purposes but no other purpose. It is a simple matter for the carers to obtain appropriate parental orders in family jurisdiction. Furthermore, the core decision in *Singh* was to revive the finding of the original Adjudicator who found the child's exclusion to be disproportionate. The Court of Appeal noted that the ECHR had admitted the Article 8 and 14 claims in the case as 'arguable'. On 27 August 2004, the child entered the UK and at the government's initiative a friendly settlement was reached under which the applicants withdrew their ECHR application in return for payment from the UK government of some £42,000 plus legal costs. For further criticisms, see 11.116, below.

³ [2004] EWCA Civ 1075, [2004] INLR 615.

⁴ At para 86 per Munby J.

⁵ See discussion in *Re J (a child)* [2005] UKHL 40, [2005] 3 All ER 291 at paras 13–28. In all non-Convention cases, the courts have consistently held that they must act in accordance with the welfare of the individual child. If they do decide to return the child, that is because it is in his or her best interests to do so. In cases decided by reference to the Hague Convention, which was motivated by the belief that it is in the best interests of children for disputes about their future to be decided in their home countries, the receiving country might on occasion have to do something which was not in the best interests of the individual child involved. The States which became parties to these treaties accepted this disadvantage to some individual children for the sake of the greater advantage to children in general.

⁶ *Re J (a child)* [2005] UKHL 40.

⁷ *Re J (a child)* at para 37. See in contrast *In Re E (Abduction: Non-Convention Country)* [1999] 2 FLR 642 per Thorpe LJ at 647. In *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2008] 3 WLR 931, Lord Bingham stated concerning family life at para 37 that:

'Families differ widely, in their composition and in the mutual relations which exist between the members, and marked changes are likely to occur over time within the same family. Thus there is no pre-determined model of family or family life to which article 8 must be applied. The article requires respect to be shown for the right to such family life as is or may be enjoyed by the particular applicant or applicants before the court, always bearing in mind (since any family must have at least two members, and may have many more) the participation of other members who share in the life of that family. In this context, as in most Convention contexts, the facts of the particular case are crucial.'

⁸ *Re J (a child)* at para 39. In *EM Lebanon* (the House of Lords judgment) Baroness Hale stated at para 47 that:

'The discriminatory laws of Lebanon are the reason why [the child's removal from his mother's care] is a real risk in this case. They are also the reason why the interference cannot be justified. But it is the effect upon the essence of the child's right with which we have to be concerned.'

⁹ *EM (Lebanon) v Secretary of State for the Home Dept* [2006] EWCA Civ 1531 (21 November 2006).

11.15 Immigration decision-makers and courts likewise have given little attention to the legal consequences of generic restrictions applicable to certain child removals or departures, which we set out below. These restrictions are not binding on the Secretary of State, but they do have consequences for parents and carers, who may have to decide whether they can voluntarily leave the UK to establish family life elsewhere. These statutory restrictions on child removals therefore are relevant matters to consider in the fair balance assessment under Article 8 ECHR or a public interest balance on a parent's deportation under UK domestic immigration law. These issues are most likely

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to arise where a partner of the person being removed has children from another relationship and the Home Office or immigration authority is considering whether the resident partner can be expected to leave the jurisdiction with his or her excluded partner. The removal of a habitually resident¹ child from the UK without the consent of a parent or carer, or permission of a court, can constitute a wrongful removal or abduction. The Hague Convention on the Civil Aspects of International Child Abduction applies to a child under 16 who, immediately before the retention or removal, was habitually resident in the UK and whose removal is in breach of rights of custody attributed to a person, institution or any other body, either jointly or alone.² Section 1 of the Child Abduction Act 1984 makes it an offence for a parent to take or send a child out of the UK without the consent of all those with parental responsibility.³ Section 13 of the Children Act 1989 imposes a restraint on the international movement of children if there is a residence order in force and there is more than one holder of parental responsibility, except that the holder of a residence order can take the child out of the jurisdiction for periods up to a month at a time.⁴

¹ Habitual residence is a question of fact and all the circumstances of the case will be taken into account. It must also be given its ordinary meaning: *Re G (Adoption: Ordinary residence)* [2002] EWHC 2447 (Fam), [2003] 2 FLR 944. It is defined more by the quality of the residence than its length and requires an element of intention. Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, 'durable ties' with the country of residence or intended residence and many other factors may be taken into account: *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677. The period of time can be short *Re S (A Minor) (Custody: Habitual residence)* [1998] AC 750. It is also possible to be habitually resident in two countries at once. Factors such as location of the home, employment, financial arrangements and location of bank account and local connections are just some of the many factors which may be relevant. The status of children can depend upon the intentions which parents have for the children: *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937, *Al Habtoor v Fotheringham* [2001] EWCA 186, [2001] 1 FCR 385; *Re S (Custody: Habitual residence)* [1998] AC 750. In European law dealing with the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility Regulation (EC) No 2201/2003 the ECJ held that the autonomous definition in the Directive placed a child's habitual residence as 'corresponding to the actual centre of interests of the child': *A (Area of Freedom, Security and Justice)* [2009] EUECJ C-523/07_O (29 January 2009).

² Articles 3, 4, 5. Note also the prohibition on removal of wards and children in care. It is prohibited to remove a ward from the jurisdiction without leave of the Court: Family Law Act 1986, s 38. It is also an offence to remove a child in care from a place of safety or from the responsible person (Children Act 1989, s 49; Children and Young Persons Act 1969, s 32(3)) and their placement outside England and Wales requires leave from the Court, even if all persons with parental responsibility for the child have consented: Children Act 1989, Sch 2, para 19. It can also be a criminal offence for a person to remove from the UK a habitually resident or Commonwealth citizen child for the purposes of adopting that child abroad. Such prospective adopter must get an order from the High Court giving them parental responsibility for the purposes of adopting abroad (Adoption and Children Act 2002, s 85). See *A (a child) (adoption: removal)*, *Re* [2009] EWCA Civ 41, [2009] All ER (D) 45 (Feb), re placement in the USA.

³ Under the Children Act 1989, s 3(1) 'parental responsibility' is defined as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'. Note that an unmarried father does not automatically have parental responsibility for his child: Children Act 1989, s 2(2). Where the parents of a child are not married to each other, the father acquires parental responsibility for the child if he is registered as the father on the child's birth certificate, he and the mother make a parental responsibility agreement providing him with parental responsibility or the court on application orders this (Children Act 1989, s 4). Some aspects of parental responsibility acknowledged by the courts include: determining a child's religion

and education, consenting to their medical treatment, having physical possession or contact with the child, consenting to or arranging the child's emigration and protecting and maintaining the child. See Hershman & McFarlane *Children Law and Practice* Vol 1A 'parental responsibility'.

- ⁴ Where a residence order is in force with respect to a child, no person may remove the child from the UK without either the written consent of every person who has parental responsibility for the child or leave of the court: Children Act 1989, s 13(1). An unmarried father does not have parental responsibility if not on the child's birth certificate or in the absence of a parental responsibility agreement or a court order: Children Act 1989 s 4, but see *Re C (Child Abduction Unmarried Father: Rights of Custody)* [2002] EWHC 2219 (Fam), [2003] 1 WLR 493; *Re H (Child Abduction Unmarried Father: Rights of Custody)* [2003] EWHC 492 (Fam), [2003] 2 FLR 153.

11.18 UK family courts¹ generally have jurisdiction to determine applications in relation to any child who is habitually resident² or present within its geographical jurisdiction.³ This is true even if the child in question is liable to removal or deportation.⁴ Similarly, family courts can decide on applications for family court orders⁵ from adults (parents or carers) who are liable to removal or deportation.⁶ These family orders define the rights and obligations of parents in relation to their children in private law cases,⁷ or, in the case of public law orders⁸ or wardship,⁹ operate to protect the child from significant harm at the hands of his or her parents or carers or resolve particular issues concerning children.

- ¹ Family proceedings courts, county courts, the Principal Registry and the Family Division of the High Court. Section 42(1) applies the Family Law Act 1986 to England and Wales, Scotland and Northern Ireland.
- ² See 11.14 fn 1 above; see also *Re R (Abduction: habitual residence)* [2003] EWHC 1968 (Fam), [2004] 1 FLR 216. The status of children can depend upon the intentions which their parents (but not one parent acting unilaterally) have for them: *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388. In European law dealing with the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility Regulation (EC) No 2201/2003 the ECJ held that the autonomous definition in the Directive placed a child's habitual residence as 'corresponding to the actual centre of interests of the child': *A (Area of Freedom, Security and Justice)* [2009] EUECJ C-523/07_O (29 January 2009).
- ³ Family Law Act 1986, s 2(2), (3), 3(1), *Re R (Care Proceedings: Jurisdiction)* [1995] 3 FCR 305, *Re Matondo* [1993] Imm AR 541 also known as *Re M (A Minor) (Immigration: Residence Order)* [1993] 2 FLR 858, *R v Home Secretary, ex p Khawaja* [1984] 1 AC 74. See for adoption jurisdiction, Adoption and Children Act 2002, s 49. See concerning children born to a surrogate British mother for Turkish domiciled parents: *Re G* [2007] EWHC 2814 (Fam), [2008] Fam Law 95 (28 November 2007).
- ⁴ *R v Secretary of State for the Home Department, ex p T* [1994] Imm AR 368, [1995] 1 FLR 293; *Re A (children) (care proceedings: asylum seekers)* [2003] EWHC 1086 (Fam), [2003] 2 FLR 921.
- ⁵ For example, residence, contact, specific issues and prohibited steps orders under s 8 of the Children Act 1989 or care or supervision orders under s 31 of the Children Act 1989 or wardship under the High Court's inherent jurisdiction.
- ⁶ *R v Secretary of State for the Home Department, ex p T* [1994] Imm AR 368, [1995] 1 FLR 293; *Re A (children) (care proceedings: asylum seekers)* [2003] EWHC 1086 (Fam), [2003] 2 FLR 921.
- ⁷ Cases when there is a dispute between parents or other carers about whom the child should live with (residence order) or what contact the child should have with them (contact order) or whether the child should be removed from the jurisdiction (prohibited steps order) or, for example, enrolled at a certain type of school (specific issue order).
- ⁸ Care orders which vest parental responsibility in the local authority and supervision orders which place the child under the supervision of a local authority whilst continuing to live with the carers.

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- ⁹ The inherent jurisdiction developed by the High Court deriving from what Lord Denning in *Re L (An Infant)* [1968] 1 All ER 20 at 24G termed the ‘right and duty of the Crown as *parens patriae* to take care of those who are not able to take care of themselves.’

DOMICILE

11.31 The legal rules may be summarised as follows:

- (i) ‘There is a strong presumption in favour of the continuance of the domicile of origin. As contrasted with the domicile of choice, “its character is more enduring, its hold stronger and less easily shaken off”.’¹
- (ii) What has to be proved is an intention freely formed to reside in a certain territory indefinitely. All the elements of the intention must be shown to exist if the change is to be established: if any one element is not proved, the case for a change fails.³ Statements as to domicile by a testator in a will,² by a taxpayer on an Inland Revenue form,³ or in an application for registration or naturalisation as a British citizen are not necessarily reliable.⁴
- (iii) The burden of proving that a domicile of choice has been acquired rests on the person who asserts that the domicile of origin has been lost.⁵ If the burden of proving a change has not been discharged, the domicile of origin will remain.⁶
- (iv) The abandonment of a domicile of choice is easier than its acquisition, although there must be unequivocal evidence of abandonment.⁷ One reason for the difference is that abandonment of a domicile of choice does not depend upon the acquisition of a new domicile. As stated, if no new domicile of choice is acquired, the domicile of origin revives.

¹ Per Lord MacNaughten in *Winans v A-G* [1904] AC 287 at 290. For modern examples see *Cramer v Cramer* [1986] Fam Law 333, CA; [2005] UKSSCSC CP_3108_2004 (25 April 2005) a case about entitlement to widow’s pension; *SM (Domicile of choice, Scots law) Pakistan* [2008] UKAIT 00092 (26 November 2008).

² *Re Steer* (1858) 3 H & N 594; *A-G v Yule and Mercantile Bank of India* (1931) 145 LT 9.

³ In *Re Fuld* [1968] P 675 per Scarman J at 684, 685, *Buswell v IRC* [1974] 2 All ER 520, [1974] 1 WLR 1631. Every fact, however trivial, is admissible for the purpose of proving an intention to acquire or discard a domicile: *Re Flynn, Flynn v Flynn* (1968) 1 All ER 49.

⁴ *Begum (Rokeya) v Entry Clearance Officer* [1983] Imm AR 163; *Khatun (Hamida) v Entry Clearance Officer, Dhaka* [1988] Imm AR 138, IAT; *SM (Domicile of choice, Scots law) Pakistan* [2008] UKAIT 00092 (26 November 2008) – a person who evinces a desire to retain the laws of his original home (as distinct from the rules of UK or Scots law) for a continuing part of his life does not show the intention relevant to a change of domicile.

⁵ *Winans v A-G* [1904] AC 287 at 290 and 291. See also *R v Entry Clearance Officer, Islamabad, ex p Ali* CO (3585/97) (20 January 1999, unreported) per Turner J, concerning ambiguities and inferences from the questionnaire used by the Home Office to test domicile.

⁶ *Agulian v Cyganik* [2006] EWCA Civ 129, [2006] 1 FCR 406 (24 February 2006), *Scapaticci v A-G* [1955] P 47, [1955] 1 All ER 193. See also *Abktar (Ali)* [2002] UKIAT 02135.

⁷ *Re Lloyd Evans, National Provincial Bank v Evans* [1947] Ch 695 at 703; *Re Raffanel’s Goods* (1863) 3 Sw & Tr 49.

MARRIAGE AND CIVIL PARTNERSHIP

General problems of validity

11.34 In order to obtain admission as a spouse, the applicant must satisfy the entry clearance officer that the marriage is lawful and complies with the requirements of the Immigration Rules. A valid marriage requires that both parties had the necessary capacity to marry, and that the celebration was in a valid form. Capacity to marry is normally determined by the ante-nuptial domiciliary law of each party.¹ A valid civil partnership requires that the partners are of the same sex, that neither of them is already a civil partner or lawfully married, both are over 16, and neither are within prohibited degrees of relationship.² The formal validity of the marriage or civil partnership is determined by the law of the place of celebration.³ The parties can apply to the courts for a declaration that a marriage or civil partnership⁴ was at its inception a valid marriage/civil partnership, or that it subsisted or did not subsist at a particular date if one of the parties to the marriage/civil partnership is domiciled in the UK or on the date of application had been habitually resident in England and Wales for one year preceding the date of the application.⁵ A detailed review of private international law relating to validity of marriages and divorces and civil partnerships is beyond the scope of this work,⁶ but we focus on the particular problems likely to be encountered in immigration cases, in particular the rules relating to polygamous marriages and the recognition of *talaq* divorces.

¹ Family Law Act 1986, s 55. See: *X City Council v MB* [2006] EWHC 168 (Fam) (13 February 2006); *SM (Domicile of choice, Scots law) Pakistan* [2008] UKAIT 00092 (26 November 2008). See concerning a marriage valid under Sharia and Bangladeshi law but concerning which it was found the vulnerable adult lacked the capacity to marry – thus invalidating the marriage in English law: *Westminster Social and Community Services Department v C* [2008] EWCA Civ 198, [2009] 2 WLR 185.

² Civil Partnership Act 2004, s 3. Parental consent is required if a proposed civil partner is under 18 (Civil Partnership Act 2004, s4).

³ *CB (Validity of marriage: proxy marriage) Brazil* [2008] UKAIT 00080 (10 October 2008) The AIT upheld the validity of a proxy marriage celebrated in Brazil between two parties domiciled in the UK because such marriages were valid according to Brazilian law.

⁴ Civil Partnership Act 2004, ss 58–61.

⁵ Family Law Act 1986, s 55. If it is asserted that the marriage was void *ab initio*, the remedy lies in a petition of nullity. In deciding whether to grant recognition to a foreign marriage, the court will exercise ‘common sense, good manners and reasonable tolerance’: *Cheni v Cheni* [1965] P 85, recognising the marriage of an uncle and niece as valid under the law of their domicile but noting that an overseas marriage that would be ‘offensive to the conscience of the English Court’ may not be recognised even if it is valid under the foreign law. See on the presumption of validity of marriage: *FI (Bangladesh presumption marriage legitimacy)* [2005] UKIAT 00016 (Civil Partnership Act 2004, ss 58, 224).

⁶ IDI, Ch 8 Annex B ‘Recognition of Marriage and Divorce’, deals with several of the most common validity issues, namely polygamous, proxy and telephone marriages, as well as *talaq* and customary divorces and divorce in the Philippines. See on proxy phone marriage for the purpose of Art 8 ECHR, *J (Pakistan)* [2003] UKIAT 00167 and on the validity of a proxy Brazilian marriage: *CB (Validity of marriage: proxy marriage) Brazil* [2008] UKAIT 00080 (10 October 2008). See on the Islamic institution of *muta* or *sighe* which the Tribunal stated is not marriage within the meaning of the Immigration Rules, as its existence does not imply a relationship continuing or intended to continue beyond its termination (*LS (Mut’a or sighe) Iran* [2007] UKAIT 00072 (30 July 2007)). IDI, Ch 8, Annex H ‘Civil Partnerships’ deals with the eligibility, registration and dissolution of civil

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partnerships and lists the foreign civil partnerships recognised in the UK. See on customary marriages and divorce NA (*Customary marriage and divorce, evidence*) Ghana [2009] UKAIT 00009 (12 January 2009).

Recognition of talaq and other overseas divorces

11.39 Section 46 of the Family Law Act 1986 draws a distinction between a divorce ‘obtained by means of proceedings’ and a divorce ‘obtained otherwise than by means of proceedings’.¹ A divorce ‘obtained otherwise than by means of proceedings’ cannot be valid if either party to the marriage was habitually resident in the UK during the period of one year immediately preceding the date the divorce was obtained.² This particular provision is of great importance in immigration cases, because, in an immigration context, it frequently happens that one of the parties to the claimed divorce was so resident in the UK. Where the sponsor has at all material times been habitually resident in the UK, the divorce is entitled to recognition in English law only if it was ‘obtained by means of proceedings’.³ In the starred determination *Baig v Entry Clearance Officer, Islamabad*, the Tribunal held that an effective divorce must have been obtained under the law of the country in which it was obtained and that the divorce be ‘obtained by means of’ the proceedings – one must be able to say that if the proceedings had not taken place, the divorce would not have been obtained.⁴ Registration of a *talaq* under the Muslim Family Law Ordinance amounts to proceedings,⁵ but a bare *talaq* does not,⁶ nor does a *talaq al-hasan*, obtained by the required pronouncements, if it is not notified to the Chairman of the Union Council under the Muslim Family Law Ordinance.⁷

¹ Family Law Act 1986, s 46(1) and (2)

² Family Law Act 1986, s 46(2). On the meaning of ‘habitual residence’ see 11.14 fn 1, above.

³ Family Law Act 1986, s 46(1), *Baig v Entry Clearance Officer, Islamabad* [2002] UKIAT 04229, [2003] INLR 117 (starred); *B v Entry Clearance Officer, Islamabad (Pakistan)* [2002] UKIAT 04229 (13 September 2002) (starred). See also NC (*bare talaq, Indian Muslims, recognition*) Pakistan [2009] UKAIT 00016 (19 March 2009) in which the AIT upheld the validity of bare talaqs which took place in Kashmir and India. The AIT noted evidence that Indian Muslim husbands may lawfully divorce their wives by bare talaq, as may Pakistani Muslim husbands in that part of Kashmir which is in Pakistan. Such divorces are recognised by the United Kingdom (subject to the rules on domicile and habitual residence therein set out) pursuant to s 46(2) of the Family Law Act 1986.

⁴ [2002] UKIAT 04229, [2003] INLR 117. See also Family Law Act 1986, s 46(1); *Qureshi v Qureshi* [1972] Fam 173, [1971] 1 All ER 325; *R v Registrar General, ex p Minhas* [1977] QB 1, [1976] 2 All ER 246.

⁵ *Quazi v Quazi* [1980] AC 744, [1979] 3 All ER 897, HL.

⁶ *Bi (Maqsood)* (10144); *Nadeem* (00TH 00100) IAS 2000, Vol 3, No 8.

⁷ *Baig v Entry Clearance Officer, Islamabad* [2003] INLR 117, *B v Entry Clearance Officer, Islamabad (Pakistan)* [2002] UKIAT 04229 (13 September 2002) (starred).

11.40 As stated, some provision is made in UK law for recognising overseas divorces which are obtained without any proceedings at all.¹ The requirements are that the divorce is effective under the law of the country in which it was obtained; that either the two parties were domiciled in the country where the divorce was obtained at the time or one party was so domiciled and the divorce is recognised as valid in the law of the other party’s domicile; and that

neither party was habitually resident in the UK in the year before the divorce.² Thus a West African customary divorce may be recognised if evidence of either dissolution by a customary court or agreement by the heads of the parties' families is available by affidavit, accompanied by a document registering the divorce and a certificate of the Minister for Foreign Affairs.³

¹ Family Law Act 1986, s 46. The IDI (Ch 8 Annex B) deal with Filipino divorces, which pose a particular problem for those who retain a Philippines domicile as at present it is only possible to obtain a divorce permitting remarriage in the Philippines if both parties are Muslims. See also *NA (Customary marriage and divorce, evidence) Ghana* [2009] UKAIT 00009 (12 January 2009).

² Family Law Act 1986, s 46(2).

³ See for example *Wicken v Wicken* [1999] Fam 224.

Spouses/civil partners under 16

11.42 The age at which a person can contract a valid marriage/civil partnership varies from country to country. An age requirement will usually be classified as a matter of capacity affecting the essential validity of the marriage. It will therefore fall, under English law, to be dealt with according to the law of the domicile of the particular person. A marriage/civil partnership contracted by a spouse/partner domiciled in the UK is not valid if he or she is under 16.¹ However, in a number of countries marriage under the age of 16 is permitted and marriage by a spouse under this age, domiciled there, is regarded as valid. The Immigration Rules concerning young spouses/civil partners are contained in HC 395, para 277. The Rules do not permit entry for settlement or leave to remain as a spouse/civil partner if either the applicant or sponsor is under 21 at the date of arrival or grant of leave.²

¹ Matrimonial Causes Act 1973, s 11(a)(ii). Civil Partnership Act 2004, ss 3–4.

² See 11.62 below. The government has raised the age for spouse leave to 21 'to prevent forced marriages': *Controlling our Borders: Making Migration Work for Britain: The Five year Strategy for Asylum and Immigration*, Cm 6472, February 2005, p 22. In a press statement dated 5 December 2007, the Secretary of State is quoted as saying: 'I believe it is right that we protect those at risk and that is why I am proposing that the age at which a person can sponsor or be sponsored to come to the UK for marriage is raised from 18 to 21'. See generally on forced marriages: Forced Marriage (Civil Protection) Act 2007 which is expected to commence in autumn 2008 under which courts can make orders for the purposes of protecting a person from being forced into a marriage or from any attempt to be forced into a marriage; or a person who has been forced into a marriage. The Act enables a victim or a 'relevant third party' to make an application for a Forced Marriage Protection Order without the court's permission. Any other person may apply only if they first obtain the court's permission. A relevant third party is a person (or an organisation), specified by the Lord Chancellor. On the 12 December 2007, the Ministry of Justice published a consultation paper to ascertain what need there is for relevant third parties, what type of people or organisations should act and what safeguards are needed.

Proving the validity of a marriage/civil partnership

11.45 In *Akhtar*¹ the Tribunal accepted the view of experts on Islamic law that in that tradition the parties need not have met, and so a telephone marriage was valid even though the husband was not present at the marriage ceremony. In *Ur Rehman* the Tribunal held that if both parties are domiciled in a country where a telephone marriage is valid, the marriage is recognised

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under English law even if one of the parties was resident in the UK on the date of the marriage.² The IDI states that proxy marriages are valid, provided they are recognised in the country where they are celebrated.³ The fact that a proxy may be appointed by telephone from England would not detract from recognition of the marriage celebrated elsewhere. However, by the time the application for entry clearance is determined, the couple must have met in order to comply with a specific requirement of the Immigration Rules aimed at arranged marriages.⁴ A Pakistan Islamic marriage is complete even if the attendant traditional ceremonial such as the departure of the bride (ruksati) is dispensed with.⁵

¹ (2166).

² *Ur Rehman* (TH 5885/99) IAS 2000, Vol 3, No 15. The IDI however, say that a telephone marriage is not valid if one party is in the UK at the time: IDI (May/03), Ch 8, s 1, Annex B, para 3.1. This advice, in our view, is wrong, unless of course the party who is in the UK has acquired a domicile in England and Wales, Scotland or Northern Ireland. See *CB* (Validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080 (10 October 2008).

³ IDI (May/03), Ch 8, s 1, Annex B, para 3.1.

⁴ HC 395, para 281(iii); see further 11.67 below.

⁵ *Hussain (Basharat) v Visa Officer, Islamabad* [1991] Imm AR 182.

ADMISSION OF FAMILY MEMBERS AND PARTNERS

11.47 In order for family members and unmarried or civil partners to be admitted for entry or permitted to stay in the UK they must have a sponsor who is in the UK and who wants to bring in the family member or partner.¹ The sponsor may be a person with limited leave such as a student or work permit holder, or a British citizen or settled in the UK.² Persons admitted as spouses or partners are dependent on the immigration status of their partner until they obtain settlement.³ Although entry clearance to join family in the UK stands as leave to enter, a change of circumstances between issue of the entry clearance and arrival here may result in cancellation of leave by an immigration officer.⁴ If the sponsor is found to have obtained entry unlawfully, or doubts are raised about the validity of the marriage or the relationship, or if the relationship breaks down, or the new arrival has recourse to public funds, an extension of stay may be refused or existing leave curtailed.⁵ A decision to remove the person will normally follow. The Rules allow the grant of settlement to spouses, civil and unmarried partners who have been victims of domestic violence by their sponsor or a member of his or her family during the probationary period.⁶ Spouses, civil and unmarried partners bereaved during their probationary period may also obtain settlement under the Immigration Rules.⁷ Once spouses and unmarried partners have been granted settlement they may not normally be deprived of it, whether or not the marriage or relationship lasts,⁸ and cannot be removed from the UK, unless the Home Office can demonstrate that deception was used in seeking (whether successfully or not) to obtain settlement,⁹ or they are the subject of a deportation order.¹⁰

¹ See next section for maintenance, accommodation and third-party support.

² Note that students cannot sponsor their unmarried partners. HC 395 para 76

- ³ Note that the spouse and unmarried partner rules do permit the grant of indefinite leave to remain in circumstances where the sponsorship no longer exists, either because the spouse or partner has died or the relationship ended through domestic violence. These concessions are the exception to the ongoing sponsorship requirement.
- ⁴ HC 395, para 321(ii), 321A; Immigration (Leave to Enter and Remain) Order 2000, SI 2000/1161, Art 6. See chapter 3 above for refusal and cancellation of leave.
- ⁵ Immigration Act 1971, s 3(3)(a); HC 395, paras 322, 323. See chapter 4 above for curtailment of leave. IDI, Ch 9, s 5 'Variation of Stay: Curtailment' states: 'It should be borne in mind that the curtailment provisions are discretionary. Therefore curtailment should not follow automatically if one of the above criteria applies. When curtailing a person's leave the burden of proof rests with the Secretary of State. Careful consideration should accordingly be given to all the person's circumstances.'
- ⁶ HC 395, paras 289A, 289B, inserted by HC 104, HC 538, HC 582.
- ⁷ HC 395, as amended by Cm 4851, paras 287(b) (spouses and civil partners) and 295M (unmarried partners).
- ⁸ Indefinite leave to remain can only be revoked in one of the situations set out in the Nationality Immigration and Asylum Act 2002, s 76. The Immigration (Leave to Enter and Remain) Order 2000 (SI 2000/1161) provides the power to vary or cancel non-lapsing leave (either indefinite or limited) where the person is outside the UK (Pt IV, para 13(6) and (7)).
- ⁹ Immigration and Asylum Act 1999, s 10(1)(b); CD (s 10 curtailment: right of appeal) India [2008] UKAIT 00055.
- ¹⁰ A deportation order nullifies any leave to remain, including indefinite leave. Prior to the passage of s 10 of the Immigration and Asylum Act 1999 (fn 8 above), persons entering sham marriages to remain in the UK were deported on public good grounds: see *R v Immigration Appeal Tribunal, ex p Cheema* [1982] Imm AR 124, CA; *R v Immigration Appeal Tribunal, ex p Patel (Anilkumar Rabindrabhai)* [1988] AC 910, [1988] 2 All ER 378, [1988] 2 WLR 1165; *Patel (Yanus) v Immigration Appeal Tribunal* [1989] Imm AR 416, CA. See chapter 15 below.

11.48 Those with limited leave to enter or remain under the new migrant worker tiers, have certain rights to sponsor family or partners. Generally the spouse, civil partner or unmarried partner¹ and children under 18 of such migrant workers or EC Association categories can qualify for the same term of stay as the sponsor.² Minor children are permitted entry or stay where both parents are in the UK, the sponsor is the sole parent or has sole responsibility for the child or there are serious or compelling family considerations which make the child's exclusion undesirable.³ Such applicants require entry clearance in that capacity, must satisfy maintenance and accommodation requirements and that they will not remain in the UK beyond the term of stay of their sponsor. The rules for family sponsorship by students, are slightly different. Students can sponsor their spouse or civil partners but not their unmarried partners and there is no requirement that the children of such sponsors be here with both parents or a single parent with sole responsibility.⁴ As with the sponsor, such family members must show they intend to leave the UK at the expiry of their leave.⁵ The family members of students are permitted to work only if the student has been granted leave of 12 months or more.⁶ Under the Rules persons present and settled in the UK can sponsor a broader array of family members, including adopted children and dependent relatives.⁷ Refugees can also sponsor family members,⁸ as may persons with humanitarian protection,⁹ but those with discretionary leave must still rely on policy concessions for family reunion rights.¹⁰ On the family sponsorship of EEA nationals, see 7.88ff above.

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- ¹ There were certain categories of temporary entrant permitted to sponsor their spouse, civil partners, children or unmarried or same-sex partners. These included: work permit employees, highly skilled migrants, international graduates scheme members, representatives of overseas newspapers, news agencies and broadcasting organisations, sole representatives, private servants in diplomatic households, domestic workers in private households, overseas government employees, Ministers of religion, missionaries and members of religious orders, visiting religious workers and religious workers in non-pastoral roles, airport-based operational ground staff of overseas owned airlines, persons with UK ancestry (HC 395, paras 194–199, 295J), persons intending to establish themselves in business, innovators, persons intending to establish themselves in business under the provisions of EC Association Agreements, investors, writers, composers and artists (HC 395, paras 240–245, 295J), retirees (HC 395, paras 263–270, 295J). Certain of these categories have been withdrawn or subsumed in the new points-based system tiers. The spouse, civil partners, unmarried and same-sex partners of Tier 1, 2 and 5 migrants are now dealt with in HC 395, paras 319AA–319K. Others can sponsor only their spouse, civil partners or children – see Students (HC 395, para 76–81).
- ² The spouse, civil partners, unmarried and same-sex partners of Tier 1, 2 and 5 migrants are now dealt with in HC 395, paras 319AA–319K. Spouses, civil partners and children (who are unmarried and not civil partners) are provided for in HC 395, 240–245 (for EC Association holders). HC 395, Students can sponsor their spouse, civil partner and children but not their unmarried partners (HC 395, paras 76–81).
- ³ HC 395, paras 125, 197, 243, 274. Note the minor children should not be married or civil partners. (HC 582 amendment) Note that under the terms of a policy concession work permit holders who are intra-company transferees could also sponsor their adult dependent children who are part of the family unit: IDI, Ch 5, s 9, para 1.1.
- ⁴ HC 395, paras 76, 79 (students and prospective students).
- ⁵ HC 395, paras 76.
- ⁶ HC 395, paras 77, 80.
- ⁷ HC 395, paras 277–319.
- ⁸ HC 395, as amended, paras 352A–F, 356. Refugee and temporary protection family reunion is open to their spouse, civil, unmarried and same-sex partners and minor children who are not married or in a civil partnership and has not formed an independent family unit – but not de facto adopted children – although the entry of such children required consideration under Article 8 ECHR: *MK (Somalia) v Entry Clearance Office* [2008] EWCA Civ 1453, [2008] All ER (D) 252 (Dec). See also *AS (Somalia) v Entry Clearance Officer, Addis Ababa* [2008] EWCA Civ 149, [2008] Fam Law 382. See 12.196 below. See also *NM ('leading an independent life') Zimbabwe* [2007] UKAIT 00051 (24 May 2007), *MI (Paragraph 298(iii): 'independent life') Pakistan* [2007] UKAIT 00052 (5 June 2006) family members and close relatives of those granted temporary protection under the Temporary Protection Directive 2001/55/EC).
- ⁹ HC 395, para 356. See 12.197 below.
- ¹⁰ See 12.197ff below.

ENTRY CLEARANCE REQUIREMENTS

11.49 Persons who wish to enter the UK with a view to settlement with a family member, including a spouse or civil or unmarried or same-sex partner, must obtain a prior entry clearance before doing so¹ unless they claim the right of abode. The exceptions are returning residents² and children born in the UK who are not British citizens.³ This requirement is strictly applied. A person who marries or enters a civil partnership while on temporary admission,⁴ or having been granted leave to enter or remain in the UK for a period of six months or less⁵ will be required to return home for entry clearance unless there are circumstances, which make this requirement (as an interference with family or private life) disproportionate.⁶ The inconvenience or expense of having to travel home to obtain a visa may not be considered sufficient reason for waiver of the entry clearance requirement,⁷ even where

the Home Office is satisfied that all other requirements of the Immigration Rules (presence of sponsor; intention to live together; having met; maintenance and accommodation) are met.⁸ Entry clearance as leave to enter may be cancelled if there has been a change of circumstance since its issue (such as the death of a partner or the breakdown of the marriage prior to entry)⁹ or it was obtained through false representations or non-disclosure of material circumstances.¹⁰ As stated in chapter 3 entry clearances are issued in the country of residence and are valid as leave to enter.¹¹

- ¹ HC 395, paras 281(vi) (spouses), 276R(vi) (spouses of discharged soldiers), 290(vii) (fiancé(e)s), 295A(viii), 295J (ix) (unmarried partners), 276X(iv), 297(vi), 301(vi), 310(xii), 314(xii) (children), 317(vi) (other dependent relatives). Leave to enter is to be refused if no such entry clearance is produced on arrival: paras 276T, 276Z, 283, 292, 295C, 300, 303, 303C, 313, 316, 316C, 316F, and 319.
- ² HC 395, paras 18, 19. See 4.25ff above.
- ³ HC 395, para 305. Such a child is subject to immigration control and requires leave to enter where admission is sought and leave to remain to stay in the UK but can be granted leave to enter or remain in line with a parent coming to or in the UK. See para 304.
- ⁴ Under the Immigration Act 1971, Sch 2, para 21; for temporary admission, see 3.39ff below. See below on restrictions on the right to marry in the UK.
- ⁵ HC 395, para 284(i), amended by HC 538 and substituted by Cm 5949, as applied by para 286.
- ⁶ IDI (Mar/06), Ch 8, s 1, para 2.4. See *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167; *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302 (6 December 2007); *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, [2008] 1 WLR 1420, [2009] 1 All ER 363; *EB Kosovo (FC) v Secretary of State for the Home Department* [2008] UKHL 41, [2008] 4 All ER 28; *Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2008] 3 WLR 166; *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5, [2009] All ER (D) 92 (Jan). See now requirement for permission to marry at 11.66 below.
- ⁷ The Tribunal has considered whether it was feasible for spouse entry clearance applications to be made by Iraqi, Somali, Palestinian and Afghani applicants in circumstances where there are no or limited entry clearance facilities in the home country and travel to a neighbouring entry clearance facility is dangerous. See *MS (Inability to make entry clearance application) Somalia* [2005] UKIAT 00003; *EH (Palestinian entry clearance proportionality) Iraq* [2005] UKIAT 00062; *KJ (entry clearance proportionality) Iraq* [2005] UKIAT 00066; *SA (Entry clearance application in Jordan, proportionality) Iraq* CG [2006] UKAIT 00011 (9 February 2006); *SM (Entry Clearance, proportionality) Afghanistan* CG [2007] UKAIT 00010 (2 January 2007); *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5, [2009] All ER (D) 92 (Jan).
- ⁸ *R v Secretary of State for the Home Department, ex p Mahmood* [2001] WLR 840, CA; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167; *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302, [2007] All ER (D) 97 (Dec); *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, [2008] 1 WLR 1420, [2009] 1 All ER 363; *EB Kosovo (FC) v Secretary of State for the Home Department* [2008] UKHL 41, [2008] 4 All ER 28; *Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2008] 3 WLR 166; *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5, [2009] All ER (D) 92 (Jan).
- ⁹ HC 395, para 321(ii); para 286 referring to para 284(vi).
- ¹⁰ HC 395, para 321(i). Refusal would also be justified on the grounds of restricted returnability, medical grounds, or where the person is subject to a deportation order, exclusion would be conducive to the public good, or the person has a criminal record: para 321(iii).
- ¹¹ HC 395, para 25A, 28. Immigration (Leave to Enter and Remain) Order 2000, SI 2000/1161, Arts 3, 5. See further chapter 3.

11.50 Certificates of entitlement. Family members claiming the right of abode need a certificate of entitlement unless they have a UK passport describing

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them as a British citizen or a CUKC having the right of abode.¹ Certificates of entitlement can be issued abroad prior to travel or in the UK.² There is a duty on the entry clearance officer abroad properly to classify an application as either one for entry clearance or for a certificate of entitlement to the right to abode; this is not the responsibility of the applicant.³ In *R v Secretary of State for the Home Department, ex p Phansopkar*⁴ the Court of Appeal held that where there was considerable delay in processing certificates of entitlement, a person with the right of abode could travel without one and require his or her application to be determined in the UK by the Home Office without having to be removed first. However, the Immigration Act 1988 amended the Immigration Act 1971 to require a person claiming the right of abode to prove it by means of a certificate of entitlement if he or she did not have a British passport,⁵ and those refused leave to enter the UK or refused a certificate of entitlement may have a right of appeal against such decisions.⁶ Arrival without a certificate of entitlement, is unwise. It will also be difficult for the person to board an airline to come to the UK without proper documentation.⁷

¹ Immigration Act 1971, s 3(9), inserted by Immigration Act 1988, s 3.

² HC 395, paras 12–14 do not prescribe where a certificate of entitlement must be applied for; see *R v Secretary of State for the Home Department, ex p Phansopkar* [1976] QB 606, [1975] 3 All ER 497, CA. See the Immigration (Certificate of Entitlement to Right of Abode in the United Kingdom) Regulations 2006, SI 2006/3145.

³ *Khatun (Kessori)* (4272) founded the long-established principle, upheld by the Immigration Appeal Tribunal in *Rahman* (00TH00307) (25 January 2000, unreported), that an applicant cannot be expected to know or understand the complexities of the immigration and nationality laws of the UK. Note that the UK Visas application forms for a certificate of entitlement (VAF7 2007) and for entry clearance for settlement (VAF4 2007) are now different, and the correct application is more easily ascertained.

⁴ [1976] QB 606, [1975] 3 All ER 497, CA.

⁵ IA 1971, s 3(9), as amended by the IA 1988, s 3; HC 395, para 12, 13, 14. For further details on proof of entitlement to a right of abode, see 2.21–2.22.

⁶ Nationality Immigration and Asylum Act 2002, ss 82(2)(c).

⁷ See carriers' liability provisions: IAA 1999, Pt II, ss 40ff, chapter 14 below.

11.51 *Family permits for family members of EEA nationals.* So far as concerns non-EEA family members coming to join EEA nationals other than British citizens in the UK, the imposition of a strict requirement that a family permit should be obtained prior to departure for the UK is, in our view, incompatible with the right of admission granted by EC law.¹ Of equal concern is the clear disparity between EU rights of admission under Council Directive 2004/38/EC and the strict admission rules for EEA family under the Immigration (European Economic Area) Regulations 2006.² The rules now make provision for leave to enter as the primary carer or relative of an EEA national self-sufficient child, for which entry clearance is required.³

On the entry and stay of EEA family member, see 7.88ff above.

¹ See 7.94 above.

² SI 2006/1003. See *CO (EEA Regulations: family permit) Nigeria* [2007] UKAIT 00070 (30 July 2007). See further 7.94ff, above.

³ HC 395, para 257C, inserted by HC 164 from 1 January 2005 and amended by HC 582 from 5 December 2005 and HC 1053 from 30 April 2006. *Metock v Minister for Justice, Equality and Law Reform*: C-127/08 [2009] All ER (EC) 40 which held that under the Citizens' Directive family members who are nationals of non-member countries have rights to move and reside in the Member State to which the union citizen had moved regardless

of whether the family member had previously been lawfully resident in another Member State. See changes to the UKBA European caseworking Instructions, Chs 1, 2, 3 and 5 and the UK Visas Entry Clearance Instructions, Ch 21 to deal with this authority. See *SM (Metock; extended family members) Sri Lanka* [2008] UKAIT 00075; *HB (EEA right to reside, Metock) Algeria* [2008] UKAIT 00069.

11.52 Persons given leave to enter under the rules¹ as a visitor, student or in some other temporary capacity can in certain circumstances qualify under the Rules to vary that leave to stay with their relatives or partners in the UK without having first to return to their country of origin.² However a person, who was granted leave to enter for six months or less in a capacity other than a fiancé(e) or proposed civil partner,³ may not remain as a spouse/ civil partner, but must return home and obtain an entry clearance in that capacity.⁴ Persons who intended to marry or join relatives here permanently when they arrived for a visit or in other form of temporary stay run some risk of being treated as an illegal entrant on the basis that they deceived the immigration officer on entry.⁵

¹ Note also that Home Office instructions (now withdrawn from the website) note concerning this criterion that the grant of discretionary leave is a grant which was not given in accordance with the rules. Accordingly, a person granted discretionary leave cannot switch to spouse, unmarried or same-sex partner from within the UK: HC 395, paras 284, 295D(i).

² HC 395, paras 284, amended by HC 538, Cm 5949 (spouses/civil partners, who may not switch where granted leave under six months – this is the term generally given to visitors), 295D (unmarried partners), 298 (children), 311, 314 (adopted children) and 317(vi), 318 (other dependants), where the distinction is made between the requirement of an entry clearance when seeking leave to enter and leave to remain. Paragraph 284 now requires the applicant to have limited leave to enter or remain in the United Kingdom which was given in accordance with any of the provisions of these Rules, other than where as a result of that leave he would not have been in the United Kingdom beyond 6 months from the date on which he was admitted to the United Kingdom on this occasion in accordance with these Rules. The exceptions comprise where the leave in question was limited leave to enter as a fiancé or proposed civil partner or as the spouse, civil partner, unmarried or same-sex partner of a Tier 1 Migrant and that spouse or partner is the same person in relation to whom the applicant is applying for an extension of stay under this Rule. The switching rules are now quite complex. The switching rules also require that the children of parents given limited leave to enter with a view to settlement or unmarried or same-sex partners of certain temporary entrants (see 11.46 fn 1 above) who are seeking leave to remain in the UK are required to have entered with entry clearance in the same capacity (paras 301(vi), (295J)(ix)).

³ Note that a person cannot 'switch' to fiancé or proposed civil partner from another category in the UK (HC 395, para 293). A fiancé or proposed civil partner can switch to spouse in the UK even if the limited leave to enter granted in this capacity was less than six months (para 284).

⁴ HC 395, para 284(i) as amended. There have been difficulties in cases where the spouse/partner delayed entry to the UK and therefore had not completed their two-year probationary term as a spouse when their leave to remain was set to expire. This is now addressed by the Rules which grant a 'probationary' period of leave not exceeding 27 months to allow applicants time to arrange their entry clearance: para 282. The problems under the previous arrangement are illustrated in *FB (HC 395, para 284: 'six months') Bangladesh* [2006] UKAIT 00030 (16 March 2006). A person given leave to enter the UK for a period expiring on the day bearing the same date as the date of entry in the sixth month after entry is given leave for a period of six months and one day. Such a person is therefore not excluded from seeking to remain in the UK as a spouse under para 284(i) of HC 395, as amended by HC 538 on 1 April 2003. That period of six months and one day does not, however, extend beyond six months from the date of admission within the meaning of para 284(i), as amended by Cm 5949 (in force from 25 August 2003 to 1 October 2004). The leave of any such person is nevertheless extended by s 3C of the

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Immigration Act 1971 if he applies for variation; and in that case he too meets the requirements of para 284(i). The case did not concern the most recent change to para 284(i), amended by Cm 6339, (taking effect on 1 October 2004).

- ^s For illegal entry, see chapter 16 below. They may also be refused permission to marry in the UK. See 11.68 below.

PRESENCE OF SPONSOR

MAINTENANCE AND ACCOMMODATION

11.55 Before granting entry clearance to family members to join a sponsor, the entry clearance officer will have to be satisfied that there is adequate maintenance and accommodation for them in the UK without recourse to public funds.¹ These rules apply to both accommodation and maintenance. The spouses, civil partners, unmarried and same-sex partners and children of refugees, of persons granted humanitarian protection, or of persons granted temporary protection and the spouse, civil partners and children of Gurkhas and foreign and Commonwealth soldiers discharged from the British army are not subject to the maintenance and accommodation requirements.² In the past, the Home Office has also waived the maintenance and accommodation requirement in particular cases for family members of those with exceptional leave to remain (now humanitarian protection or discretionary leave) and the UK's responsibilities under Article 8 may necessitate waiver to ensure compliance with the Human Rights Convention.³ The IDI referring to the maintenance and accommodation requirements for spouses and partners, children and other dependent relatives indicate the care that should be taken if refusing applications on the maintenance and accommodation ground alone.⁴ 'Public funds' are defined⁵ as:

- (a) housing under Part VI or VII of the Housing Act 1996 and under Part II of the Housing Act 1985, Part I or II of the Housing (Scotland) Act 1987, Part II of the Housing (Northern Ireland) Order 1981 or Part II of the Housing (Northern Ireland) Order 1988;⁶
- (b) in England, Scotland and Wales, attendance allowance, severe disablement allowance, carer's allowance and disability living allowance under Part III of the Social Security Contribution and Benefits Act 1992;⁷ income support, council tax benefit and housing benefit under Part VII of that Act; a social fund payment under Part VIII of that Act; child benefit under Part IX of that Act;⁸ income based jobseeker's allowance under the Jobseekers Act 1995, State pension credit under the State Pension Credit Act 2002; or child tax credit and working tax credit under Part 1 of the Tax Credits Act 2002;⁹
- (c) in Northern Ireland, attendance allowance, severe disablement allowance, carer's allowance and disability living allowance under Part III of the Social Security Contribution and Benefits (Northern Ireland) Act 1992; income support, council tax benefit, housing benefit under Part VII of that Act; a social fund payment under Part VIII of that Act; child benefit under Part IX of that Act; or income based jobseeker's allowance under the Jobseekers (Northern Ireland) Order 1995.

Neither NHS treatment nor State education counts as recourse to public funds for the purpose of the Rule.¹⁰ There are a number of precise exceptions which qualify the scope of the public funds prohibition list, set out in the relevant instructions.¹¹ For example, working tax credit can be claimed by a foreign spouse, civil or unmarried partner and it is not considered recourse to public funds for the purposes of the rule.¹² A common question was whether the receipt of public funds by sponsors in their own right could disqualify partners/relatives from joining them in circumstances where there would be no additional recourse to public funds, but where the partners or relatives benefited indirectly. This was known as 'indirect reliance on public funds'. After years of divergence between Home Office policy as set out in correspondence¹³ and the wording of the rules, and of conflicting Tribunal and High Court decisions,¹⁴ this issue was put to rest in 2000 by an Immigration Rule amendment stating that 'a person is not to be regarded as having (or potentially having) recourse to public funds merely because he is (or will be) reliant in whole or in part on public funds provided to his sponsor, unless, as a result of his presence in the UK, the sponsor is (or would be) entitled to increased or additional public funds'.¹⁵

¹ See 11.48, above.

² HC 395, as amended, paras 276R, 276X, 352A, AA, D, FA, FD, FG, 356.

³ For example, in a policy set out in a Home Office letter of 17 May 1990 and withdrawn on 15 January 1996, a policy specifically for Somali nationals was established which agreed to take a 'flexible approach and consider waiving the requirement in individual cases; in deciding whether to do this each case was to be considered on its individual merits, and the decision maker would look, inter alia, at the degree of difficulty continuing separation of the family is causing'. 'Somali Family Reunion Policy' [1993] Imm AR 40. The Home Office policy on family reunion is currently being rewritten and the instructions have been withdrawn from the UKBA website. See concerning the withdrawn policy: *Miao v Secretary of State for the Home Department* [2006] EWCA Civ 75 (16 February 2006). See on the necessity for discretionary decisions outside the Rules to be made within a Convention-compliant policy framework: *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302, [2007] All ER (D) 97 (Dec).

⁴ IDI (Mar/06), Ch 8, s 1, para 3.5, 'The ... refusal on maintenance and accommodation grounds alone is likely to be rare. To ensure a consistent approach across IND, maintenance and accommodation should be included in the grounds for refusal only if this has been approved at SEO level or above'; IDI (Mar/06), Ch 8, ss 1, 2, Annex F, 'Family Members: Maintenance and Accommodation'.

⁵ HC 395, para 6. This rule is subject to frequent change and an up-to-date version should be consulted. See also IDI (Mar/06), Ch 8, ss 1, 2, Annex F.

⁶ See: *KA (Public funds: housing) Iraq* [2007] UKAIT 00081 (14 August 2007) in which the Tribunal held that the provision of larger Council accommodation to house the sponsor's family was housing made available under the statutory provisions mentioned in sub-para (a) of the definition of 'public funds' in para 6 of the Immigration Rules, whether or not in fulfilment of a duty to house homeless persons, and therefore is recourse to public funds, even where the tenure of the housing is governed by some other statute. In our view this decision, premised on grounds which the Tribunal itself appears to have identified at the reconsideration, is flawed in its reasoning. The Tribunal rejected the City of Edinburgh Council evidence that the secure tenancy in issue would be granted pursuant to the Housing (Scotland) Act 2001, Part 2 and held that there could be no tenancy unless the council was enabled by the Part I or II of the Housing (Scotland) Act 1987 to have a house to let to the appellant. The Tribunal gave no consideration to para 6A of the Rules or to a consideration of Article 8 of the ECHR.

⁷ In *Nisa (Munibun) v Entry Clearance Officer, Islamabad* [2002] UKIAT 01369 it was held that without evidence of savings from benefits, it can be assumed that a person on disability requires the whole of those benefits for his/her own adequate maintenance. In *Shabir v ECO* (01/TH/2897 IAT) where the sponsor on a disability living allowance totalling more than the standard minimum benefit normally paid to a couple had been able

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to make substantial savings, the Tribunal accepted the disability allowance would be sufficient to cover the maintenance costs of the appellant without recourse to public funds. Most recently in *KA (Adequacy of maintenance) Pakistan* [2006] UKAIT 00065, the Tribunal stated: 'There have been one or two cases which have indicated that a frugal life style can be taken into account in deciding whether maintenance would be "adequate", but in our view those cases should not be followed. In particular, we doubt whether it would ever be right to say that children could be maintained "adequately" at less than the level which would be available to the family on income support, merely because one of their parents asserts that the family will live frugally. The purpose of the requirement of adequacy is to ensure that a proper standard, appropriate to a family living in a not inexpensive western society, is available to those who seek to live here'. The Tribunal did not consider the case by reference to Article 8. In *MK (Adequacy of maintenance, disabled sponsor) Somalia* [2007] UKAIT 00028 (13 March 2007), the Tribunal confirmed that the disability living allowance is paid to the sponsor because she is perceived as having greater needs for funds than an able bodied person and should not be considered an extra amount of money which a person may or may not need and which, together with the enhanced income support, would put the sponsor in the position that she had more funds than the joint income support level which is the minimum level for an able-bodied couple. In this case, the sponsor was a deaf and dumb refugee; the appellant was her post-flight spouse. The Tribunal did not consider the case by reference to Article 8. See also *AM (3rd party support not permitted R281 (v)) Ethiopia* [2007] UKAIT 00058 (21 June 2007). These recent Tribunal decisions, at least as they relate to disability allowance savings, are in doubt following the Court of Appeal judgment in *MK (Somalia)* [2007] All ER (D) 443 on 28 November 2007 in which a majority of the Court accepted that as it was for the sponsor to spend her disability allowance as she wished as there was nothing in the Social Security Contributions and Benefits Act 1992 that required it to be spent on assistance. If the sponsor chose to spend that money on the claimant, and it was adequate for his maintenance, then there would be no recourse to public funds, and it could not be said that she was doing anything improper. Accordingly, there was an error of law in the immigration judge's findings and the AIT had erred in not so finding. See also *HI (Uganda) v ECO* [2007] All ER (D) 41926 (October 2007); *NM (Disability discrimination) Iraq* [2008] UKAIT 00026 (25 March 2008).

⁸ According to the IDI (Mar/06), Ch 8, ss, 1, 2, Annex F, para 2), The British/settled spouse or civil partner may claim child benefit for his or her family if the spouse/civil partner is entitled to this under DWP legislation.

⁹ See fn 6 above. UK-settled sponsors may claim working credit and child benefit for his or her family if they are entitled to it under social security legislation: IDI (Mar/06), Ch 8, ss 1, 2, Annex F, para 2. See chapter 13 below, and see fn 11 below.

¹⁰ HC 395, para 6.

¹¹ See HC 395, para 6B, inserted by HC 3546 in February 2005, which provides for exceptions by way of regulations under the Immigration and Asylum Act 1999, s 115 and Tax Credits Act 2002, s 42. The paragraph states: 'A person shall not be regarded as having recourse to public funds if he is a person who is not excluded from specified benefits under s 115 of the Immigration and Asylum Act 1999 by virtue of regulations made under sub-ss (3) and (4) of that section or s 42 of the Tax Credits Act 2002.'

¹² IDI (Mar/06), Ch 8, ss 1, 2, Annex F, states: 'where a foreign spouse / civil partner / unmarried or same-sex partner is married or in a civil partnership or in a relationship to a person present and settled in the UK he/she may claim family credit on behalf of his/her spouse/civil partner/unmarried or same-sex partner and family'. The Tax Credits (Immigration) Regulations 2003, SI 2003/653, provide that where one member of a couple is a person subject to immigration control and the other is not, or is in one of the excepted categories set out in the regulations, their entitlement to tax credit is determined as if neither is subject to control. See also HC 395, para 6B, fn 11 above and fn 15 below.

¹³ See eg letter from Nicholas Baker to Sir Giles Shaw MP, October 1994, (1995) Legal Action (July) at 21; Nicholas Baker to Max Madden MP, set out in *Kausar v Entry Clearance Officer (Islamabad)* [1998] INLR 141 at 144.

¹⁴ *R v Immigration Appeal Tribunal, ex p Singh* [1989] Imm AR 69; *R v Secretary of State for the Home Department, ex p Bibi (Islam)* [1995] Imm AR 157; *Entry Clearance Officer v Ahmed (Bashir)* [1991] Imm AR 130; *Kausar v Entry Clearance Officer (Islamabad)* [1998] INLR 141.

- ¹⁵ HC 395, para 6A, inserted by Cm 4851 from 2 October 2000. For applications lodged after the 30 March 2009, the rules on this issue, as amended by HC 314, apply. These changes amend the definition of public funds in the Immigration Rules to make it clear that where a sponsor's increased entitlement to public funds is due only to an increase that he and the dependant are jointly entitled to receive by virtue of the relevant regulations, this will not be treated as recourse to public funds. The new Rule at para 6C makes it clear that anticipated entitlement to public funds payable either to the person or to the sponsor as a result of the dependant's presence in the UK cannot be relied upon to satisfy the maintenance and accommodation requirements of an Entry Clearance application. The amendment brought in by HC 314 states:

'6A. For the purpose of these rules, a person (P) is not to be regarded as having (or potentially having) recourse to public funds merely because P is (or will be) reliant in whole or in part on public funds provided to P's sponsor unless, as a result of P's presence in the United Kingdom, the sponsor is (or would be) entitled to increased or additional public funds (save where such entitlement to increased or additional public funds is by virtue of P and the sponsor's joint entitlement to benefits under the regulations referred to in paragraph 6B).

6B. Subject to paragraph 6C, a person (P) shall not be regarded as having recourse to public funds if P is entitled to benefits specified under section 115 of the immigration and asylum act 1999 by virtue of regulations made under sub-sections (3) and (4) of that section or section 42 of the Tax Credits act 2002.

6C. A person (P) making an application from outside the United Kingdom will be regarded as having recourse to public funds where P relies upon the future entitlement to any public funds that would be payable to P or to P's sponsor as a result of P's presence in the United Kingdom, (including those benefits to which P or the sponsor would be entitled as a result of P's presence in the United Kingdom under the regulations referred to in paragraph 6B).'

11.56 The maintenance and accommodation rules for the admission for settlement of spouses, civil and unmarried or same-sex partners are slightly different from those applying to children and other relatives. Spouses, civil and unmarried/same-sex partners need to show that there will be adequate accommodation for themselves and any dependants, without recourse to public funds, in accommodation which they own or occupy exclusively, and that they (the parties) will be able to maintain themselves and any dependants adequately, without recourse to public funds.¹ Children must show that they can and will be accommodated adequately by the parent, parents or relative sponsoring the child, without recourse to public funds, in accommodation owned or occupied exclusively by the parent, parents or relative, and that they can and will be maintained adequately by the parent, parents or relative, without recourse to public funds.² Other dependent relatives must show that they can and will be accommodated adequately together with any dependants, without recourse to public funds, in accommodation owned or occupied exclusively by the sponsor, and that they can and will be maintained adequately, together with any dependants, without recourse to public funds.³ The different wording reflects the Home Office view as to who should be responsible for maintaining and accommodating the particular relatives. In the case of spouses, the Rule appears to envisage that the spouses will provide for themselves; children may be accommodated and supported only by their parent or parents or other sponsoring relative; and other dependent relatives⁴ may be supported by anyone, but must be accommodated by sponsors in accommodation owned or occupied by the sponsor. However, in *AM Ethiopia*⁵ the Court of Appeal held that HC 395, paras 281, 297 and 317 disallow

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reliance on third-party support. The Court noted that the part played by the sponsor (or the parent in the case of para 297) is of the first importance, third-party arrangements are necessarily more precarious and more difficult to verify and that there was no evidence to show the Secretary of State intended to treat these family entrants differently. The IDIs indicate that for spouse and partners short term third-party support 'may be accepted exceptionally if it is clear that it would only be in effect for a limited period and the couple have a realistic prospect of supporting themselves thereafter'.⁶

¹ HC 395, paras 281(iv) and (v) (spouses/civil partners), 295A(v) and (vi) (unmarried/same-sex partners). Fiancé(e)s/ proposed civil partners may not work before the marriage/civil partnership, so that they must be adequately maintained and accommodated until that time, and thereafter the provisions mirror those for spouses/civil partners: HC 395, para 290(iv)–(vi).

² HC 395, paras 297(iv) and (v), 298(iv) and (v), 301(iv) and (iva), 303A(iv) (child of fiancée/proposed civil partner) 310(iv), 311(iv), 314(iv), 316A (iv), 316D (v).

³ HC 395, para 317(iv) and (iva), as amended by Cm 4851 in October 2000.

⁴ Note *VS (Para 317(iii), no 3rd party support) Sri Lanka* [2007] UKAIT 00069 (30 July 2007) in which the Tribunal held that for an applicant to be wholly or mainly dependent on the sponsor as required by para 317(iii), he needed to demonstrate that he was living on the sponsor's money.

⁵ *AM (Ethiopia) v Entry Clearance Officer* [2008] EWCA Civ 1082, [2008] All ER (D) 150 (Oct); *MW (Liberia) v Secretary of State for the Home Department* [2007] EWCA Civ 1376, [2007] All ER (D) 340 (Dec). The Tribunal did not have full representations on this issue in *GG (HC 395, para 317 Joint Sponsorship) Jamaica* [2004] UKIAT 00095 but nevertheless held in respect of a sponsorship under para 317(i)(f), that where there are a number of relatives who have severally undertaken the responsibilities of sponsorship, it is unlikely to matter much which of the sponsors provides the support for accommodation and maintenance.

⁶ IDI (Mar/06), Ch 8, ss 1, 2, Annex F, para 5.1. On the evidence required concerning such short-term third-party support and long-term support, see: *AK (Long-term third party support) Bangladesh* [2006] UKAIT 00069 (5 September 2006).

11.58 In determining whether parties or sponsors are able to support themselves and their dependants, information is obtained about their normal income and regular commitments and the case is then assessed to see whether the money available will be sufficient to support the dependants concerned. Where someone is joining a sponsor in the UK, generally there would have to be evidence of an ability to maintain the immigrant from the sponsor's own earnings and savings.¹ Fiancé(e)s/proposed civil partners are not permitted to work until their leave has been extended after marriage,² but persons admitted as spouses can take into account their own anticipated earnings.³ Applicants' skills and qualifications may suffice without evidence of a job offer if they are of direct value to gaining employment in the UK, but those with few skills might need to show that there is a credible job open to them in the UK, or that relatives or friends can realistically offer an opening.⁴ The IDI state that jobs that are unrealistic in the light of the applicant's skills, or jobs that appear to have been manufactured for the application, which lack any prospect of continuing, will not suffice. However, the instructions also state that 'care must be taken' not to make assumptions'. The fact that unemployment in a certain area is high is not in itself enough to warrant refusal.⁵ Income support has been held an appropriate yard stick to assess whether the income available to the sponsor and his or her family would be adequate.⁶ While the Tribunal has stated that it doubts whether it would ever be right to say that children could be maintained 'adequately' at less than the level which would be

available to the family on income support, merely because one of their parents asserts that the family will live frugally,⁷ the Court of Appeal held that although the disability living allowance was calculated according to the sponsor's need for care and mobility, once the disability living allowance was in her hands, it was for her to spend as she chose, as there was nothing in sections 72 and 73 of the 1992 Act that required it to be spent on assistance. If the sponsor chose to spend that money on the claimant, and it was adequate for his maintenance, then there would be no recourse to public funds, and it could not be said that she was doing anything improper.⁸

¹ *AM (Ethiopia) v Entry Clearance Officer* [2008] EWCA Civ 1082, [2008] All ER (D) 150 (Oct); *MW (Liberia) v Secretary of State for the Home Department* [2007] EWCA Civ 1376, [2007] All ER (D) 340 (Dec). See 11.54.

² HC 395, para 291; IDI (Mar/06), Ch 8, ss 1, 2, Annex F, para 3.

³ The IDI (Mar/06), Ch 8, ss 1, 2, Annex F, paras 4–5 state that the earnings of either/both parties should be taken into equal account and, and evidence of sufficient independent means, employment or sufficient prospects of employment for one or both of the parties should be provided.

⁴ IDI (Mar/06), Ch 8, ss 1, 2, Annex F.

⁵ IDI (Mar/06), Ch 8, ss 1, 2, Annex F.

⁶ *KA (Adequacy of maintenance) Pakistan* [2006] UKAIT 00065 (4 September 2006); *MK (Adequacy of maintenance, disabled sponsor) Somalia* [2007] UKAIT 00028 (13 March 2007), *AM (3rd party support not permitted R281 (v)) Ethiopia* [2007] UKAIT 00058 (21 June 2007). See also *MK (Somalia) v ECO* [2007] All ER (D) 443, *HI (Uganda) v ECO* [2007] All ER (D) 419. See *RB (Maintenance income support schedules) Morocco* [2004] UKIAT 00142, where voluntary payments from family members reduced the level of income support. See also *NM (Disability discrimination) Iraq* [2008] UKAIT 00026 (25 March 2008).

⁷ *KA (Adequacy of maintenance) Pakistan*. The Tribunal further states that: 'Where a sponsor has disabilities it should be assumed that enhanced benefits, such as a higher rate of Income Support, or Disability Living Allowance, have been awarded out of necessity and are not available to support dependants coming from abroad': *MK (Adequacy of maintenance, disabled sponsor) Somalia*, *AM (3rd party support not permitted R281 (v)) Ethiopia*. This approach by the Tribunal would have the effect that most disabled settled or citizen parents were unable to sponsor their dependent children or economically inactive spouse or partners to the UK. The reported Tribunal determinations have not so far considered whether the rules as so interpreted are human rights compliant and non-discriminatory. See *NM (Disability discrimination) Iraq* [2008] UKAIT 00026 (25 March 2008); *MW (Liberia) v Secretary of State for the Home Department* [2007] EWCA Civ 1376, [2007] All ER (D) 340 (Dec).

⁸ *MW (Liberia) v Secretary of State for the Home Department* [2007] EWCA Civ 1376, [2007] All ER (D) 340 (Dec).

11.59 The Rules do not prohibit the provision of accommodation by a third party.¹ However the accommodation available for the family member must either be owned or occupied exclusively by the parties or the sponsor; these requirements are alternatives, not cumulative. A freehold interest is not necessary to comply with the requirement of ownership, but there must be some interest in the house, such as a tenancy. Occupation of premises may be as a licensee or lodger.² It is doubtful whether boarding children with a neighbour will suffice until the sponsor is the occupier in law,³ but there is no requirement that the accommodation should be the sponsor's sole or main residence. The requirement that a person does 'own or occupy exclusively' property does not carry any technical legal meaning of exclusive occupation. It is sufficient if there is a defined place where the person lives and which he has as his home, with the implication of stability that that implies.⁴ Exclusive

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occupation does not have to extend to the whole of premises; exclusive occupation of a bedroom will suffice, with shared use of the remainder of the premises.⁵ Accommodation can be shared with other members of a family provided that at least part of the accommodation is for the exclusive use of the sponsor and his dependants. The unit of accommodation may be as small as a separate bedroom but it must be owned or legally occupied by the sponsor; its occupation must not contravene public health regulations; and its occupation must not cause overcrowding as defined in the Housing Act, 1985.⁶

¹ *AB (Third-party provision of accommodation)* [2008] UKAIT 00018 (06 March 2008).

² IDI (Mar/06), Ch 8, ss 1, 2, Annex F, para 6.

³ *Entry Clearance Officer, New Delhi v Baidwan* [1975] Imm AR 126.

⁴ *KJ ('Own or occupy exclusively') Jamaica* [2008] UKAIT 00006 (16 January 2008).

⁵ *Zia v Secretary of State for the Home Department* [1993] Imm AR 404 at 412; *Kasuji v Entry Clearance Officer, Bombay* [1988] Imm AR 587; IDI (Mar/06), Ch 8, ss 1, 2.

⁶ IDI (Mar/06), Ch 8, ss 1, 2, Annex F para 6.

11.60 Like maintenance, accommodation does not have to be available at the time of the application or decision, but only when the family member arrives in the UK.¹ However, the Tribunal may not admit evidence of available accommodation at an appeal if the arrangement was not in existence or at least canvassed at the time of the decision.² The standard of adequacy of the accommodation is that the applicant may live there without breach of the public health laws or statutory overcrowding.³ An applicant should not, however, be required to produce a report from a local authority as to the fitness of accommodation in every case, since in most cases the issue is not adequacy but availability of accommodation.⁴ Accommodation is not 'adequate' if it is to be shared with someone who has abused the child applicant.⁵

¹ IDI (Mar/06), Ch 8, ss 1, 2, Annex F accept that accommodation will often be prospective rather than available, and the test should be whether there is a reasonable prospect that adequate accommodation will be available. Note *KA (Public funds: housing) Iraq* [2007] UKAIT 00081 (14 August 2007) concerning whether the provision of larger Council accommodation for applicants under any of the statutory provisions mentioned in sub-para (a) of the definition of 'public funds' in para 6 of the Immigration Rules is recourse to public funds, even where the tenure of the housing is governed by some other statute. See on this determination 11.53 fn 6

² Starred *DR (Entry Clearance Officer post decision evidence) Morocco* [2005] UKIAT 00038, LS (post-decision evidence; direction; appealability) *Gambia* [2005] UKAIT 00085 (19 April 2005) *R v Immigration Appeal Tribunal, ex p Hassanin* [1987] 1 All ER 74, [1986] 1 WLR 1448, CA.

³ IDI (Mar/06), Ch 8, ss 1, 2, Annex F sets out guidance on overcrowding at para 6.3 and notes that local authorities have the power to licence temporary overcrowding. But see *S (Pakistan)* [2004] UKIAT 00006 where a surveyor confirmed adequacy of accommodation in terms of the Housing Act 1985, although accepting that the accommodation would be congested and the IAT held that on a 'practical' view it would not be adequate.

⁴ *Rehman v Entry Clearance Officer* [1998] INLR 500.

⁵ See *M and A v Secretary of State for the Home Department* [2003] EWCA Civ 263, [2003] Imm AR 4, where the Court of Appeal held that it is not a misuse of the language to describe accommodation as inadequate for a child because it is occupied by a parent who has physically or sexually abused the child in the past, and is likely to do so in the future. In such a case, the accommodation is unsafe, and therefore inadequate.

WHICH SPOUSES/CIVIL PARTNERS QUALIFY FOR ENTRY AND STAY?

Spouse/civil and unmarried or same-sex partners under 21

11.62 We showed at 11.42, that although marriages/civil partnerships by spouses/civil partners under 16 are not valid in the UK,¹ in a number of countries marriage/civil partnerships (or their equivalents) under the age of 16 are permitted and marriage/civil partnership by a spouse/partner under this age, domiciled there, is regarded as valid. In the past, wives or husbands under 16 qualified for admission to the UK under the Immigration Rules. An amendment to the rules in 1986 required both parties to a marriage to be aged 16 or above on arrival in the UK before an entry certificate or leave to enter or remain was granted. The repeal of s 1(5) of the Immigration Act 1971 in 1988 meant that this rule applied to all marriages. But a spouse who married validly abroad when under the age of 16 was eligible to enter to join a spouse here on reaching that age, if the other requirements of the rules were met. From 21 December 2004, the rules were amended again, to prevent the grant of entry clearance or leave to enter or remain if either the sponsor or the applicant spouse/civil partner is aged under 18 at the date of arrival or grant of leave in the UK.² In respect of applications lodged after 27 November 2008 the Rule now states that a person cannot be granted entry clearance, leave to enter, leave to remain or variation of leave as a spouse or civil partner of another if either the applicant or the sponsor will be aged under 21 on the date of arrival in the United Kingdom or (as the case may be) on the date on which the leave to remain or variation of leave would be granted.³ The rule change is said to prevent forced marriages.⁴

¹ Matrimonial Causes Act 1973, s 11(a)(ii); Civil Partnership Act 2004, ss 3–4.

² HC 395, para 277, as amended by HC 164. Between 31 March 2003 and 20 December 2004, the rule required the sponsor to have reached 18 and the applicant to have reached 16: para 277 as amended by HC 538. The minimum age requirements apply equally to fiancé(e)s, proposed civil and unmarried or same-sex partners: HC 395, paras 289AA, 295AA, inserted by HC 164. See also 11.42 fn 2 concerning the government's statement that it proposes to increase the age to 21.

³ HC 395, para 277 inserted by HC 1113.

⁴ See the Forced Marriage (Civil Protection) Act 2007 – in force from 25 November 2008; IDI Ch 8, s 1, Annex A2, Forced Marriage.

Polygamous marriages/civil partnerships

11.63 Under immigration law a polygamous spouse/civil partner can in certain circumstances qualify for leave to enter or remain as spouse/civil partners. The rules state as a general proposition that 'nothing in these Rules shall be construed as allowing a person to be granted entry clearance, leave to enter, leave to remain or variation of leave as the spouse of a British citizen of settled sponsor if his or her marriage or civil partnership to the sponsor is polygamous; and there is another person living who is the husband or wife of the sponsor and who is, or at any time since his or her marriage or civil partnership to the sponsor has been, in the United Kingdom; or has been granted a certificate of entitlement in respect of the right of abode or an entry clearance to enter the United Kingdom as the husband or wife of the

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sponsor.¹ The rules outline certain exceptions to this general restriction on entry as a spouse/civil partner: if the person who seeks entry clearance, leave to enter, leave to remain or variation of leave has been in the UK before 1 August 1988 having been admitted for the purpose of settlement as the husband or wife of the sponsor; or has, since their marriage or civil partnership to the sponsor, been in the UK at any time when there was no such other spouse or civil partner living.² The rules also make clear that the presence of any wife or husband in the UK as a visitor, an illegal entrant or deemed non-entrant (under s 11(1) of the Immigration Act 1971) is to be disregarded when considering the polygamous spouse restrictions.³ The person claiming to be permitted entry within these exceptions is required to prove the facts showing the exception.⁴

The first marriage must be a valid one in order to disqualify the second wife. The disqualification only applies if the right of abode was obtained as a wife, and will not apply to women who are British citizens.⁵ The IDI provides that entry clearance may not be withheld from a second wife where the husband has divorced the previous wife and the divorce is thought to be one of convenience, even if the husband is still living with the previous wife and to issue the entry clearance would lead to the formation of a polygamous household.⁶ The Immigration Rules have now been amended to preclude the admission of a (so-called) polygamous (polyandrous) husband of a woman in the same terms as the rules for men.⁷ The rules apply to all applications made after 2 October 2000, regardless of the date of the marriage. The provisions do not prevent polygamous spouses entering the UK in any other capacity. The Tribunal upheld the refusal of entry for settlement to the husband of a British citizen second polygamous wife, on the grounds that the husband did not intend to live permanently with the sponsor, as he intended to remain in the UK with the wife for only six months each year and spend the remaining months with his other wife and family in Bangladesh.⁸

¹ Immigration Act 1988, s 2; HC 395, para 278. *Entry Clearance Officer, Dhaka v Begum (Ranu)* [1986] Imm AR 461. The order in which polygamous spouses marry is not important but the order in which they come to the UK for settlement is. It is the spouse who applies for settlement second, rather than the one who marries second, who will be refused: IDI (May/03), Ch 8, s 1, Annex C. Although the rules refer to polygamous civil partnerships, it is not clear what this means, since civil partnership is not marriage. Perhaps such cases will only arise if a still married partner is also a civil partner. See IDI (Mar/06), Ch 8, s 2, Annex H for the list of foreign civil partnerships. See also *SM (Domicile of choice, Scots law) Pakistan* [2008] UKAIT 00092 (26 November 2008).

² IA 1988, s 2(4); HC 395, para 279.

³ IA 1988, s 2(7); HC 395, para 280.

⁴ IA 1988, s 2(5); HC 395, para 279.

⁵ IA 1988, s 2(1).

⁶ IDI (May/03), Ch 8, s 1, Annex C, para 8.

⁷ HC 395, as amended by Cm 4851, para 278. Polyandry is in fact extremely rare.

⁸ *AB (Settlement – six months in UK) Bangladesh* [2004] UKIAT 00314. See 11.65 below.

Marriages/civil partnerships of convenience and ‘sham’ marriages/civil partnerships

11.64 A marriage/civil partnership is not invalid under the general law of England simply because it is entered for a purpose other than mutual

cohabitation,¹ and the parties to such a marriage have the relationship of man and wife. But the Immigration Rules require parties to intend to live together permanently as husband and wife,² and the policy generally is only to permit admission as a spouse for the purpose of matrimonial cohabitation.³ The old rule on marriages of convenience, in force between 1977 and 1979, gave no claim to admission to the UK where the authorities concluded that (a) the marriage was primarily entered into to obtain settlement and (b) there was no intention to live permanently together as husband and wife.⁴ Women who had the right of abode under the original s 2 of the Immigration Act 1971 and those who were married to Commonwealth citizens settled here before 1973 could enter or remain notwithstanding that their marriages were ones of convenience.⁵ The Immigration (European Economic Area) Regulations 2006,⁶ like their predecessor the 2000 Regulations and the Immigration (EEA) Order 1994,⁷ purport to exclude parties to marriages of convenience from the definition of spouse.⁸ We examine further the position more fully at 7.100 above.

- ¹ In *Vervaeke v Smith* [1983] 1 AC 145, [1982] 2 All ER 144, HL the House of Lords upheld the validity of an English marriage which the wife had contracted in 1954 solely in order to obtain British nationality and a British passport and to escape the possibility of deportation for being a prostitute. The validity of a marriage has also been upheld in other cases where it has been contracted with the object of evading immigration control: *Silver v Silver* [1955] 2 All ER 614, [1955] 1 WLR 728; see also *Martens v Martens* (1952) SA 771, approved by Karminski J in *H v H* [1954] P 258, [1953] 2 All ER 1229. See further *Szechter (otherwise Karsov) v Szechter* [1971] P 286, [1970] 3 All ER 905. But see *Puttick* below.
- ² HC 395, para 281(iii). This criterion is specific to spouse not civil partners.
- ³ *AB (Settlement – six months in UK) Bangladesh* [2004] UKIAT 00314, *Patel (Yanus) v Immigration Appeal Tribunal* [1989] Imm AR 416, CA. See also *VK (marriage of Convenience) Kenya* [2004] UKIAT 00305.
- ⁴ HC 239, para 264, March 1977. See *R v Immigration Appeal Tribunal, ex p Khan (Mahmud)* [1983] QB 790, [1983] 2 All ER 420, CA.
- ⁵ *Secretary of State for the Home Department v Huseyin* [1988] Imm AR 129, CA; *R v Secretary of State for the Home Department, ex p Puttick* [1981] QB 767, [1981] 1 All ER 776.
- ⁶ SI 2006/1003, reg 2 – ‘spouse’/ ‘civil partner’ do not include a party to a marriage/civil partnership of convenience.
- ⁷ SI 2000/2326, reg 2(2). See analysis of the case law in *VK (Marriage of Convenience) Kenya* [2004] UKIAT 00305 (24 November 2004); *IS (marriages of convenience) Serbia* [2008] UKAIT 00031 (11 April 2008).
- ⁸ SI 2006/1003, reg 2, definitions of ‘spouse’ and ‘civil partner’.

11.65 The Immigration and Asylum Act 1999¹ imposes a duty on marriage registrars to whom a notice of marriage or proposed civil partnership has been given to report to the Secretary of State for the Home Department suspicions on reasonable grounds that the marriage/civil partnership will be a sham marriage/partnership.² A ‘sham’ marriage/civil partnership is defined as:

‘a marriage/civil partnership (whether or not void)

- (a) entered into between a person (‘A’) who is neither a British citizen nor a national of an EEA State other than the United Kingdom and another person (whether or not such a citizen or such a national); and
- (b) entered into by A for the purpose of avoiding the effect of one or more provisions of the United Kingdom immigration law or the immigration rules.’³

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This definition is very broad. In *R (on the application of Baiai) v Secretary of State for the Home Department*⁴ Lord Bingham (and the parties) approved the definition in Article 1 of the EC Council Resolution 97/C382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience, which defined a marriage of convenience as ‘a marriage ... with the sole aim of circumventing the rules on entry and residence ... and obtaining ... a residence permit or authority to reside in a Member State’.⁵ This interpretation accords with the old rule on marriages of convenience and ensures the provision does not re-introduce by a side wind the old, much criticised primary purpose rule.⁶

¹ Immigration and Asylum Act 1999, ss 24, 24A; (s 24A came into force from 15 April 2005). See also Reporting of Suspicious Marriages and Registration of Marriages (Miscellaneous Amendments) Regulations 2000, SI 2000/3164. Reporting of Suspicious Civil Partnerships Regulations 2005, SI 2005/3174.

² These provisions are additional to the requirements of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, ss 19–25 and the Civil Partnership Act 2004, Sch 23 which require permission for civil marriage/civil partnership in the UK to be obtained from the Secretary of State, for which see the Immigration (Formation of Civil Partnerships) Regulations 2005, SI 2005/2917. Note that s 25 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 will cease to have effect when the Immigration, Asylum and Nationality Act 2006 (s 50(3)(a) will come into force on 29 February 2008: Immigration, Asylum and Nationality (Commencement No 8) Order 2008, SI 2008/210 but no other part was not yet in force as at 31 December 2007).

³ [2008] UKHL 53, [2008] 3 WLR 549, [2008] 3 All ER 1094.

⁴ IAA 1999, ss 24(5), 24A(5).

⁵ At para 6. See *IS (marriages of convenience) Serbia* [2008] UKAIT 00031 (11 April 2008) in which the AIT held ‘If there is no evidence that could support a conclusion that the marriage is one of convenience, the appellant does not have to deal with the issue. But once the issue is raised by evidence capable of pointing to a conclusion that the marriage is one of convenience, it is for the appellant to show that his marriage is not one of convenience.’ The respondent has the burden of proving evidence capable of showing a marriage of convenience.

⁶ For detailed discussion of the primary purpose rule and the case law to which it gave rise, see the fourth edition of this work at 11.54–11.69 and *VK (Marriage of Convenience) Kenya* [2004] UKIAT 00305 (24 November 2004, unreported).

Marriage/civil partnership in the UK: restrictions

11.68 The government has invoked public concern at the problem of sham immigration marriages as justification for a number of strictures which prevent or limit the rights of persons subject to immigration control and their partners marrying or entering civil partnerships in the UK or switching their short-term leave to remain to leave on spouse or civil partnership grounds.¹ These restrictions impact on the genuine as well as the sham marriage or civil partnership. We have referred at 11.65 above to the requirement for registrars to inform the Secretary of State of suspected ‘sham’ marriages or civil partnerships. The most significant and onerous restrictions, however, are contained in the Asylum and Immigration (Treatment of Claimants) Act 2004, s 19 and Sch 23 to the Civil Partnership Act 2004 which requires ‘persons who are subject to immigration control’² who wish to marry or form a civil partnership in the UK³ before a registrar⁴ to meet an additional qualifying condition before the registrar can enter notice of their proposed marriage or civil partnership in the notice book.⁵ From 1 February 2005, such a prospective spouse/civil partner must satisfy the registrar that he or she has entry

clearance as a fiancé(e) or prospective civil partner or marriage or civil partner visitor,⁶ or is 'settled' in the UK (as defined in the Immigration Rules, para 6),⁷ or has the written permission of the Secretary of State to marry in the UK (this is evidenced by a Home Office certificate of approval for the marriage or civil partnership).⁸ Following the successful challenges to the scheme in the High Court, Court of Appeal and House of Lords, the government has made some, but not all, necessary changes to the scheme.⁹ The House of Lords held that s 19(3)(b) of the 2004 Act – dealing with the requirement for written permission from the Secretary of State – should be read as meaning 'has the written permission of the Secretary of State to marry in the United Kingdom, such permission not to be withheld in the case of a qualified applicant seeking to enter into a marriage which is not one of convenience and the application for, and grant of, such permission not to be subject to conditions which unreasonably inhibit exercise of the applicant's right under Article 12 of the European Convention'¹⁰ The current guidance requires all applicants, those with leave to remain and overstayers or illegal entrants, to complete an application form and provide detailed information concerning their relationship and marriage/partnership plans. Overstayers and illegal entrants are warned that the application may invite enforcement action.¹¹ There is no right of appeal against the Secretary of State's decision refusing permission to marry, although such a decision is susceptible to judicial review. Application forms for certificates of approval were reissued in November 2008 – after the Lords' judgment. The fee of £295 – expressly criticised in the case as one which could be expected to 'impair the essence of the right to marry' – was maintained.¹²

¹ The 'no switching' provision prevents persons from qualifying to vary their leave to remain as the spouse/civil partner of a British citizen or resident if they have not been in the UK beyond six months from the date of last admission, unless admitted as a fiancé/proposed civil partner. (HC 395, para 284 as amended, applying to marriage applications from 1 April 2003).

² A person is 'subject to immigration control' for these purposes if he or she is not an EEA national and requires leave to enter or remain in the UK under the Immigration Act 1971 (whether or not leave has been given): Asylum and Immigration (Treatment of Claimants Act 2004, s 19(4).

³ AI(TC)A 2004, ss 19–20 (England and Wales), 21–22 (Scotland), 23–24 (Northern Ireland). These marriage provisions commenced on 1 February 2005. The Civil Partnership Act 2004, Sch 23: the civil partnership provisions commenced on 5 December 2005; and the Immigration (Procedure for Formation of Civil Partnerships) Regulations 2005, SI 2005/2917 on 14 November 2005. The 'permission to marry' scheme has been adapted to apply to civil partnerships. Where two people wish to register as civil partners of each other and one of them is subject to immigration control, the person subject to immigration control must either (i) have an entry clearance granted expressly for the purpose of enabling him or her to form a civil partnership in the UK, (ii) have the written permission of the Secretary of State to form a civil partnership in the UK, or (iii) fall within a class specified by regulations. The exempt persons are those who are settled in the UK and those to whom Sch 3 to the Civil Partnership Act 2004 applies (registration by former spouses one of whom has changed sex): Immigration (Procedure for Formation of Civil Partnerships) Regulations 2005, SI 2005/2917, reg 4.

⁴ The provisions in the AI(TC)A 2004, s 19(1) apply to marriages solemnised on the authority of certificates issued by a superintendent registrar under Part III of the Marriage Act 1949 (ss 27, 31). This means that marriages according to the rites of the Church of England solemnised after the publication of banns or on the authority of special or common licences are not affected by the new provision. The Joint Committee on Human Rights held that the provisions would lead to a significant risk of discrimination on the grounds of religion or belief without necessary objective and reasonable justification (14th report Session 2003–2004). See *R (on the application of Baiji) v Secretary of State for the*

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Home Department [2006] EWHC 823 (Admin), [2006] 3 All ER 608, [2006] 2 FCR 131, [2006] Fam Law 535 in which Silber J found the scheme discriminatory as the regime: (i) regards all marriages by a person who requires a certificate of approval for marriage (COA) as automatically actually or potentially marriages of convenience; (ii) discriminates irrationally in favour of Anglican marriages conducted under Part II of the 1949 Act; (iii) fails to take account of evidence, if available, that a particular marriage is not a sham; (iv) makes immigration status the only factor affecting whether a non-EEA national can marry in this country; (v) does not allow representations by persons affected by the scheme (para 74–89). In a second application in the same case, *R (on the application of Baiai) v Secretary of State for the Home Department* [2006] EWHC 1454 (Admin), [2006] 4 All ER 555, the Secretary of State raised the issue of legality but did not challenge the findings on discrimination. Then the case went to the Court of Appeal, who held that: (i) Article 12, which deals with the right to marry, is regarded in the jurisprudence as a significant and fundamental right, of the sort that the courts must be vigilant to protect (para 32); (ii) the Secretary of State can only interfere with the exercise of Article 12 rights in cases that involve, or very likely involve, sham marriages; (iii) to be proportionate, a scheme to achieve that end must either properly investigate individual cases, or at least show that it has come close to isolating cases which are very likely to fall into the target category; and (iv) it must also show that the marriages targeted do indeed make substantial inroads into the enforcement of immigration control. The court held that the scheme in issue in this case did not pass that test. The House of Lords was asked to consider the fees charged for marriage approval – currently at £590 if both parties require certificates of approval. JCWI noted at the previous rate of £135, the BIA earned at least £1 million per year from these applications (JCWI Press Release, 5 December 2007). The House of Lords in *R (on the application of Baiai) v Secretary of State for the Home Department* [2008] UKHL 53, [2008] 3 WLR 549, [2008] 3 All ER 1094 broadly agreed with the Court of Appeal although it set aside the declaration of incompatibility with the ECHR except on the discrimination arising from the different treatment of marriages solemnised in the Anglican church. Rather than finding the whole scheme incompatible the Lords held that permission to marry should not be withheld if the marriage was not one of convenience and that conditions such as a fee should not unreasonably inhibit the right to marry under Article 12 ECHR.

⁵ The entry in the marriage notice book enables the persons to marry in the UK before a registrar. The relevant prospective spouse must give their notice (see on form of prescribed notice the Registration of Marriages (Amendment) Regulations 2005, SI 2005/155) to designated registrars (listed in the Immigration (Procedure for Marriage) Regulations 2005, SI 2005/15), even if they intend marrying in a different registry office. Similar notice provisions apply for civil partnerships: Civil Partnership Act 2004, Sch 23, para 4. Note that the regulations specify the registration districts in England and Wales at which persons subject to immigration control may give notice of a marriage/civil partnership: SI 2005/2917, reg 5 and Sch 2. According to the Explanatory Notes, the restricted number of locations will enable the Immigration Service to target their intelligence and enforcement effort in order to tackle abuse of the immigration system via sham civil partnerships in England and Wales. In the context of marriage, there is less evidence of abuse in Scotland and Northern Ireland, therefore notice may be given there at any registration district.

⁶ A fee currently £500 is payable for fiancé/proposed civil partner entry clearance, £63 for marriage or civil partnership visitor entry clearance and £295 for a certificate of approval. The marriage/civil partnership visitor requirements apply to persons subject to immigration control who intend coming to the UK for a short visit in order to marry/enter a civil partnership. See IDI (Mar/06) Ch 8, s 3, Annex K. Such persons, even where the parties are non-visa nationals, require entry clearance granted expressly for the purpose of enabling them to marry/enter a civil partnership in the UK: see HC 395, paras 56D–F, inserted by HC 346 from 15 March 2005. If both parties to the marriage are subject to immigration control they both need the certificate permitting their marriage.

⁷ See the Immigration (Procedure for Marriage) Regulations 2005, SI 2005/15, reg 6.

⁸ AI(TC)A 2004, s 19(3), Civil Partnership Act 2004, Sch 23. The certificate is valid for three months from the date of the grant.

⁹ *R (on the application of Baiai) v Secretary of State for the Home Department* [2006] EWHC 823 (Admin), [2006] 3 All ER 608, [2006] 2 FCR 131, [2006] Fam Law 535; *R (on the application of Baiai) v Secretary of State for the Home Department* [2006] EWHC 1454 (Admin), [2006] 4 All ER 555. Under the original guidance on the granting of certificates permitting marriage/civil partnerships, in order to qualify for a certificate of

approval, the person was expected to have valid leave to enter or remain in the UK, to have been granted over six months' leave to enter or remain on the last occasion; and have at least three months of this leave remaining at the time of making the application and 'only if there were compelling and compassionate features, which would make it inappropriate for the person to be required to go abroad to obtain an entry clearance, would a certificate of approval be issued where the person does not have leave to enter or remain': IDI (Feb/05), Ch 1, s 15. (This IDI is no longer published on the UKBA website.)

¹⁰ *R (on the application of Baiat) v Secretary of State for the Home Department* [2008] UKHL 53, [2008] 3 All ER 1094 at para 32.

¹¹ UKBA 'Important information regarding Certificate of Approval for marriage or civil partnership applications', 2007.

¹² *R (on the application of Baiat) v Secretary of State for the Home Department* [2008] UKHL 53, [2008] 3 All ER 1094 per Lord Bingham at para 30 and Baroness Hale at para 40.

Leave to enter and remain

11.69 As previously stated, fiancé(e)s, proposed civil partners and spouses/civil, unmarried and same-sex partners seeking to enter must normally have entry clearance.¹ Fiancé(e)s, proposed civil partners are given up to six months leave to enter, with a prohibition on taking employment,² and spouses or civil, unmarried and same-sex partners are given an initial period, which is often referred to as a probationary period, not exceeding 27 months, with no such employment prohibition (although they can be granted indefinite leave to enter if they have been married/in a civil, same-sex or unmarried partnership and living together outside the UK for four years prior to the application).³ If a fiancé(e) or proposed civil partner fails to marry during the initial period of leave, an explanation will have to be given to the Home Office, and an extension of leave for an appropriate period may be given if the explanation is acceptable and there is evidence that the marriage/civil partnership will take place soon.⁴ Once the fiancé(e) or proposed civil partner has married and has obtained the initial probationary leave to remain as a spouse or civil partner, the employment prohibition is lifted. A person admitted in another capacity (for a period greater than six months) who marries or enters a civil partnership during his or her stay here⁵ can apply for leave to remain as a spouse or civil partner if, in addition to fulfilling the requirements for entry in that capacity (except for entry clearance), he or she has not remained in breach of the immigration laws and the marriage/civil partnership did not take place after a decision to deport or a recommendation for deportation had been made, or a preparatory notice served.⁶ However, no 'switching' is permitted from another temporary capacity to that of fiancé(e) or proposed civil partner, and an application to remain as a fiancé(e)/proposed civil partner from a person admitted in another capacity will be refused unless there are exceptional compassionate circumstances, such as a serious or terminal illness of one of the parties.⁷ It should be noted that fiancé(e)s, proposed civil partners and spouses or civil partners are not precluded from coming to the UK as visitors before or even during their settlement application, provided they intend to leave the UK at the end of the particular visit for which entry is sought.

¹ See HC 395, paras 281(vi) (spouses/civil partners) and 290(viii) (fiancé(e)s)/proposed civil partners), 295A(viii) (unmarried and same-sex partners).

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- ² HC 395, para 291. In cases where the applicant is not sure whether he or she will remain in the UK or return home after the wedding, he or she should be treated as a fiancé(e) rather than as a visitor: IDI (May/03), Ch 8, s 2, Annex K.
- ³ HC 395, para 282, 295B. Note that to qualify for indefinite leave to remain applicants (except those aged under 18 or over 65 at the time of the application) must show that they have a sufficient knowledge of English language and about life in the UK. HC 395, paras 282(c), 287(vi), 295B(c), 295F(vi). The 27-month term is to give applicants time to arrange their travel to the UK and complete their period of 2 years as the spouse or civil partner of a person present and settled in the United Kingdom – the probationary term necessary to qualify for settlement (inserted into the Rules by HC 971, July 2008).
- ⁴ HC 395, para 293 and 294.
- ⁵ See 11.68 above on restrictions on the right to marry in the UK.
- ⁶ HC 395, para 284(i), (iv) and (v). *FB (HC 395 para 284: 'six months') Bangladesh* [2006] UKAIT 00030, [2006] Imm AR 400, the Tribunal considered the terms of para 284(i) of the Immigration Rules, HC 395. The IDI appear to allow a 'grace' period after a limited leave has expired, for certain applications after entry for leave to remain as a spouse: IDI (Mar/06), Ch 8, s 1, para 5.7. The Rules were amended in July 2008 (HC 971) to refuse an extension of stay as the spouse or civil partner of a person present and settled in the UK if the marriage or civil partnership has taken place after a decision has been made to deport the applicant or he has been recommended for deportation or been given notice under s 6(2) of the Immigration Act 1971 or been given directions for his removal under s 10 of the Immigration and Asylum Act 1999: HC 395, para 284(v).
- ⁷ IDI (Mar/06), Ch 8, s 3, para 3.2.

11.70 After what was a 12 months' and is now a two years' probationary leave as a spouse, or civil, same-sex or unmarried partner, an application can be made for indefinite leave to remain, which should be granted provided the maintenance and accommodation conditions are still met, the marriage or partnership is subsisting, each of the parties intends to live permanently with the other as his or her spouse or partner and the applicant (save for certain exempt applicants and those over 65)¹ has sufficient knowledge of the English language and about life in the UK.² Under transitional arrangements, HC 395, paras 33E and 33F stated that until 31 January 2008, applications for ILR from those who do not satisfy the English language and knowledge of UK life tests will be considered instead as an application to extend temporary stay in the UK. After 1 February 2008, such applications will simply be refused.³ It follows that applicants will have to have evidence of their language and life in the UK knowledge and skills before making such application. Those without such skills can be granted repeat terms of temporary leave as spouse/partners.⁴ The language of the settlement rule is discretionary, allowing the Secretary of State to grant further limited leave rather than settlement. The IDI used to state that such leave could be granted only when there is reason to doubt the lasting nature of the marriage or civil partnership or where there is real prospect of reconciliation between separated spouses or partners.⁵ This has now been deleted. The IDI now indicate that detailed enquiries should be made where doubts exist as to whether the relationship is genuine and subsisting: (i) where doubts exist as to whether the relationship is genuine and subsisting, (ii) there are real reasons to doubt the validity of the marriage or civil partnership, (iii) there is an allegation or other information that the marriage or civil partnership is not genuine, is a forced marriage or civil partnership formed under duress or the parties are no longer living together, or (iv) where the only evidence as to the continued subsistence of the marriage or civil partnership comes from the benefiting spouse or partner.⁶ Extensions of stay are subject to the general discretion to refuse on the ground of

undesirable conduct.⁷ There is no discretion to grant leave to remain under the Immigration Rules in the case of marriage or civil partnership breakdown,⁸ except for the purpose of access to children permanently residing with a parent or carer resident in the UK (see 11.76 below), or because of domestic violence (see 11.70 below). Where a person leaves the UK during the currency of a temporary leave, that person may be re-examined as to the fulfilment of the marriage requirements on a re-entry to the UK during the currency of that leave, and leave may be cancelled if the marriage has broken down,⁹ Spouse or partnership leave can also be curtailed if the person ceases to meet the requirements of the Rules under which that leave was granted.¹⁰ The IDI instructions on curtailment states: 'It should be borne in mind that the curtailment provisions are discretionary. Therefore curtailment should not follow automatically ... When curtailing a person's leave the burden of proof rests with the Secretary of State. Careful consideration should accordingly be given to all the person's circumstances.'¹¹ This admonition is particularly important in spouse/partnership cases where the relationship may have broken down due to domestic violence or the person may have contact with a child or divorce/family proceedings may be pending.¹² Where the settled spouse/civil/same-sex or unmarried partner has died during the probationary period, indefinite leave will be granted provided that the marriage/partnership was subsisting at the time of the death and the parties intended to continue cohabitation.¹³

¹ HC 395, paras 287(b), 289A, 295M, as amended by HC 582, with effect from 5 December 2005. Relevant to this chapter, the exempted candidates include: those qualifying for permanent residence under the domestic violence rules (applying using application form SET (DV)), are the husband, wife or civil partner of the citizen of another country on discharge from HM Forces (including Gurkhas)); are a bereaved husband, wife, civil partner or unmarried partner, are the husband, wife, civil partner, or unmarried or same-sex partner of a British citizen or of a permanent resident of the UK who is a permanent member of HM Diplomatic Service, a staff member of the British Council on a tour of duty abroad, or staff member of the Department for International Development or can show medical evidence of a 'long-standing, permanent disability that prevents you from learning English'. See UKBA 'Knowledge of language and life in the United Kingdom' and concerning the test at: <http://www.lifeintheuktest.gov.uk/>. If you speak English to a reasonable standard, you will need to pass the Life in the UK test. If you are not an English speaker, you will need to take and pass a course in English and citizenship. See the tutorial on the Life in the UK test website.

² HC 395, paras 287(a), 295G. See further chapter 5. See on civil partnership breakdown in the EEA regulations – *WW (EEA Regs, civil partnership) Thailand* [2009] UKAIT 00014 (05 March 2009).

³ HC 395, paras 33E and 33F were deleted by HC 314 from 31 March 2009. The Explanatory Memorandum states that: 'A person who is unable to satisfy the requirement to demonstrate knowledge of language and life in the UK can still be considered for an extension of stay but will need to ensure that they apply specifically for further leave to remain in the UK rather than for indefinite leave to remain. Applications for indefinite leave to remain that do not meet the requirement to demonstrate knowledge of language and life in the UK where it is required will be refused.' See UKBA 'Knowledge of language and life in the United Kingdom', at: <http://www.bia.homeoffice.gov.uk/ukresidency/>.

⁴ See fn 3 above. There is no clear information concerning such repeat applications by those who cannot meet the language and knowledge of life tests. In a letter dated 8 September 2006 (ILPA mailing September 2006), the then Parliamentary Under Secretary of State Joan Ryan MP stated that although a gender impact assessment had not been commissioned it was recognised that there are particular difficulties concerning this test affecting women in some communities. In the European context, integration tests have been challenged as breaching Article 7(2) of Directive 2003/86/EC.

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- ⁵ IDI (Oct/06), Ch 8, s 1, para 2.1. Further limited leave should not be granted where the requirements for settlement are met: *Tamweer* (3490).
- ⁶ IDI (Mar/06), Ch 8, ss 1, 2, 9, paras 3.2 and 4.2.
- ⁷ HC 395, paras 322, 323. See on general grounds for refusal, *JC (Part 9 HC395, burden of proof) China* [2007] UKAIT 00027 (8 March 2007); *RM (Kwok On Tong: HC 395, para 320) India* [2006] UKAIT 00039 (18 April 2006).
- ⁸ *Patel v Secretary of State for the Home Department* [1986] Imm AR 440.
- ⁹ *R v Immigration Appeal Tribunal, ex p Chaudhry* [1983] Imm AR 208, QBD.
- ¹⁰ See the Immigration Act 1971, s 3(3)(a); HC 395, para 395.
- ¹¹ IDI (June/04), Ch 9, s 5, para 2.
- ¹² See *MS (Ivory Coast) v Secretary of State for the Home Department* [2007] EWCA Civ 133 (22 February 2007) on the government policy not to remove persons engaged in family litigation and the Court finding concerning the grant of discretionary leave to certain such applicants
- ¹³ HC 395, para 287(b), inserted by Cm 4851. See also IDI (Oct/04), Ch 8, s 1, para 6.

Domestic violence rule

11.71 A spouse/civil or unmarried/same-sex partner (see 11.72 below) may be granted indefinite leave to remain provided that there is proof that the applicant has been the victim of domestic violence¹ during the probationary period while the marriage/partnership or relationship was subsisting and the applicant is able to produce evidence to establish that a permanent breakdown of the relationship was caused before the end of that period as a result of domestic violence.² The rule (formerly a concession outside the Rules) does not apply to persons admitted to the UK as the spouse or unmarried partner of a sponsor who had only limited leave to remain, or where the sponsor is an EEA national exercising free movement rights under EC law.³ Nor does it apply to fiancé(e)s/proposed civil partners. The rule requires the applicant to produce 'such evidence as may be required by the Secretary of State' to establish permanent breakdown as a result of domestic violence. The IDI suggest the following:⁴

- (i) an injunction, non-molestation order or other protection order made against the sponsor (but not an *ex parte* (without notice) or interim order);
- (ii) a relevant court conviction against the sponsor; or
- (iii) full details of a relevant police caution issued against the sponsor.

In recognition of the fact that it is difficult for victims of domestic violence to produce such documentary evidence, the IDIs also state that the Secretary of State will also accept as a substitute more than one of the following:

- (i) a medical report from a hospital doctor confirming that the applicant has injuries consistent with being a victim of domestic violence;
- (ii) a letter from a family practitioner who has examined the applicant and is satisfied that the injuries are consistent with being a victim of domestic violence;
- (iii) an undertaking given to a court that the perpetrator of the violence will not approach the victim;
- (iv) a police report confirming attendance at the home of the applicant as a result of a domestic violence incident;

- (v) a letter from a social services department confirming its involvement in connection with domestic violence;
- (vi) a letter of support or report from an identified women's refuge.⁵

The Tribunal and courts have considered these evidential requirements. The Secretary of State's contention had been that the evidential requirements in the IDI were prescriptive and decisive of the issue whether domestic violence can be proved. Contrary to this contention, in *Ishtiaq* the Court of Appeal held (at paras 31 and 38 per Dyson LJ for the Court) that:

'... para 289A(iv) should be construed so as to further the policy of enabling persons whose relationships have permanently broken down as a result of domestic violence before the end of the probationary period to be granted indefinite leave to remain. A construction which precludes an applicant, whose relationship has in fact broken down as a result of domestic violence, from proving her case by producing cogent relevant evidence would defeat the evident purpose of the rule. The purpose of para 289A(iv) is to specify what an applicant has to prove in order to qualify for indefinite leave to remain during the probationary period: viz that the relationship has been caused to break down permanently as a result of domestic violence. It is not the purpose of para 289A(iv) to deny indefinite leave to remain to victims of domestic violence who can prove their case, but cannot do so in one of the ways that have been prescribed by the Secretary of State in his instructions to caseworkers. ...

I would hold that para 289A(iv) gives the caseworker a discretion to decide what evidence to require the applicant to produce in the individual case. In exercising that discretion, I would expect the caseworker usually to start by applying the guidance given in section 4 of chapter 8 of the IDIs. But if the applicant is unable to produce evidence in accordance with that guidance, it would seem to me that the caseworker should seek an explanation for his or her inability to do so. If the applicant provides a reasonable explanation for her inability to produce such evidence, then the caseworker should give the applicant the opportunity to produce such other relevant evidence as she wishes to produce.⁶

The IDI has been rewritten to comply with this judgment. Where an applicant submits evidence to show that he or she has been subjected to domestic violence from persons other than the sponsor, he/she may still qualify under the concession if it is clear that this has been the reason for the marriage/partnership/relationship breakdown, for example, where those abusing the applicant are members of the sponsor's family against whom the sponsor offers no protection.⁷ The application for indefinite leave to remain is not required to be made while the applicant still has leave to remain as a spouse or partner.⁸ The IDI suggests that reasons for the delay should be given (but in the light of the rule such reasons are not a requirement) and may include the fact that the sponsor withheld the applicant's passport, or that the stress of the situation caused the applicant to overlook the need to regularise his or her status.⁹

¹ HC 395, para 289A. The IDI Ch 8, s 4, Victims of Domestic Violence, July 2008 defines domestic violence as a: 'form of physical, sexual or emotional abuse which takes place within the context of a close relationship. In most cases, the relationship will be between partners (married, cohabiting, or otherwise) or ex-partners.' Definition of injury (legal): 'Any harm done to a person by the acts or omissions of another ie injuries are not just restricted to physical harm.'

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- ² HC 395 para 289A. See, on whether the proven domestic violence was the cause of the breakdown of the relationship, *R (on the application of Butler) v Secretary of State for the Home Department* [2002] EWHC 854 (Admin), [2002] All ER (D) 259 (Apr); *R (on the application of B) v Secretary Of State For Home Department* [2002] EWCA Civ 1797, [2006] All ER (D) 207 (Mar) where the Court of Appeal quashed a decision of the SSHD that a relationship had not broken down as a result of domestic violence when the wife secured a non-molestation order after the parties had separated. The Court (per Judge J and Hale LJ at paras 21–26, 30–33) held that the domestic violence caused the breakdown of the relationship as it was ‘a significant contributory factor to what happened’ and part of a ‘stormy’ relationship prior to their separation.
- ³ IDI (Jul/08), Ch 8, s 4, para 2.1. The rationale is that ‘such persons have not been admitted to the UK for the purpose of settlement’. Such a person can apply under the European Provisions. See ECI, Ch 5, s 05.
- ⁴ IDI (Jul/08), Ch 8, s 4. The guidance states that the original or a certified copy of the court order or memorandum of conviction is required or details of the time and place of the police caution, and if produced ILR should be granted without further enquiry, that where a prosecution is pending caseworkers should ask the applicant for all relevant evidence from both parties (where not already provided) and make a separate assessment of their application or seek guidance from a deputy chief caseworker if a decision in such circumstances is not possible: paras 4.1.1.
- ⁵ IDI (Jul/08), Ch 8, s 4, para 3.1. The list of ‘acceptable’ refugees for these purposes is provided in IDI (Jul/08), Ch 8, s 4, Annex AB.
- ⁶ *Ishtiaq v Secretary of State for the Home Department* [2007] EWCA Civ 386 (26 April 2007). The Court held that the Tribunal determinations *RH* (HC 395, para 289A: *no discretion*) *Bangladesh* [2006] UKAIT 43 was wrong and rejected the reasoning adopted by the Tribunal in *JL* (*Domestic Violence: evidence and procedure*) *India* [2006] UKAIT 58.
- ⁷ IDI (Jul/08), Ch 8, s 4, para 5. See also *Butler* (fn 1 above).
- ⁸ HC 395, para 289A.
- ⁹ IDI (Jul/08), Ch 8, s 4, para 2.2. The IDI states that the rules do not require a person to have valid leave to remain in the United Kingdom, nor do they require a person to have last been admitted or granted as a spouse/civil partner/unmarried partner/same-sex partner. The Rules only require a person to have been previously admitted or granted as a spouse/civil partner/unmarried partner/same-sex partner. The rule will also apply to those spouses still on temporary leave because they are unable to meet the knowledge of life and language tests for ILR.

ADMISSION OF UNMARRIED AND SAME-SEX PARTNERS

11.72 The Immigration Rules also make provision for the admission of people who are not married but have a permanent relationship.¹ The Rules replaced hard-won concessions concerning the admission of heterosexual cohabitantes and same-sex partners, and were added in October 2000 to give effect to the right to family or private life under Article 8 of the ECHR. The Rules allow for the admission of men and women aged 21 or over to join partners of the same or opposite sex aged 21 or over,² who are present and settled or being admitted for settlement in the UK,³ or who are in the UK with limited leave for work, business or investment,⁴ and with whom they have been living in a relationship akin to marriage for two years.⁵ The intention of the rules relating to unmarried and same-sex partners is to allow genuine long-term relationships to continue. Short breaks apart would be acceptable for good reason, such as work commitments or looking after a relative which takes one partner away for a period of up to six months where it was not possible for the other partner to accompany him or her, and it can be seen that the relationship continued throughout that period.⁶ The threshold cohabitation rule will not be satisfied by partners merely visiting each other as often as

they can during the two years, but where they have been living together in a committed relationship for the two years (barring short breaks) but have divided their time between countries and have used the 'visitor' category to do this, this will be sufficient to meet the requirement.⁷ Any previous marriage or similar relationship must have permanently broken down.⁸ There is no longer any requirement that the parties are unable to marry, but they must not be involved in a consanguineous relationship.⁹ They must intend to live together permanently¹⁰ and be able to satisfy the maintenance and accommodation criteria.¹¹ On-entry applicants need entry clearance, just as spouses/civil partners do.¹² Normally leave will be granted for an initial period not exceeding 27 months (allowing a two-year probationary period), followed by settlement, if the relationship still subsists and the English language and knowledge of life tests are satisfied. But where an unmarried partner has lived abroad with their British citizen or settled partner for a period of four years, indefinite leave to enter can be granted on entry – again subject to the language and knowledge of life criteria.¹³ Applicants seeking to enter or remain as the partner of a person with limited leave for such purposes as work, business or investment must not intend to remain beyond the period of leave granted to their partner.¹⁴ After-entry applicants (those switching from another category such as visitor or student) must not have remained in breach of the immigration laws, and the relationship must have pre-dated any enforcement action (decision to deport, recommendation for deportation or service of notice preparatory to recommendation, or directions for removal as an overstayer under s 10 of the Immigration and Asylum Act 1999).¹⁵ There is a policy for unmarried partners similar to DP3/96,¹⁶ but a claim that a decision to remove constitutes an interference with family/private life rights under ECHR, Article 8 (particularly where for example, homosexuality is illegal or socially unacceptable in the partner's country of nationality or residence, and the couple cannot establish a joint home there), could found an appeal on human rights grounds.¹⁷

¹ HC 395, paras 295A–295O, inserted by Cm 4851 on 2 October 2000.

² HC 395, para 295AA, inserted by HC 538 and amended by HC 164 from 21 December 2004. The raising of the age to 21 was brought in by HC 227 from 27 November 2008. See 11.40 fn 2.

³ HC 395, para 295A(i). A member of HM forces serving overseas, a permanent member of the diplomatic service or a UK-based staff member of the British Council on a tour of duty abroad, or a staff member of the Department for International Development who is a British citizen or settled in the UK, is to be regarded as 'present and settled' for this purpose: para 295A as amended by Cm 5597. There is provision for the entry, stay and settlement of the spouse, civil partners, and children of discharged Gurkhas or Commonwealth soldiers in HM Forces who are settled or admitted for settlement under HC 395, paras 276E–Q. Paragraph 281 of HC 395 (as amended by Cm 4851, Cm 5597 and HC 582) and para 295A of HC 395 (as amended by Cm 4851 and Cm 5597) make provision for the entry/stay and settlement of spouse, civil partners, same-sex or unmarried partners of members of HM Forces, permanent members of the Diplomatic Service, comparable UK-based staff members of the British Council on a tour of duty overseas or staff members of the Department for International Development who are British citizens or UK settled.

⁴ HC 395, para 295J, referring to partners present in the UK under HC 395, paras 128–193 (work permit and other employment), 200–239 (business, self-employment, investor, writer, composer or artist), or 263–270 (retired persons of independent means). See 11.48 fn 1 for full list of temporary entrants able to sponsor in their same-sex or unmarried partners.

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- ⁵ The policy formulated in October 1997 required four years' cohabitation as a threshold period, which made it very difficult for someone who began a relationship with a British citizen while here in a temporary capacity, eg as a student, to qualify. The minimum cohabitation period was reduced to two years as from 16 June 1999.
- ⁶ IDI (Mar/06), Ch 8, s 9, Annex Z.
- ⁷ IDI (Mar/06), Ch 8, s 9, Annex Z. The IDI suggests that case officers should look to see evidence of a committed relationship, such as joint commitments, correspondence or official records linking partners to the same address, or record of the births of children born to the relationship.
- ⁸ HC 395, paras 295A(ii), 295D(ii), and 295J(ii).
- ⁹ HC 395, paras 295A(iii), 295D(v), 295J(iii), inserted by Cm 5949. Paragraph 295A(iv), which required inability to marry, was deleted by HC 538. The Rule gives statutory effect to the decision in *R v Secretary of State for the Home Department, ex p Ozminnos* [1994] Imm AR 287, QBD.
- ¹⁰ HC 395, paras 295A(vii), 295D(x); for those joining partners with limited leave to remain they must intend to live together during the partner's stay: para 295J(v).
- ¹¹ HC 395, paras 295A(v) and (vi); 295D(viii) and (ix); and 295J(vi) and (vii).
- ¹² HC 395, paras 295A(viii) and 295J(ix).
- ¹³ HC 395, para 295B as amended by HC 538 on 31 March 2003, 295A(b)(i) and (ii).
- ¹⁴ HC 395, para 295J(viii).
- ¹⁵ HC 395, para 295D(iv) and (vii).
- ¹⁶ See *BP (DP3/96, Unmarried Partners) Macedonia* [2008] UKAIT 00045 (28 February 2008).
- ¹⁷ See chapter 8 above. The minister indicated in a written answer of 16 June 1999 that the arrangements for unmarried partners (then contained in a policy outside the rules) would be taken into account when deciding whether to initiate enforcement action (eg for overstaying). See *BP (DP3/96, Unmarried Partners) Macedonia* [2008] UKAIT 00045 (28 February 2008).

11.73 Leave to enter to join or accompany an unmarried partner settled in the UK, or leave to remain with such a partner, will normally be for 27 months in the first instance,¹ and indefinite leave may be granted at the end of the two year probationary period, provided the relationship is still subsisting, each of the parties intends to live permanently with the other as his or her partner, the maintenance and accommodation criteria are still met and the applicant (unless over 65 or exempted) has sufficient knowledge of the English language and about life in the UK.² Indefinite leave may also be granted if the UK-settled partner dies during the probationary period and at the time of the death the relationship was subsisting and the parties intended to live together permanently.³ The Rules as amended make it clear that for the purposes of admission of unmarried partners, a member of HM Forces serving overseas, a permanent member of HM Diplomatic Service or a comparable UK-based member of staff of the British Council on a tour of duty abroad or a staff member of the Department for International Development who is a British Citizen or is settled in the UK is to be regarded as present and settled in the UK. Unmarried partners may also benefit from the provisions of the rules relating to access to children,⁴ and from the domestic violence rule, in the same way as parties to a marriage.⁵

¹ HC 395, paras 295B, 295E, 295G (save for those above who have been living together in a relationship outside the UK for four years or more, who can be granted indefinite leave to enter)

² HC 395, paras 295G, 295H. See UKBA 'Knowledge of language and life in the United Kingdom', at: <http://www.bia.homeoffice.gov.uk/ukresidency/>.

³ HC 395, paras 287(b) and 295M–295O, putting unmarried partners on a par with married couples. Note, bereaved partners, as with bereaved spouses and civil partners are not required to satisfy the English language and life in the UK tests.

⁴ HC 395, paras 246–248F, as amended by Cm 4851, see 11.76 below.

⁵ HC 395, para 289A.

MARRIAGE BY OVERSTAYERS AND ILLEGAL ENTRANTS

11.76 There remains the situation of those who marry/form a civil partnership or enter a relationship and one (or both) of the parties is or becomes liable to removal, because he or she is an overstayer or illegal entrant. As we have seen, the Immigration Rules provide that a person who entered in a temporary capacity and seeks leave to remain for marriage or to stay with a partner must be in the UK with limited leave and must not have remained in breach of the immigration laws.¹ From 1 February 2005, such persons will require permission to marry in the UK, and from 5 December 2005 will require permission to enter a civil partnership in the UK.² However, to give effect to the UK's obligations under the ECHR,³ the Home Office has adopted removal policies to deal with these situations. Much time was spent in court debating the ambit and legality of the policy, DP 2/93, which operated between 1993 and 1996.⁴ This was replaced in 1996 by DP3/96, applying to marriages which came to the notice of the Home Office after 13 March 1996.⁵ The 1993 policy included common-law relationships,⁶ but they were expressly excluded from the 1996 policy,⁸ only to be reinstated in 1999.⁷ Neither policy dealt with same-sex relationships. Under DP 3/96, which deals only with married couples, removal action will not normally be initiated if (a) the couple have been married and have cohabited for at least two years before the commencement of enforcement action and (b) it would be unreasonable to expect the settled spouse to accompany his or her spouse on removal.⁹ This is almost identical to the policy for unmarried couples. Both were formulated in order to clarify the practice contained in the Immigration Rules relating to deportation and removal.¹⁰ In the case of *AB (Jamaica v Secretary of State for the Home Department)*, Sedley LJ, who gave the lead judgment, pointed out that it is today necessary that discretionary decisions outside the Immigration Rules should be made within a 'Convention – Compliant Policy Framework,' and that DP3/96 now co-exists with Article 8 of the Convention which, by virtue of s 6 of the Human Rights Act 1998, the State is required to respect.¹¹ From this decision and from an examination of the original purpose of the extra rule policies, such as DP3/96, it is certainly arguable that none of these policies can be read in isolation from the more general policies which are contained both in the Immigration Rules relating to removal and deportation or from Article 8 of the ECHR, as is made clear in the judgment of Sedley LJ in *AB (Jamaica)*. The policy has application to a relationship in which for part of the time the parties were co-habiting and in the remainder were married.¹² Such policies are a relevant factor for consideration by the Tribunal, and although they use different criteria from the Convention rights engaged by removal, they could not have made it proper for the immigration judge to adopt a higher standard than Article 8(2) permits in gauging the reasonableness and hence the proportionality of removal.¹³ Although the policy uses the language of deportation to cover situations where administrative removal rather than deportation is now the order of the day, it still applies as before.¹⁴ It is not clear, however, whether, as in the case of children, these policies now

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apply to those who are neither illegal entrants nor overstayers, and whose marriage or cohabitation has occurred during temporary admission.¹⁵

- ¹ HC 395, para 284(i) and (iv) (spouses/civil partners); 295D(iv), (vii) (unmarried partners).
- ² See 11.67 above.
- ³ The policy was held to be compatible with ECHR, Art 8 in *Gangadeen v Secretary of State for the Home Department* sub nom *Khan v Secretary of State for the Home Department* [1998] Imm AR 106, CA.
- ⁴ See eg *R v Secretary of State for the Home Department, ex p Amankwah* [1994] Imm AR 240; *Lye v Secretary of State for the Home Department* [1994] Imm AR 63; *Secretary of State for the Home Department v Hastrup* [1996] Imm AR 616; *Mirza v Secretary of State for the Home Department* [1996] Imm AR 314.
- ⁵ See *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302, [2007] All ER (D) 97 (Dec). Other policies published at about the same time dealt with children and the Appendix to the judgments in *R (on the application of Dabrowski) v Secretary of State for the Home Department* [2003] EWCA Civ 580, [2003] Imm AR 454, [2003] INLR 411.
- ⁶ The instructions, DP2/93, provided that persons who had married or begun cohabitation with a partner before enforcement action began, and who had been married or cohabiting for two years before coming to attention, should not as a general rule be forced to leave the UK.
- ⁷ See *BP (DP3/96, Unmarried Partners) Macedonia* [2008] UKAIT 00045 (28 February 2008). Statement of policy made by former Home Office Minister of state, Mr Kirkhope, on 22 Feb 96.
- ⁸ See *BP (DP3/96, Unmarried Partners) Macedonia* [2008] UKAIT 00045 (28 February 2008). On 16 June 1999 the Minister of State, Mr Mike O'Brien, announced in Parliament the outcome of his review of immigration policy in relation to the unmarried partners concession, stating: 'It has been decided that, in order to demonstrate a commitment akin to marriage, it is not necessary to demonstrate a prior cohabitation period of four years, and the prior cohabitation period has, therefore, been changed to two years.' Apart from this statement by the Minister, para 36.4.1 of Chapter 36 of the OEM reads as follows: '... enforcement action should not normally be initiated ... where the subject has a genuine and subsisting relationship akin to marriage with a person who is present and settled here and the couple have lived together in this country for at least 2 years before the commencement of enforcement action. And any previous marriage (or similar relationships) by either party has permanently broken down. And it is unreasonable to expect the settled partner to accompany the subject on removal. And the couple are not involved in consanguineous relationship with one another.'
- ⁹ In *AB (Jamaica) v Secretary of State for the Home Department*, Sedley LJ at para 20 in the judgment for the Court, observed: 'In substance, albeit not in form, [the UK spouse] was a party to the proceedings. It was as much his marriage as the appellant's which was in jeopardy, and it was the impact of removal on him rather than on her which, given the lapse of years since the marriage, was now critical. From Strasbourg's point of view, his Convention rights were as fully engaged as hers. He was entitled to something better than the cavalier treatment he received not only from the Home Office but, I regret to say, from the AIT. It cannot be permissible to give less than detailed and anxious consideration to the situation of a British citizen who has lived here all his life before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact.' DP3/96. 'Enforcement action' includes a specific instruction to leave with a warning of liability to deportation if the subject fails to do so, in addition to the service of a notice of intention to deport or illegal entry papers, or a recommendation for deportation: DP3/96, para 5.
- ¹⁰ HC 395, paras 364 and 395C.
- ¹¹ *AB (Jamaica)*, above, at paras 1 and 2.
- ¹² *BP (DP3/96, Unmarried Partners) Macedonia* [2008] UKAIT 00045 (28 February 2008). In the stated policy contained in DP3/96 and that set out in the OEM for cohabiting couples, the Secretary of State is in effect stating that on questions of a family being allowed to remain in the UK she is prepared to discount the appellant's breach of the immigration laws if there exists a qualifying period when the appellant and her UK-born and settled partner are in a relationship of cohabitation or of marriage, or a combination of both these situations, which has endured for at least two years before the commencement of enforcement action.

- ¹³ *AB (Jamaica) v Secretary of State for the Home Department* at para 27 per Sedley LJ.
¹⁴ See Appendix to judgments in *R (on the application of Dabrowski) v Secretary of State for the Home Department* [2003] EWCA Civ 580, [2003] Imm AR 454, [2003] INLR 411.
¹⁵ *Dabrowski* above at paras 12–17 (Sedley LJ) and para 28 (Laws LJ).

11.77 The exclusion of a civil, unmarried or same-sex partner who fulfilled removal policy criteria would almost certainly be held unlawful after the inclusion of civil, unmarried and same-sex partners into the Immigration Rules, especially in the light of Article 8 read with Article 14 ECHR.¹ These policies are to be read and applied in the context of case guidance on Article 8 evaluations.² UKBA guidance acknowledges the sensitive issues which arise in family removal. The Enforcement Instructions and Guidance dealing with family removal arrangements has recently been updated.³

- ¹ Further, the then Minister of State, Mike O'Brien, indicated in a written statement to parliament on 16 June 1999 that the then unmarried partners concession would be taken into account in the same way as the marriage policy in deciding whether to remove overstayers etc. See *CH (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 792 (26 July 2007) for discussion on whether a bereaved spouse is within DP3/96.
² See *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, [2008] 1 WLR 1420, [2009] 1 All ER 363; *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2008] 4 All ER 28; and *Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2008] 3 WLR 166; *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5, [2009] All ER (D) 92 (Jan).
³ EIG, Ch 45, Family Cases, 23 January 2009.

ADMISSION OR STAY FOR THE PURPOSES OF CONTACT WITH RESIDENT CHILDREN

11.78 In 1994, the Immigration Rules made provision for the first time for parents to come to Britain for access visits to their UK resident children.¹ The rules were substantially amended in October 2000 in order to ensure compliance with ECHR Article 8 obligations of respect for family life, as set out in the ECHR decision in *Berrehab*.² Entry is no longer confined to visits but could lead to settlement. In one important respect the amended rule was and is deficient. It provides for entry to a contact parent where the parent or carer with whom the child permanently resides is resident in the UK.³ On the face of it, the rule appears not to afford entry where the applicant parent is the 'custodial' parent with whom the child permanently resides and that parent's entry and stay is designed to facilitate frequent contact between the British parent and the child. In our view, an interpretation that excluded entry or stay in such circumstances would be discriminatory and contrary to the ECHR jurisprudence the rule is designed to incorporate.⁴ As the rule assumes the applicant parent may have contact rights under a residence order,⁵ it does cover the situation where the parents have a joint residence order and share the care of their child.⁶ Entry clearance is required for those already living abroad. There is some limited capacity to switch to the contact parent rule if the applicant in the UK has leave to enter or remain as a spouse/civil or unmarried or same-sex partner of a person present and settled in the UK who is the other parent of the child.⁷ The applicant for entry clearance must have a residence or contact order granted by a court in the UK, or a certificate from

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a district judge confirming his or her intention to maintain contact with the child.⁸ The applicant for leave to remain must have either the orders for residence or contact, or the certificate, as for entry clearance, or simply a statement from the child's other parent (or, if contact is supervised, from the supervisor) that the applicant is maintaining contact with the child.⁹ The applicant for entry or leave to remain must intend in either case to take an active role in the child's upbringing¹⁰ and satisfy the maintenance and accommodation requirements.¹¹ Leave to enter or remain is for 12 months in the first instance.¹² An applicant in this category can also be granted settlement under the Immigration Rules,¹³ provided the applicant has completed 12 months in this capacity, enjoys frequent and regular visiting or staying access with the child and intends this to continue¹⁴ and continues to meet the other requirements of the rules. In particular, the leave to remain and settlement rules state that the applicant parent must not have remained in breach of the immigration laws. If applicants have done so, the Home Office will expect them to leave the UK and apply for entry clearance, unless such removal decision breaches Article 8.¹⁵ When deportation is being considered (on conducive grounds or after conviction of a criminal offence) the considerations of DP4/96¹⁶ will continue to apply, since the effect of the order would be to prevent parental access in the UK until the deportation is revoked. As the entry rule requires parents to have a residence or contact order granted by a court in the UK, it will often be necessary for parents – even overstayer parents – to remain in the UK while they obtain such court order. The Secretary of State's practice is to grant assurances or undertakings not to remove in such cases¹⁷ and this may extend to the grant of discretionary leave to await the outcome of the family proceedings.¹⁸

¹ HC 395, paras 246–248, amended by Cm 4851 on 2 October 2000. The rule concerns a child resident in the UK. The term 'resident' is not defined, whereas alternative terms such as 'settled in the UK' or 'ordinarily resident' are well defined: HC 395 para 6.

² *Berrehab v Netherlands* (1988) 11 EHRR 322; see also *Ciliz v Netherlands* [2000] 2 FLR 469. Whether there is a breach of Art 8 of the ECHR will depend on the degree of contact between parent and child: see *Hlomodor v Secretary of State for the Home Department* [1993] Imm AR 534, CA above; *Lye v Secretary of State for the Home Department* [1994] Imm AR 63 and *R v Secretary of State for the Home Department, ex p Nijjar* [1994] Imm AR 50.

³ HC 395, para 246(ii).

⁴ See fn 2 above.

⁵ Under s 8(1) of the Children Act 1989 a residence order means an order settling the arrangements to be made as to the person with whom a child is to live; a contact order means an order requiring the person with whom a child lives to allow the child to visit or stay with the person named in the order or for that person and the child to have contact with each other. It is not necessary to show that exceptional circumstances exist before a shared residence order may be granted: *D v D (Shared residence order)* [2001] 1 FLR 495. The failure of parents to co-operate is not a bar to a joint residence order where this would in all other respects be the right order: *Re G (Residence same sex partner)* [2005] 2 FLR 957.

⁶ HC 395, para 246 (iii)(a).

⁷ HC 395, para 248A(vii), as amended. The rule does not require the relationship to have broken down, and would apply equally to an ongoing relationship which did not involve cohabitation by the parties. Generally applicants for leave to remain will be separated/divorced spouse or partners.

⁸ HC 395, paras 246(iii) and 248A(iii).

⁹ HC 395, para 248(iii)(c). These provisions for consensual arrangements go some way to meeting the difficulties posed by the previous rule, which required a court order. In *R v Secretary of State for the Home Department, ex p Kebbeh* (CO 1269/98, 30 April 1998, unreported) a removal decision was quashed because, inter alia, it prevented the applicant

obtaining the necessary order from the family court to enable him to comply with the rule. See also: *MS (Ivory Coast) v Secretary of State for the Home Department* [2007] EWCA Civ 133 (22 February 2007).

¹⁰ HC 395, paras 246(iv) and 248A(iv).

¹¹ HC 395, paras 246(vi), (vii) and 248A(ix), (x).

¹² HC 395, paras 247, 248B.

¹³ HC 395, paras 248D, 248E.

¹⁴ HC 395, para 248D(iii).

¹⁵ The combination of the much improved Immigration Rules and the abolition of deportation for overstayers by the Immigration and Asylum Act 1999, s 10 (see chapter 15) means that any interruption of contact caused by the need to return for entry clearance is likely to be short and so compatible with Art 8 family life considerations. But the requirement to leave for entry clearance may be disproportionate where for example the family is vulnerable, entry clearance or return may be protracted or the children are young and even a short separation could be deleterious for the child.

¹⁶ DP4/96, para 8, providing that 'it may be unreasonable to expect [the subject of a deportation order] to return abroad to apply for entry clearance ... in these cases it will be important to assess the quality and the regularity of access to the child in deciding how much weight should be attached to it as a compassionate factor'.

¹⁷ See *MS (Ivory Coast) v Secretary of State for the Home Department; Re A (children) (care proceedings: asylum seekers)* [2003] EWHC 1086 (Fam), [2003] 2 FLR 921 The fair trial rights protected by Article 6, and the procedural requirements of Article 8, are relevant in such cases: see eg *Ciliz v Netherlands* [2000] 2 FLR 469.

¹⁸ *MS (Ivory Coast) v Secretary of State for the Home Department*.

ADMISSION OF CHILDREN UNDER 18

Meaning of 'parent'

11.80 Under the Immigration Rules, a parent is defined to include:

- (a) the stepfather of a child whose father is dead and the reference to stepfather includes a relationship arising through civil partnership;
- (b) the stepmother of a child whose mother is dead and the reference to stepmother includes a relationship arising through civil partnership;
- (c) the father as well as the mother of an illegitimate child where he is proved to be the father;
- (d) an adoptive parent in a recognised or de facto adoption;
- (e) in the case of a child born in the UK who is not a British citizen, a person to whom there has been a genuine transfer of parental responsibility on the ground of the original parent(s)' inability to care for the child.¹

The Instructions to entry clearance officers, the Entry Clearance Guidance notes that the commissioning British parent in the surrogacy arrangement may also be a parent under the rules; the guidance stresses such decisions should be 'in harmony' with the Human Fertilisation and Embryology Act 1990.²

The Immigration Rules recognises as 'parent' both the mother and father of an illegitimate child if paternity is proved.³ This contrasted with the position in British nationality law, where (until 1 July 2006 which saw the commencement of section 9 of the Nationality Immigration and Asylum Act 2002), the father of an illegitimate child was not able to pass on citizenship.⁴ Illegitimate children are treated the same as others for the purposes of all of the

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Immigration Rules, and for those born after the 1 July 2006 are treated the same as others for the purposes of nationality, subject to proof of the relationship

¹ HC 395, para 6.

² UK Visas Entry Clearance Guidance Vol 1, Ch 14, para 14.22. The Human Fertilisation and Embryology Act 1990 (HFEA 1990) provides that the 'mother' of a surrogate child is the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child (s 27(1)). In the case of a child who is being or has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination, if at the time of the placing in her of the embryo or the sperm and eggs or of her insemination, the woman was a party to a marriage, and the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, then, the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing or to her insemination. If the woman was not married or the husband of the birth mother did not consent, the father is the genetic father of the child (s 28). See also the Human Fertilisation and Embryology Act 2008, ss 33 and 53 which come into force in April 2009.

³ HC 395, para 6. See chapter 2, above for more details. See on DNA testing of children, IDI (Nov/06), Ch 8, s 3, Annex N.

⁴ British Nationality Act 1981, s 50(9) provides that a child's mother is the woman who gives birth to the child; a child's father is the husband, at the time of the child's birth, of the woman who gives birth to the child, the father under section 28 of HFEA 1990 or if neither of these apply is any person who satisfies prescribed requirements as to proof of paternity. Under the British Nationality (Proof of Paternity) Regulations 2006 (SI 2006/1498), the father is taken to be the person named as such in a birth certificate issued within one year of the child's birth or a person who satisfies the Secretary of State he is the father (generally by DNA) (reg 2). The provision came into force on 1 July 2006 and applies to children born after that date. The Immigration and Nationality Directorate has a policy of discretionary registration of illegitimate children born before that date where there are no doubts as to paternity, no reasonable objection from either parent and no character objections: NI, Ch 9, s 9. See 2.53 (citizenship by descent), above.

Non-British children born in the UK

11.86 The Immigration Rules lay down requirements for non-British children born in the UK seeking leave to enter and leave to remain. Such children must be born in the UK, under 18, unmarried, or not a civil partner, not leading an independent life or having formed an independent family unit, and must not have been away from the UK for more than two years.¹ If the child is accompanied by or seeking to join a parent with limited leave, leave to enter is given for the same period as that of the parents, or the longer of the two periods if each parent has a different period of leave, save where the parents are separated, in which case leave is given for the same period as the parent who has day-to-day control.² If neither of the parents has a current leave, leave to enter or remain will normally be refused, unless it is unlikely that the parents will be removed in the immediate future and there is no other person outside the UK who could reasonably be expected to care for the child.³ In such cases, three months' leave to enter may be given. If one of the parents is a British citizen or if the parental rights and duties in respect of the child are vested in a local authority, indefinite leave to enter or remain may be given.⁴ Children born in the UK who are not British citizens are not removable in their own right, as they are neither overstayers nor illegal entrants but can be removed as a member of the family of an overstayer or illegal entrant parent.⁵

¹ HC 395, para 305(ii)–(v).

² HC 395, paras 305(i)(a) and 306.

³ HC 395, para 307.

⁴ HC 395, paras 305(i)(b) and (c) and 308. The guidance for dealing with children in local authority care is contained in IDI (Aug/03), Ch 8, s 3, Annex M, para 8. See also IDI, Ch 8, s 4 Children Born in the UK not British Citizens, March 2007.

⁵ Immigration Act 1971, Sch 2, para 10A (inserted by the Nationality Immigration and Asylum Act 2002 from 10 February 2003); HC 395, para 395C. Removal is not possible if the person ceases to be a member of the family of the person to be removed. Care should be taken to ascertain whether such child might have a claim to British citizenship. The OEM guidance states that a child will not normally be removed where: he and his mother or father are living apart from the offender, or the child has spent some time in the UK and is nearing the age of 18, or has left home and has established him or herself on an independent basis and that before making a family removal decision, decision-makers should consider in the case of a child of school age, the effect of removal on his or her education, and the practicability of any plans for the child's care and maintenance in this country if one or both parents were removed: OEM (Dec/07), Section B, Ch 10, *Persons liable to administrative removal under section 10*.

The 'under 12 and Seven Year Child concessions'

11.99 The Home Office used to have a concession whereby, where the child seeking to join the UK single parent was under 12 but the sole responsibility rule was not satisfied, entry clearance for settlement was granted on a concessionary basis if there was adequate accommodation.¹ The IDI on this 'under 12s concession' stated that it might be appropriate to withhold the concession where the UK parent was so handicapped, according to professionally confirmed evidence, as to be incapable of properly caring for the child; or where there were older siblings, or if it was being used to get round the prohibition on the entry of certain children of polygamous marriages.² Unfortunately this useful concession was abolished on 29 March 2003. Applications after that date are not being accepted.³ There will be cases in the appeal system where the policy remains applicable.⁴

The policy DP5/96 – termed the Seven Year Child Concession – was said to strike a balance between safeguarding the interests of children who have established close connections with the United Kingdom over a significant period of time and the need to ensure that no incentive is provided to parents to seek to circumvent and abuse the system of immigration control.⁵ On 9 December 2008, the Minister for Borders and Immigration announced the withdrawal of DP5/96 stating that the original purpose of the concession had been overtaken by the Human Rights Act 1998. The Minister acknowledged that a child's residence in the UK will continue to be an important relevant factor in removal decisions. There will be a number of children in the appeals and decision-making system to whom the policy remains applicable.

The DP5/96 policy has been explicated, analysed and applied in a number of important case authorities.⁶ The most recent such case *R (on the application of A) v Secretary of State for the Home Department*⁷ concerned a claim of unlawful discrimination in respect of a decision of the Secretary of State to grant limited discretionary leave rather than ILR to a minor who had lived in the UK for seven years with relatives who were not subject to removal. The minor had no parent in the UK. The evidence before the Court was that

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children with parents subject to removal who benefitted from DP5/96 were granted ILR. The issue concerned whether the grant of limited discretionary leave rather than ILR to this minor simply on his lack of a parent was discriminatory. The Court held that the difference in treatment of the relevant child was 'simply arbitrary when regard is had to the aim of that policy which is to protect the interests of those children who have established their private life in this country, who should normally not be uprooted from it as a result and who should accordingly normally be regarded as settled here'. Further not applying the same general presumption – that ILR will be granted to a relevant child – on the ground that that child is not living with a parent who also requires leave to remain was one no reasonable person could have decided to adopt in the circumstances.

¹ IDI (Dec/00), Ch 8, Annex M, para 12.

² IDI (Dec/00), Ch 8, Annex M, para 12, The detailed guidance for the admission of children with older siblings provided that the numbers of children either side of the dividing line would be relevant, as would whether or not the children have been living together as a group, the arrangements for the care of the children in the UK and the hardship caused by leaving an older sibling alone at home. See on the reunion of separated siblings *Sen v Netherlands* (2003) 36 EHRR 7, ECtHR.

³ IDI (Aug/03), Ch 8, s 3, Annex M.

⁴ *KK (under 12 policy in-country applications) Jamaica* [2004] UKIAT 00268.

⁵ See the UKBA statement cited at para 48 in *R (on the application of A) v Secretary of State for the Home Department* [2008] EWHC 2844 (Admin), [2009] 1 FLR 531.

⁶ See *R (on the application of Dabrowski) v the Secretary of State for the Home Department* [2003] EWCA Civ 580, [2003] Imm AR 454; *R (on the application of Sadowska) v the Secretary of State for the Home Department* [2006] EWHC 797 (Admin), [2006] All ER (D) 207 (Mar); *R (on the application of Tozhlukaya) v Secretary of State for the Home Department* [2006] EWCA Civ 379, [2006] All ER (D) 155 (Apr); *Baig v Secretary of State for the Home Department* [2005] EWCA Civ 1246, [2006] All ER (D) 155 (Apr). See on the application of the policy to children without parents: *NF (Ghana) v Secretary of State for the Home Department* [2008] EWCA Civ 906, [2008] All ER (D) 409 (Jul); *R (on the application of A) v Secretary of State for the Home Department* [2008] EWHC 2844 (Admin), [2009] 1 FLR 531.

⁷ [2008] EWHC 2844 (Admin), [2009] 1 FLR 531.

INTER-COUNTRY ADOPTION/SURROGACY ARRANGEMENTS

11.101 Inter-country adoption and inter-country surrogacy arrangements are increasingly common and are sought to be regulated so as to protect children and women from exploitative and commercial trafficking and 'baby buying' practices. An inter-country adoption is one in which the prospective adoptive parent does not have the same nationality and/or country of residence as the child he or she wishes to adopt. In inter-country surrogacy arrangements the parent providing the genetic material for his/her child's conception, has a different nationality or country of residence from the surrogate/ birth mother and/or child conceived as a result of the surrogacy arrangement. These inter-country arrangements are undertaken in and outside the UK. Certain British citizens and residents travel abroad to adopt children or enter into surrogacy arrangements through clinics based abroad. In a similar fashion overseas nationals enter the UK to arrange removal of children for adoption or non-commercial surrogacy arrangements through British clinics.¹ These arrangements often involve relatives of the parties seeking adoption or surrogacy. Inter-country adoptions from Britain often involve local authorities

and generally occur when relatives seek to assume responsibility for children after the death of the child's British parents, or the child's reception into local authority care. Until relatively recently inter-country adoptions were not subject to internationally agreed standards or procedures, and the children being adopted were vulnerable to exploitation and even trafficking for gain. This led to the formulation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Convention).² The UK ratified the Convention on 1 June 2003 and its provisions were extended to the Isle of Man on 1 November 2003. There are now 75 contracting states to this Convention³ and two other states have signed but not yet ratified it.⁴ The Convention has three important objectives. It seeks to establish internationally agreed safeguards to ensure that inter-country adoptions take place in the best interests of the child and with respect for his or her fundamental rights. It aims to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and the abduction, sale or trafficking of children for adoption prevented. Finally, it enables Contracting States to recognise adoptions made in other Contracting States, so preventing the need for children to be adopted for a second time in the receiving state. Adoptions made in Convention States in accordance with Convention requirements are termed Convention adoptions. Inter-country adoptions involve the consideration of domestic and private international family law as well as immigration law. These principles and the associated arrangements to enforce them have become a feature of Convention and non-Convention inter-country adoptions in the UK. There are no concluded international agreements concerning transnational surrogacy agreements. In the absence of such international standards, the ECO guidance simply stress that such arrangements should be in harmony with the Human Fertilisation and Embryology Act 1990.⁵

- ¹ On the legal issues associated with surrogacy arrangements undertaken in the UK involving commissioning parents who were not domiciled in the UK, see: *G, Re* [2007] EWHC 2814 (Fam), [2008] Fam Law 95. The case concerned a non-commercial surrogacy arranged by a Turkish couple in the UK.
- ² The Convention was concluded on 29 May 1993 and its text can be found in Schedule 1 to the Adoption (Intercountry Aspects) Act 1999.
- ³ The Hague Convention website: <http://www.hcch.net/index> regularly updates the list of states which have ratified the Convention.
- ⁴ The United States of America has ratified the Convention and it is expected to come into force there in April 2008. Ireland and the Russian Federation have signed but not yet ratified the Convention.
- ⁵ UK Visas Entry Clearance Guidance Vol 1, Ch 14, para 14.22. For definitions of 'parent', see the Human Fertilisation and Embryology Act 2008, ss 33 and 35–41. In the UK, surrogacy agreements are unenforceable and it is illegal to negotiate a commercial surrogacy arrangement: Surrogacy Arrangements Act 1985, ss 1, 2. Commercial surrogacy arrangements are permitted in other jurisdictions, for example Ukraine, some states in the United States. Inter-country surrogacy cases can produce complex issues in private international law – see *X & Y (Foreign Surrogacy)*, *Re* [2008] EWHC 3030 (Fam), [2009] Fam Law 115.

11.102 The Adoption (Intercountry Aspects) Act 1999, which came into force on 1 June 2003, was passed in order to give effect to the Convention in domestic law. The Adoption and Children Act 2002 (the 2002 Act) which came into force on 30 December 2005 replaced the 1999 Act and the Adoption Act 1976 and together with the Adoptions with a Foreign Element

Regulations 2005 sets down many of the arrangements for inter-country adoptions.¹ The Children and Adoption Act 2006 includes a statutory framework, (in effect from 2 August 2007), for the suspension of inter-country adoption from specified countries where there are concerns about their adoption practices.² Relevant to the entry into the UK and removal from the UK of children for the purposes of adoption, these legislative provisions make a distinction between Convention and non-Convention adoptions and set out the requirements and conditions that must be met for Convention and non-Convention adoptions in or outside the UK:

- by persons habitually resident in the UK who wish to bring into the UK children whose habitual residence is outside the UK, such children being either recently adopted under an external adoption or proposed for adoption in the UK. These arrangements cover children habitually resident in Convention States and non-Convention States;³
- by a person or couple who wish to remove a child for the purposes of adoption under the law of a country or territory outside the British Islands – these removal arrangements can be for a non-Convention adoption abroad or where the adoptive parents are from a Convention State and wish to obtain a Convention adoption in the UK.⁴

¹ The 2002 Act replaced the Adoption Act 1976 (1976 Act) and also incorporates most of the provisions of the 1999 Act. The relevant sections of the 1999 Act which remain in force include s 1 and part of s 2, which enabled the UK to implement the Convention, s 7 which amended the British Nationality Act 1981, and Sch 1, which contains the text of the Convention. Inter-country adoptions in England and Wales have been regulated between 2003 and 30 December 2005 by the Intercountry Adoption (Hague Convention) Regulations 2003, SI 2003/118, and the Adoption (Bringing Children into the United Kingdom) Regulations 2003, SI 2003/1173, made under the transitional provisions in the 2002 Act which amended the 1976 Act. SI 2003/1173 applied to adoptions from non-Hague Convention countries. The 2003 regulations have now been repealed and replaced by the Adoptions with a Foreign Element Regulations 2005, SI 2005/392 (the AFE Regulations 2005). The AFE Regulations 2005 provide for adoptions under the Convention and non-Convention adoptions and apply to bringing children into the UK and to removing children from the UK for the purposes of adoption. The Adoption and Children Act 2002 (Commencement No 10) (Transitional and Savings Provisions) Order 2005, SI 2005/2897 made transitional provisions where the adoption process was started before 30 December 2005 in relation to inter-country adoption cases. For Hague Convention cases in progress on 30 December 2005, Article 6 of the ECHR sets out a general rule, with exceptions, that any action or decision taken before that date under a provision of the Hague Convention Regulations shall, on or after that date, be treated as if it were an action or decision taken under the corresponding provision of Part 3 of the AFE Regulations 2005. Article 7 makes transitional provision concerning the conditions to be met by prospective adopters in non-Convention cases and specifies the extent to which the Adoption (Bringing Children into the United Kingdom) Regulations 2003 still apply.

² On the 27 September 2007, there was a temporary suspension of adoptions from Cambodia and on 6 December 2007 adoptions from Guatemala were suspended due to concerns at their adoption practices. The Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) Regulations 2008, SI 2008/1807 now apply to adoptions from Cambodia and Guatemala (see SSI 2008/304, 2008/305 for Scotland). The effect of these restrictions is that the Minister cannot take any steps to assist the bringing of a child from a restricted country into the UK for adoption unless they are satisfied they should do so, following a request for special exception from the prospective adopter.

³ Adoption and Children Act 2002, ss 83–86; AFE Regulations 2005, Pt 2, Ch 1, regs 3–11. On habitual residence, see 11.15 fn 1 above.

⁴ Adoption and Children Act 2002, ss 84–86; AFE Regulations 2005, Pt 2, Ch 2 for removal for a Non-Convention adoption abroad and Pt 3 Ch 2 where the adoption is in the UK but the adopters are from a Convention State.

The assessment and approval of adoptive parents

11.103 The key safeguards agreed under the Convention for adopted and prospective adoptive children are set down in the 2002 and 2006 Acts and the AFE Regulations 2005. The Regulations set down the arrangements which must be complied with by persons habitually resident in the UK who wish to bring into the UK either a child adopted by a British resident under an external adoption effected within 12 months of entry¹ or a child intended to be adopted in the UK by the British resident.² Section 83 of the 2002 Act makes it an offence for a person habitually resident in the UK to bring in such children, except in compliance with the regulatory arrangements.³ A key safeguard in the regulatory arrangements is the requirement for prospective adoptive parents to be assessed and approved as suitable adoptive parents by an approved adoption agency – often inaptly termed a ‘home study’ report.⁴ The adoption agency which receives the application for assessment of suitability by prospective adopters is obliged to consider, report on and decide the person’s suitability as adoptive parents.⁵ It is a criminal offence for anyone but a prescribed Adoption Agency to provide a report on the suitability of prospective adopters for an inter-country adoption.⁶ If the prospective adopters are approved as suitable adopters by the adoption agency, the report and case papers are then sent to the Inter-country Adoption Casework Team at the Department for Children, Schools and Families for the issue of a Certificate of Eligibility and Suitability from the Secretary of State for Education and Skills.⁷ When the child arrives in the UK, the prospective adopter must inform his or her local authority within 14 days of the child’s arrival and of his/her intentions concerning adoption.⁸

¹ The Adoption and Children Act 2002, s 83(1)(b) placed a restriction on entry where the child had been adopted within the six months immediately prior to entry. This provision has been amended by the Children and Adoption Act 2006, s 1, and from 1 October 2007 the restriction now covers children adopted in the previous 12 months. An external adoption is an adoption other than a convention adoption of a child effected under the law of any country or territory outside the British islands whether or not it is a full adoption – that is one in which the child is treated in law as the child of no person other than the adopters: Adoption and Children Act 2002, ss 83(3), 88(3). On habitual residence, see 11.15 fn 1 above.

² The Adoption and Children Act 2002, s 83.

³ The Adoption and Children Act 2002, s 83(7). Section 83 does not apply if the child is intended to be adopted under a Convention adoption order: s 83(2).

⁴ AFE Regulations 2005, regs 3–5. An adoption agency is defined in the Adoption and Children Act 2002, s 2(1) as either a local authority or registered adoption society. On registered adoption society, see the Care Standards Act 2000, Pt 2; SI 2004/3203, art 2(1)(a). See also the Suitability of Adopters Regulations 2005, SI 2005/1712. See for Wales, the Local Authority Adoption Services (Wales) Regulations 2007, SI 2007/1357, the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, and for Scotland, the Adoption and Children (Scotland) Act 2007, which received Royal Assent on the 15 January 2007 but at the time of writing, January 2008, was not yet in force. For a full list of all Voluntary Adoption Agencies, see the government adoption site at: <http://www.everychildmatters.gov.uk/adoption/>. For up-to-date information on inter-country adoptions, see: <http://www.dfes.gov.uk/intercountryadoption/>.

⁵ AFE Regulations 2005, reg 3; the Adoption Agencies Regulations 2005, SI 2005/389, regs 21–30. The AFE Regulations 2005 need to be read with the Adoption Agencies Regulations 2005, SI 2005/389. The Adoption Agencies Regulations set out the procedure to be followed in respect of the assessment of prospective adopters including obtaining information and various reports from police and medical practitioners concerning the adopters (regs 23, 25). Under s 91A of the Adoption and Children Act 2002 (as amended),

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from 2 April 2007 the Secretary of State can charge a fee to adopters seeking services for adoption for foreign element adoptions or those to which s 83 of the 2002 Act applies.

- ⁶ Adoption and Children Act 2002, s 94. See also the Restriction on the Preparation of Adoption Reports Regulations 2005, SI 2005/1711. See *Re M (Adoption: international adoption trade)* [2003] EWHC 219 (Fam), [2003] 3 FCR 193 in which a private home study report did not reflect the true reality of the family into which the child was to be adopted or the fact that a child already in the family had been on the Child Protection Register and the mother had not been found suitable to be an adopter by either her local authority or Barnardos.
- ⁷ See the Adoption Agencies Regulations 2005, regs 21–30; AFE Regulations 2005, regs 18, 19. In Wales, certification of suitability is undertaken by the Children's Health and Social Care Directorate National Assembly of Wales – Adoptions with a Foreign Element, in Scotland by the Children and Young People's Group Scottish Executive – Intercountry Adoption, and in Northern Ireland by the Childcare Policy Directorate, Department of Health, Social Services and Public Safety. The Certificate of Eligibility and Suitability confirms that the prospective adopter has been assessed, approved as suitable to be an adoptive parent, is eligible to adopt, and that the child will be authorised to enter and reside permanently in the UK if entry clearance and leave to enter or remain is granted and not revoked or curtailed.
- ⁸ AFE Regulations 2005, reg 24. Thereafter, until the adoption the local authority has obligations to visit, review and report on the child's placement: reg 5.

11.104 There are several different types of adoption, which can be inter-country or foreign element adoptions. These are:

- Convention adoptions made in a court in the UK or by the relevant court or authority in another Convention State. A Convention adoption order made by a UK court can be to enable a habitually resident child to be taken from the UK¹ or in respect of a child formerly habitually resident in a Convention State who is brought to the UK by a UK prospective adopter for the purposes of obtaining a Convention adoption order in a UK court.
- Overseas adoptions in a country designated by the Secretary of State for the Home Department under the Adoptions (Designation of Overseas Adoptions) Order 1973.
- Other foreign element adoptions: legal (non-Convention) adoptions in the child's home State but unrecognised in UK law, or *de facto* adoption. An external adoption which is a legal adoption in the child's home State may secure recognition at common law, by application in the High Court.² These adoptions have differing legal effect in family law and in immigration law. In family law, the issue concerns whether the adoption creates the legal relationship of parent and child and the adoptive parent has parental responsibility for the child.³ In immigration terms, the issue concerns whether the adoption confers British citizenship on the child, or provides a basis for entry under the rules.

Convention and designated 'overseas' adoptions⁴ are recognised and given full legal effect in family and immigration law in the UK.⁵ By contrast, *de facto* adoptions are not recognised in family law as conferring parental responsibility on the 'parent', but such 'adoption' can be given effect in immigration law as a basis for entry and stay.⁶ Adopters and prospective adopters may need advice concerning the legality and effect of a foreign adoption that they have obtained or on the procedures they must follow in order to adopt a foreign child in the UK or abroad. All such adoptions require consideration of the

adopter's capacity to adopt here and/or abroad. Depending on the law in the adopting and reception countries, the adopters may need to establish domicile, habitual or a specified term of residence or to have particular religious beliefs to obtain a legal adoption.⁷ Some countries do not have formal adoption laws and any transfer of parental responsibility may be via a guardianship order or informal or *de facto*.⁸ A legal guardianship made in these circumstances may closely approximate to British 'special guardianship orders' and in circumstances where the child's home country does not have adoption arrangements or adoption is contrary to the 'parent's' religious beliefs, the 'parents' may seek entry for the purpose of obtaining a special guardianship order in the UK giving them parental responsibility for the child.⁹ Such application requires to be determined outside the rules. The intersection of family and immigration law in international child placements whether by adoption, guardianship or via surrogacy creates legal complexities. Thus those *de facto* adopted children who qualify for entry under the Immigration Rules¹⁰ may require a family order after entry to ensure their 'parent' is granted the formal legal responsibility necessary to obtain such things as medical consents, arranging travel documentation and dealing with public authorities. On the other hand children whose adoption is legal in their home country or capable of legal recognition in the UK may not qualify for entry as adopted children. In this complex area of law and practice, advisers need to be aware of both family and immigration law requirements.

¹ Note the residence and domicile requirements before an adoption order can be made under the Adoption and Children Act 2002, s 42 requires that the child have his/her home with the adopters for varying terms depending on whether the child is formally placed with the adopters or the child of a partner. If the prospective adopter is the parent, or the child was placed for adoption with the applicant by an adoption agency or in pursuance of an order of the High Court, he/she will have to have the child living with him or her for 10 weeks before an application for adoption can be made. If the applicant is a step-parent of the child or a partner to the child's parent he/she has to wait for six months before lodging the adoption application. If the applicants are local authority foster parents the child will have to have lived with them for one year preceding the application. All other adopters have to have had the child living with them or with one of them if it is a couple for a period of three years (continuous or not) in the five years preceding the application'. The Court can give leave for an adoption application to be issued before expiry of the one-year and three-year residence periods – s 42(6). Section 49 also requires that the adopter (or one of the couple) be domiciled in the UK and that the adopters (both of the couple) have been habitually resident in the UK for not less than one year ending with the application. See concerning residence for Convention adoptions – AFE Regulations 2005, reg 56.

² The Adoption and Children Act 2002 defines 'adoption' (s 66) as including: (i) an adoption effected under the law of a [Hague] Convention country outside the British Islands, and certified in pursuance of Article 23(1) of the Convention (a 'Convention adoption'); (ii) an overseas adoption; or (iii) an adoption recognised [at common law] by the law of England and Wales and effected under the law of any other country. Concerning High Court declarations recognising an external adoption, see *Re Valentine's Settlement* [1965] Ch 831 at 843A-C per Lord Denning; *ND (Children) (Recognition of foreign adoption orders)*, *Re* [2008] EWHC 403 (Fam), [2008] All ER (D) 398 (Jun).

³ See the Adoption and Children Act 2002, s 67 – status conferred by adoption.

⁴ See 11.112 below on *de facto* adoptions.

⁵ HC 395, para 6 provides that an adoption generally includes a *de facto* adoption in accordance with the requirements of para 309A of these rules, and 'adopted' and 'adoptive parent' should be construed accordingly. A 'parent' includes an adoptive parent, where a child was adopted in accordance with a decision taken by the competent administrative authority or court in a country whose adoption orders are recognised by the UK or where a child is the subject of a *de facto* adoption in accordance with the requirements of para 309A of these rules (except that an adopted child or a child who is the subject of a *de*

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facto adoption may not make an application for leave to enter or remain in order to accompany, join or remain with an adoptive parent under paras 297–303. See *SK ('Adoption' not recognised in UK) India* [2006] UKAIT 00068 (1 September 2006). See our criticism of this decision at 11.12 fn 2, above.

⁶ HC 395, paras 6, 297, 309A–316F.

⁷ See fn 1 above. On habitual residence, see 11.15 fn 1 above, and chapter 13, below, and on domicile 11.26–11.33 above. To take the example of the Hindu Adoptions and Maintenance Act 1956, ss 6–8 this requires adult prospective adopters to be of sound mind and to be Hindu. Married women cannot apply to adopt under the 1956 Act but the adoption order includes both married parties on the adoption order as the child's parents.

⁸ Islamic jurisprudence recognises the concepts of 'Kafala' – the placement of a child with a caring family without changing his lineage. The Protection Of Children (Hague Convention) Act, 2000 incorporates the Hague Convention of 19 October, 1996, on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (the Abduction Convention). The Hague Convention, Art 3 recognises kafala as an analogous relationship of authority determining the rights, powers and responsibilities of parents. See 11.112 below.

⁹ The Adoption and Children Act 2002 created the new relationship of special guardianship under which the special guardian has legal parental responsibility for the child which is expected to last until the child is 18. Unlike adoption orders, a special guardianship order does not remove parental responsibility from the child's birth parents, although their ability to exercise it is extremely limited. See the Children Act 1989, ss 14A–F.

¹⁰ HC 395, paras 309A, 311, 314.

Designated overseas adoptions

11.107 Where a child is legally adopted in a country¹ which has been designated for the purposes of the Adoption (Designation of Overseas Adoptions) Order 1973, the UK recognises that there has been a legal Overseas Adoption.² It is not necessary to adopt the child for a second time in the UK. However, where the adopters or any one of them are habitually resident³ in the UK and the overseas adoption has taken place during the previous 12 months, they must comply with the requirements and conditions set out in the Adoption (Bringing Children into the United Kingdom) Regulations 2003⁴ before bringing the child to the UK.⁵ These are family law requirements. It follows that the adopter(s) obtaining a designated overseas adoption, as with Convention adopters, must apply for and receive Agency approval and certification of their suitability to adopt in the UK.⁶ If the recently adopted child is brought into the UK and the adopters have not sought and obtained approval as adopters, there is a breach of s 83 of the Adoption and Children Act 2002 and such breach may result in conviction and may render an adopter liable up to six months' imprisonment or a fine on summary conviction or up to 12 months' imprisonment or a fine on conviction on indictment.⁷ Designated Adoptions are less common as more designated countries ratify the Convention. The intention is to provide all adopted children with the same high standard of child protection. There are also plans to introduce further legislation to prune the list of designated countries and to remove those whose adoption practices do not adhere to international standards. A Designated Adoption does not change the child's nationality in the way that a Convention Adoption does, and the child will require leave to enter the UK as the child or dependant of his or her adopted parent or parents for settlement⁸ and meet the criteria listed in para 310 of the Immigration Rules, HC 395.

- ¹ In January 2008, these were the Commonwealth countries of Anguilla, Australia, Bahamas, Barbados, Belize, Bermuda, Botswana, British Virgin Islands, Canada, Cayman Islands, Cyprus, Dominica, Fiji, Ghana, Gibraltar, Guyana, Hong Kong, Jamaica, Kenya, Lesotho, Malaysia, Malawi, Malta, Mauritius, Montserrat, Namibia, New Zealand, Nigeria, Pitcairn Island, St Christopher and Nevis, St Vincent, Seychelles, Singapore, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Uganda, Zambia and the non-Commonwealth countries of Austria, Belgium, China (but only where the child was adopted on or after 5 April 1993), Denmark (including Greenland and the Faroes), Finland and France (including Reunion, Martinique, Guadeloupe and French Guyana), Germany, Greece, Iceland, Ireland, Israel, Italy, Luxembourg, The Netherlands (including the Antilles), Norway, Portugal (including the Azores and Madeira), Spain (including the Balearic and Canary Islands), Surinam, Sweden, Switzerland, Turkey, the United States of America, (but none of the states which make up the former Yugoslavia) and Zimbabwe.
- ² Adoption and Children Act 2002, s 66(1); Adoption (Designation of Overseas Adoptions) Order 1973.
- ³ See 11.15 fn 1, above, and see chapter 13, below, for definition of habitual residence.
- ⁴ AFE Regulations 2005.
- ⁵ See the Adoption and Children Act 2002, s 83(1)(b), (3).
- ⁶ See 11.101 above on the assessment and approval of adoptive parents
- ⁷ Adoption and Children Act 2002, s 83(7).
- ⁸ HC 395, para 310.

Entry and stay for adopted children

11.108 The preceding text makes clear that different types of adoption have a different status in immigration law. Certain Convention adoptions will have the effect of conferring British citizenship on the adopted child. Such children therefore do not require entry clearance.¹ All other adopted children will need entry clearance. Under the Immigration Rules, the adoptive parent is recognised as a ‘parent’ where a child was adopted in accordance with a decision taken by the competent administrative authority or court in a country whose adoption orders are recognised by the UK or where a child is the subject of a *de facto* adoption in accordance with the requirements of para 309A of these Rules (para 6). However, such children and their parents are restricted under the rules from making an application for leave to enter or remain in order to accompany, join or remain with an adoptive parent under paras 297–303.² The entry rules for settlement for adopted children impose additional requirements, namely:³

- that the child was adopted at a time when (a) both adoptive parents were resident together abroad; or (b) either or both adoptive parents were settled in the UK; and
- has the same rights and obligations as any other child of the adoptive parent’s or parents’ family; and
- was adopted due to the inability of the original parent(s) or current carer(s) to care for him and there has been a genuine transfer of parental responsibility to the adoptive parents; and
- has lost or broken his ties with his family of origin; and
- was adopted, but the adoption is not one of convenience arranged to facilitate his admission to or remaining in the UK.

¹ See 11.105 above.

² HC395, para 6: ‘parent’.

³ HC 395, paras 310–316. See also IDI, Ch 8, s 7, Annex Q ‘Adoption’ Jan 2008.

Legal but unrecognised adoptions

11.110 As stated, if a child has been legally adopted abroad in accordance with the law of a country which is not on the designated list and the adoption is not a Convention adoption, the adoption is not recognised for the purpose of domestic law.¹ The child may have to come to the UK to be adopted, and, absent any other basis for entry, if entry is for the purpose of adoption, will require entry clearance for that purpose.² The prospective adopter must comply with the requirements of s 83 of the Adoption and Children Act 2002 and the AFE Regulations 2005 which restrict a person habitually resident in the UK from bringing into the UK a child he/she has adopted in the past 12 months.³ In these circumstances to avoid the commission of an offence under s 83, the habitually resident adoptive parent will have to delay his/her entry until after 12 months or arrange to be assessed and approved as an adoptive parent before entering the UK with the adopted child. Depending on the family circumstances this assessment and approval may be very difficult to arrange. Most problems occur where the parents 'adopt' the child in advance of or in ignorance of the requirement for their assessment or approval as prospective adopters. The child is placed with the family abroad but the child's entry may breach section 83 and/or the child fail to qualify for entry clearance under the Immigration Rules. The Tribunal has stated that the law and Immigration Rules distinguishing between adoptions in those countries whose adoptions are recognised in the UK under the Adoption (Designation of Overseas Adoptions) Order 1973 and other adoptions have a sound objective basis and are not unlawfully discriminatory under the Race Relations Act 1976 (as amended) or Article 14 of the ECHR.⁴ The Tribunal has not considered or ruled whether it is unlawfully discriminatory to designate and recognise adoptions from Lesotho, Malawi, Namibia, Fiji or St Vincent (to select but a few from the designated country list) but not formal, 'best-interest', court-sanctioned adoptions from India.⁵ The child will need leave to enter the UK for adoption.⁶

¹ Adoption and Children Act 2002, s 66(1).

² The child may have another basis for entry under HC 395, para 297 if a relative of the proposed adopters. If the adoptive parents are in the UK in a temporary capacity, they may wish their child to enter as their dependent. The entry is not for the purposes of adoption. See also *MN (India) v Entry Clearance Officer* [2008] EWCA Civ 38, [2009] 1 FCR 300.

³ The Adoption and Children Act 2002, s 83(1)(b) placed a restriction on entry where the child had been adopted within the six months immediately prior to entry. This provision has been amended by the Children and Adoption Act 2006, s 1, and from 1 October 2007 the restriction now covers children adopted in the previous 12 months. See 11.103 fns 1–3 above.

⁴ *MN (Non-recognised adoptions: unlawful discrimination?) India* [2007] UKAIT 00015 (12 February 2007).

⁵ See *Singh v Entry Clearance Officer New Delhi* [2004] EWCA Civ 1075 (30 July 2004) at para 12; *Singh v The United Kingdom* (60148/00) [2006] ECHR 606 (8 June 2006).

⁶ HC 395, para 316A.

Bringing a child into the UK for the purposes of adoption

11.111 The Immigration Rules make provision for a child entered for a domestic and a Convention adoption in the UK.¹ Where the entry is for a domestic adoption the strictures for adopted children, namely: that the child

will have the same rights and obligations as any other child of the family, is being adopted due to the inability of the original parent(s) or carer(s) to care for him,² that there is a genuine transfer of parental responsibility, that the child has lost or broken or intends to lose or break his or her ties with his family of origin and the proposed adoption is not one of convenience arranged to facilitate his or her admission to the UK – these are retained for prospective adoptive children.³ Where the entry is for a Convention adoption these additional strictures do not apply.⁴ Once the child has been admitted to the UK for the purposes of adoption the procedures for obtaining an adoption must be followed.⁵

¹ HC 395, paras 316A, 316D. *MN (India) v Entry Clearance Officer* [2008] EWCA Civ 38, [2009] 1 FCR 300. See on Convention adoptions, 11.105 above. See also IDI, Ch 8, s 7, Annex Q 'Adoption', Jan 2008.

² HC 395, para 316A(vi). Note this criterion states: 'is being adopted due to the inability of the original parent(s) or current carer(s) (or those looking after him immediately prior to him being physically transferred to his prospective parent or parents) to care for him'.

³ HC 395, para 316A. See 11.108 and 11.109.

⁴ HC 395, para 316D. See 11.105 on Convention adoptions.

⁵ Family Procedure (Adoption) Rules 2005, SI 2005/2795. The question of whether a child's previous guardian has to give consent to the adoption may arise. See on whether, and whose consent to the adoption might be required: *Re J (Adoption consent of foreign public authority)* [2002] EWHC 766 (Fam), [2002] 3 FCR 635; *Re AGN (Adoption, foreign adoption)* [2000] 2 FLR 431; *Re D (Adoption foreign guardianship)* [1999] 2 FLR 865; *Re AMR (Adoption Procedure)* [1999] 2 FLR 807.

De facto adoptions

11.112 Some countries, many of which have Islamic law systems, have not enacted laws concerning adoption. In these countries, children cannot be formally adopted, although there is general social recognition of changed family relationships equivalent to the UK's special guardianship arrangements. In these arrangements the guardian substitutes for the child's parents, but the child's lineage is unaffected. In immigration law terms certain of these longstanding guardianship arrangements will qualify as de facto, customary adoptions. Certainly it is accepted that these relationships have real significance for the parties involved and should be given some legal effect. In certain circumstances, children who are the subject of de facto adoptions may be admitted to the UK for settlement with their adoptive parents¹. These circumstances are where it can be shown that at the time immediately preceding the application for entry clearance the adoptive parent (or if it is joint adoption, both parents) had been living abroad for at least 18 months and that they had cared for the child for at least the 12 months immediately preceding the application for entry clearance. They must also have assumed the role of the child's parents since the beginning of the 18-month period, so that there has been a genuine transfer of parental responsibility.² Any child who is informally adopted needs to satisfy the requirements of para 309A.³ Where a child, who is the subject of a de facto adoption, arrives in the UK without prior entry clearance, immigration officers are instructed to inform the appropriate local authority, the Department of Health and the police.⁴ This is to protect the child from possible trafficking and abduction.⁵ Where a child is admitted for settlement on the basis of a de facto adoption the parent

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can subsequently apply to adopt the child in the UK. If the adopter(s) is or are deemed to have been habitually resident in the UK⁶ when the child was brought to the UK, it is sensible to consider the terms of section 83 restricting the bringing of a child to the UK for the purpose of adoption, as this provision may have been breached in some cases. After the child has entered the UK, the adopters, if one or both is British, can apply for him or her to be registered as a British citizen.⁷

¹ HC 395, para 310(vi).

² HC 395, para 309A, inserted by HC 538 from 31 March 2003. See above. The IDI (Sep/04), Ch 8, Annex R, which post-dates the incorporation of de facto adoption into the rules, have been drafted in total ignorance of those rules and treat de facto adoption as outside the rules. The UK Visas Guidance – Adopted children (INF 7) (04/01/08) refers to the relevant requirements.

³ HC 395, paras 6A ‘a parent’, 309A; R (*on the application of Acan*) v *Immigration Appeal Tribunal* [2004] EWHC Admin 297; MK (*Somalia*) v *Entry Clearance Officer* [2008] EWCA Civ 1453, [2008] All ER (D) 252 (Dec).

⁴ IDI (Sep/04), Ch 8, Annex Q, para 3.3; Annex R.

⁵ Note that entry clearance officers, citing such concerns, are putting obstacles in the way of the admission of de facto adopted children in the context of Somali refugee family reunion, demanding home study reports etc – an example of over-zealous bureaucrats defeating the object of benign provisions. MK (*Somalia*) v *Entry Clearance Officer* [2008] EWCA Civ 1453, [2008] All ER (D) 252 (Dec).

⁶ The question of habitual residence is one of fact. See 11.15, fn 1, above, for further details.

⁷ British Nationality Act 1981, s 3(1). The ‘parents’ should be advised to apply for a residence order in the family jurisdiction so as to clarify their responsibility for and status concerning the child.

Adoptions recognised at common law

11.113 An external adoption can acquire the status of a ‘recognised’ adoption necessary for the Immigration Rules if the High Court makes a declaration recognising the adoption. In any such application the parents seeking recognition of their adoption apply for a High Court declaration, provide expert evidence on the applicable foreign adoption law and procedure, their compliance with the same and the effect in English law if recognition is granted.¹ In any application for common law recognition the safeguards contained in the Adoption and Children Act 2002 and the AFE Regulations 2005 may be likely to be factors in the High Court’s decision whether to grant the declaration recognising the external adoptions.

¹ *Re Valentine’s Settlement*, *Valentine v Valentine* [1965] Ch 831; ND (*Children*) (*Recognition of foreign adoption orders*), *Re* [2008] EWHC 403 (Fam), [2008] All ER (D) 398 (Jun).

Adoptions in the UK conferring an immigration benefit

11.115 On occasion British citizens or residents have applied in family courts to adopt foreign children who are in the UK as overstayers, illegal entrants or with temporary leave to remain. The child’s adoption in the UK by a British citizen habitually resident in the UK confers British citizenship on the child.¹ At one time, the family court considering such adoptions conferring immigration benefits on the child gave greater weight to the need to maintain strict

immigration controls when considering whether to grant the adoption.² Following the House of Lords' decision in *Re B (adoption order: nationality)*³ the courts now consider whether, 'the adoption will bring about a genuine transfer of parental responsibility and not only be motivated by a wish to assist the child to obtain a right of abode' and, 'taking into account all the child's circumstances, including the benefits of British citizenship' whether the adoption will confer real benefits on the child throughout his or her childhood.' The House stated that although the views of the Home Office should be taken into account, it was very unlikely that general concerns relating to the maintenance of immigration controls would justify the rejection of an order which met both the two tests outlined above. In *Re B*, the child in question was 16 years old and was being adopted by her grandparents. Her mother had returned to Jamaica to a life of destitution and her grandparents wanted to be able to provide the child with a secure home and educational opportunities. The Secretary of State can apply under r 23 of the Adoption Rules⁴ to be joined as a party to the application. It is her policy⁵ to do so unless a child:

- (1) is being adopted by a couple one of whom is a natural parent;
- (2) was admitted in possession of an entry clearance endorsed 'for adoption';
- (3) has been granted or would qualify for indefinite leave to remain or leave in some other capacity where it is accepted that the child's original family is unable to care for him e.g. as a minor dependent relative or in the absence of parents;
- (4) has been granted or would qualify for leave to remain for the purpose of adoption.

Some of these 'immigration benefit' adoptions will also concern irregular adoption placements or children who were brought in to the UK in breach of s 83 of the Adoption and children Act 2002. The Court is not prevented from making an adoption order if such safeguards are breached.⁶

¹ British Nationality Act 1981, s 1(5), (5A). If it is a joint adoption, it is enough that one of the adopters is a British citizen. The child does not lose his/her British citizenship if the adoption order ceases to have effect or is annulled (s 1(6)).

² *Re W (A Minor) (Adoption: Non-patril)* [1986] Fam 54; *Re K (Adoption and Wardship)* [1997] 2 FLR 221.

³ *Re B (adoption order: nationality)* [1999] 2 AC 136, HL. See also *Re H (A Minor) (Adoption Non-patril)* (1982) 12 Fam Law 218, CA; *Re H (a minor) (adoption: non-patril)* [1996] 4 All ER 600, [1997] 1 WLR 791, [1996] 2 FLR 187, *sub nom Re A (a minor) (adoption: non-patril)* [1996] 3 FCR 1, CA; *Re Adoption Application* [1992] 1 WLR 596, [1992] 1 FLR 341, [1992] Fam Law 241, *sub nom Re GD* [1992] 1 FCR 433; *Re J (a minor) (adoption: non-patril)* [1998] 1 FCR 125, [1998] 1 FLR 225, [1998] Fam Law 130, CA; *Re B (adoption order: nationality)* [1999] 2 AC 136, [1999] 2 All ER 576, [1999] 2 WLR 714; *Re R (a minor) (inter-country adoptions: practice)* [1999] 4 All ER 1015, [1999] 1 WLR 1324, [1999] 1 FCR 418, [1999] 1 FLR 1042, [1999] Fam Law 289; *Re C (a minor) (adoption illegality)* [1999] Fam 128, [1999] 2 WLR 202, [1998] 2 FCR 641. See also *X & Y (Foreign Surrogacy)*, *Re* [2008] EWHC 3030 (Fam), [2009] Fam Law 115.

⁴ Family Procedure (Adoption) Rules 2005, SI 2005/2795.

⁵ IDI (Jul/01), Ch 8, Annex S, para 5. It is the practice of family courts to inform the Secretary of State of an adoption application with immigration consequences on the first direction hearing

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- ⁶ Under s 24(2) of the Adoption Act 1976 (now repealed), the court could not make an adoption order if there had been a contravention of the s 57 prohibition on making certain payments for adoption. Section 57, although repealed, has been replicated and expanded in s 95 of the Adoption and Children Act 2002 but the court is not precluded from making an adoption order in the event of contravention. Further, the 2002 Act gives greater emphasis to the paramount consideration of the child's welfare 'throughout his life'. It can be expected that the case law balancing welfare and public, including immigration, policy will continue to be important in such cases: see 6th edition, 11.103 fn 4.

Proposal for British child to be adopted abroad

11.116 If a child who is a British citizen or resident is taken into care or accommodated due to the death or inability of his or her parents to care for him or her, a local authority may wish to place the child abroad for adoption. In order to do so, the local authority will have to apply to the family court for permission to place the child abroad with relatives or family friends.¹ These arrangements can involve securing entry for the overseas relative so that the relative can be assessed by the local authority and the placement of the child tested. If the overseas placement is approved the prospective adopters/carers and be granted an order giving them formal parental responsibility for the child.²

¹ Children Act 1989, Sch 2, para 19. See *Re S (Freeing for Adoption)* [2002] EWCA Civ 798. See also the Adoption and Children Act 2002, s 85; *G (A Child) Re* [2008] EWCA Civ 105, [2009] 1 FCR 210. See concerning the residence requirement for such overseas adoptions *A (A Child), Re* [2009] EWCA Civ 41, [2009] All ER (D) 45 (Feb).

² Adoption and Children Act 2002, s 84. In order to obtain a section 84 order the applicant must have had a home with the child in the UK for the previous 10 weeks. See also *Re B (children) (adoption: removal from jurisdiction)* [2004] EWCA Civ 515, [2004] 2 FCR 129, [2004] All ER (D) 305 (Apr), *sub nom Re A (adoption: placement outside jurisdiction)* [2005] Fam 105, [2004] 3 WLR 1207, [2004] 2 FLR 337, *sub nom B v Birmingham City Council* (2004) Times, 10 June.

UNACCOMPANIED CHILDREN

11.118 Unaccompanied children may have arrived in the UK alone to claim asylum, have been abandoned by their parents or carers after arrival here or left with private foster carers. They may have been trafficked here for the purposes of prostitution or domestic slavery.¹ Whether they originally fled to the UK in order to claim asylum they can have protection needs. It is very difficult to estimate the total number of unaccompanied children who enter the UK every year, as many will have been brought in illegally and will remain without immigration status until some event brings them to the notice of social services, the police or the Immigration Service.² However, figures do now exist for unaccompanied asylum seeking children, who have come to the notice of the Immigration and Nationality Department. The Department reported that in 2002, 6,200 unaccompanied asylum-seeking children claimed asylum in the UK and in 2003 a further 2,800 claimed asylum. The number of applications fell very slightly to 2,755 in 2004.³ The Refugee Council's Panel of Advisers statistics of unaccompanied asylum seeking children referred for their assistance showed 4,405 referrals in 1999, 4,118 in 2000, 5,005 in 2001, 6,513 in 2002 and 4,685 in 2003.⁴ The discrepancies arise from the fact that

Home Office statistics do not always include all enforcement offices and there are instances of late recording of applications by unaccompanied minors.

- ¹ See on child domestic slavery, *Siliadin v France* (Application No 73316/01) [2005] 20 BHRC 654 (26 July 2005).
- ² On the requirement to investigate the circumstances of a claimed child see: *K v A local authority* [2008] EWCA Civ 103, [2008] Fam Law 382.
- ³ Home Office Research, Development and Statistics Directorate.
- ⁴ Figures collated by the Refugee Council (unpublished). See also Commission for Racial Equality, Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children Back, 25 June 2007.

11.119 When an asylum applicant claims to be a child but his or her appearance and/or general demeanour strongly suggests that he or she is over 18, it has been the Home Office's policy to treat the applicant as an adult unless and until there is credible documentary or other persuasive evidence to demonstrate the age claimed.¹ It is only in borderline cases that it is said to be appropriate to give the minor the benefit of the doubt and treat him/her as a minor.² This can no longer be said to be good practice. First, in relation to asylum seeking children, this reliance on physical appearance/demeanour runs counter to the guidance given by UNHCR³ where it states that any assessment should take into account not only the physical appearance of the child but also his or her psychological maturity. It also recommends that a child should be given the benefit of the doubt if his/her exact age is uncertain. Secondly, the Royal College of Paediatricians and Child Health have stated⁴ that a child's age cannot be determined by a medical examination alone but must be the result of a holistic assessment taking into account the child's physical, mental and social development and maturity. The Royal College also warns against making any cultural or other assumptions about the physical development of any child or of their life experiences.⁵ Thirdly, this approach has been approved by the Administrative Court in *R (on the application of B) v London Borough of Merton*.⁶ When a professional social worker has undertaken an age assessment in compliance with the Merton guidelines, endorsed in that case it is IND policy to accept this age assessment, and where the IND is unhappy about the assessment the applicant must continue to be treated as a minor whilst the Asylum Policy Unit undertakes any review.⁷ Fourthly, the Home Office age ment processes have been extensively studied and criticised in an ILPA research report.⁸ A draft HC 395, para 352 on age assessment procedures planned to commence on the 1 December 2007 was withdrawn. The draft rule was intended to provide that disputed minors may be subjected to a medical examination by X-ray as part of the age assessment and informed of the consequences of refusing such medical examination. The proposed rule gave insufficient emphasis to the need to obtain free and informed consent from children. A consent given after the warning of adverse affects on age or asylum applications cannot be free consent. In the absence of such free consent, the medical practitioner may commit an assault on the child in subjecting him/her to a medical examination, the child's legal representative may not consent to non-therapeutic medical examination by X-ray and such tests appear to infringe the Ionising Regulations 2000.⁹

¹ Asylum Process Instruction (API), Disputed Age Cases.

² As above.

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- ³ UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, para 5.11.
- ⁴ *The Health of Refugee Children: Guidelines for Paediatricians*, Royal College of Paediatricians and Child Health November 1999.
- ⁵ Starting in May 2002, the Association of the Directors of Social Services undertook a pilot project looking at the assessment of asylum seeking children's ages. This methodology is now accepted throughout the UK. The ADSS stress the need for a holistic assessment taking into account many of the same issues pinpointed by the Royal College of Paediatricians. See Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers, Association of Directors of Social Services, 2003.
- ⁶ *R (on the application of B) v London Borough of Merton* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280. See also *ST (Minor) (Age Dispute) Afghan* [2005] UKIAT 00048; *R (on the application of A) v Liverpool City Council* [2007] EWHC 1477; *R (on the application of I) v Secretary of State for the Home Department* [2005] EWHC 1025 (Admin), (2005) Times, 10 June.
- ⁷ Asylum Process Instruction, Disputed Age Cases. See on the procedures for age disputes *R (on the application of A) v London Borough of Croydon* [2008] EWCA Civ 1445, [2009] 1 FCR 317.
- ⁸ Heaven Crawley, 'When is a Child not a Child? Asylum, Age Disputes and the Process of Age Assessment, ILPA research report, May 2007.
- ⁹ Nick Blake QC and Charlotte Kilroy, Legal Opinion on Draft Rule para 352, 7 November 2007 prepared on instructions from the Children's Commissioner of England. The opinion was released for circulation through ILPA. See further the Ionising Radiation (Medical Exposure) Regulations 2000, SI 2000/1059.

11.123 In the past, if the BIA refused an unaccompanied child asylum, it would grant him or her exceptional or discretionary leave to remain.¹ This remains the outcome for most unaccompanied children; however, the BIA have been planning for some time to start a programme of enforced returns of children to their countries of origin.² The question whether there are adequate reception arrangements for them on return is open to evaluation by the AIT.³ When unaccompanied children who have previously been granted exceptional or discretionary leave apply for further leave to remain, they are likely to be interviewed.⁴ The BIA has also set up a 'Transitions Group' with the Association of Directors of Social Services and in particular the London Borough of Croydon and Kent County Council to look at the planned returns of these young people to their countries of origin. If a child has been accommodated by a local authority and the local authority wishes to place the child abroad it will have to obtain the approval of a family court and show that such a placement would be in the child's best interests and that suitable arrangements will be made for his or her reception and welfare and that the child and every person with parental responsibility has consented.⁵ The child's consent can be dispensed with if he or she does not have sufficient understanding to give or withhold consent. A parent's consent can be dispensed with if he or she cannot be found, is incapable of consenting or withholds his or her consent unreasonably.

¹ Asylum Policy Unit Notice 1/2003. See chapter 12, below.

² *Controlling Our Borders: Making Migration Work for Britain: A Five Year Strategy for Asylum and Immigration* Cm 6472 February 2005.

³ *CL (Vietnam) v Secretary of State for the Home Department* [2008] EWCA Civ 1551, (2009) Times, 7 January. Asylum Policy Unit Notice 5/2004.

⁴ Minutes of UASC Stakeholder Group 2 July 2003.

⁵ Children Act 1989, Sch 2, para 19.

REMOVAL OF CHILDREN

11.124 If a child has no claim to remain in the UK, the decision on their removal is to be made by reference to factors such as the age of the child, the length of his or her stay in the UK, the type of care he or she has had in the UK and the effect of disrupting it, the circumstances abroad and the child's feelings. Generally, the younger the child and the longer the stay, the less likely is removal. The Home Office has provided guidance to its enforcement section as to when removal of children would be inappropriate. It may be summarised:

- (i) children under 16 who are on their own in the UK should not be removed unless their voluntary departure cannot be arranged;¹
- (ii) no unaccompanied child will be removed from the UK unless the Home Office is satisfied that adequate reception and care facilities are in place in the country to which he or she is to be removed, and where there is evidence that care arrangements are seriously defective or inadequate, exposing the child to a serious risk of harm, removal should not take place;²
- (iii) enforcement action did not normally proceed against families with children born here and who have lived here continuously to the age of seven or over, or where, having come to the UK at an early age, children have accumulated seven years' or more continuous residence. Relevant considerations included the length of the parents' residence without leave and whether removal had been delayed by protracted and repetitive representations or by parents going to ground, the age of the children, whether any of them were conceived when either parent had leave to remain, whether return to the parents' country would cause extreme hardship to the children or put their health at risk, whether either parent has a history of criminal behaviour or deception;³
- (iv) in all cases involving potential removal of children, the requirements of ECHR, Article 8 (family and private life) will have to be complied with.⁴

In *Jagot*, the High Court quashed the decision to remove the applicant child, who had lived in the UK with his grandparents for over seven years while maintaining links with his parents and siblings in Malawi, holding that the policy DP069/99 contemplated that the requirements of a firm immigration control could not, without strong reason, justify the uprooting of a child who had spent a substantial and formative part of his life in the UK. Nor could disruption to existing family life caused by removal be justified by the possibility of a future effective family life abroad.⁵ In *Jagot*, the court proceeded on the basis that the policy applied to 'port cases' ie, where the applicant had sought entry at the port and had remained on temporary admission ever since, just as it applied to cases of deportation and administrative removal for overstaying etc. In *Dabrowski*, the Court of Appeal indicated the principle behind this equivalence of treatment as being to prevent the lawful implementation of immigration and asylum policy after a certain period of time, from unnecessarily uprooting children or inducing family break-up.⁶ Where a parent's removal involved constructive removal of a British citizen child and the British citizen child would then be deprived of all

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benefits of being a British citizen and brought up in social and economic circumstances far worse than would be employed in the UK, these factors are relevant to the Article 8 'fair balance' assessment.⁷

¹ DP4/96, para 2.

² DP4/96, paras 2 and 3. *CL (Vietnam) v Secretary of State for the Home Department* [2008] EWCA Civ 1551, (2009) Times, 7 January; *Re Sujon Miah* (CO 3391/1994) (6 December 1994, unreported): irrational to seek to remove child to abusive parents in Pakistan. The very harsh decision in *GP (return, minor, Roma) Romania CG* [2003] UKIAT 00212 was predicated on the Secretary of State's undertaking in accordance with this policy.

³ See on the Seven Year Child Concession – now withdrawn, para 11.99. DP069/99 (formerly DP5/96); for wording of policy see appendix to *R (on the application of Dabrowski) v Secretary of State for the Home Department* [2003] EWCA Civ 580, [2003] Imm AR 454, [2003] INLR 411. A decision on proportionality (Art 8.2) which failed to have regard to the policy was reversed in *N (Kenya)* [2004] UKIAT 00008. See also *MA (Seven Year Child Concession) Pakistan* [2005] UKIAT 00090 (22 April 2005).

⁴ See 11.74 and chapter 8 above. See concerning the role of the Tribunal in deciding cases affected by policy: *Baig v Secretary of State for the Home Department* [2005] EWCA Civ 1246 (5 October 2005); *R (on the application of Tozhlukaya) v Secretary of State for the Home Department* [2006] EWCA Civ 379, [2006] All ER (D) 155 (Apr); *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302, [2007] All ER (D) 97 (Dec); *Shkembi v Secretary of State for the Home Department* [2005] EWCA Civ 1592 (24 November 2005), *AG (Policies; executive discretions; Tribunal's powers) Kosovo* [2007] UKAIT 00082 (7 August 2007).

⁵ *R v Secretary of State for the Home Department, ex p Jagot* [2000] INLR 501.

⁶ *R (on the application of Dabrowski) v Secretary of State for the Home Department*, fn 3 above. However, an absence of three months broke continuity for the purposes of the 'seven-year rule' in that case. See also *MA (Seven Year Child Concession) Pakistan* [2005] UKIAT 00090.

⁷ *N v Secretary of State for the Home Department* [2006] EWCA Civ 414 (24 March 2006). The remitted Article 8 reconsideration was allowed in *N* was allowed by the Tribunal (AS 18287/2004, promulgated 22 March 2007, unreported).

PARENTS, GRANDPARENTS AND OTHER DEPENDENT RELATIVES

The classes of admissible dependent relatives

11.125 The Immigration Rules severely limit the range of dependent relatives other than spouses, fiancé(e)s, civil/unmarried partners and minor children who may join their relatives in the UK, and the circumstances in which they may do so. All such relatives must be seeking to join or accompany a person who is present and settled in the UK or being admitted for settlement,¹ must be wholly or mainly financially dependent on the relative present and settled in the UK² and have no other close relatives in their own country to turn to for financial support.³ Parents and grandparents of children settled in the UK are allowed to join them only if they are:

- (i) widows or widowers aged 65 or over;⁴ or
- (ii) travelling together and at least one of them is aged 65 or over;⁵ or
- (iii) aged 65 or over, remarried or in a civil partnership, but who cannot look to the spouse/civil partner or children of the second marriage or civil partnership for financial support;⁶ or
- (iv) under 65, mainly dependent financially on relatives settled in the UK and living alone in the most exceptional compassionate circumstances.⁷

In *Zanib Bibi*⁸ it was held that a separated parent was to be equated with a widow and thus need not comply with the 'most exceptional compassionate circumstances' limb. However, the age requirements still have to be satisfied, and both widowed and separated spouses have to satisfy that limb if they are under 65. There was some limited amendment to the dependent relative rule following *Bibi* but the anomalies persist. The rule does not allow the admission of a divorced parent over 65 for example, as such parent is not provided for in the over-65 categories and the fail-safe for most exceptional compassionate circumstances is only for parents under 65. The purposive principle in *Bibi*, invoked to avoid an absurd outcome, *should* remain apposite in these circumstances. The Court of Appeal has considered this rule and called for its review, noting that it is difficult to see on what rational basis divorced persons aged 65 and over as a class are excluded from para 317(i)(a), but a subset of divorced persons aged 65 and over (those who have remarried and cannot look to the spouse or child of the second relationship for financial support) are included under para 317(i)(d). Divorced persons are a class of certain definition (unlike separated persons).⁹ The Home Office issued guidance to caseworkers in the UK that all elderly dependent relatives over 65, for whom a sponsor has given an undertaking of support, should be granted indefinite leave to remain without detailed inquiries.¹⁰

¹ HC 395, para 317(ii).

² HC 395, para 317(iii).

³ HC 395, para 317(v).

⁴ HC 395, para 317(i)(a) and (b). Previous rules allowed widowed mothers to be under 65, but the other requirements had to be complied with: *R v Immigration Appeal Tribunal, ex p Khan (Azam)* [1993] Imm AR 33, QBD. The rules were 'equalised' downwards in 1994. See *KP (Para 317: mothers-in-law) India* [2006] UKAIT 00093 (6 December 2006) – mothers-in-law are not within the categories of relatives listed in the rule.

⁵ HC 395, para 317(i)(c).

⁶ HC 395, para 317(i)(d).

⁷ HC 395, para 317(i)(e).

⁸ *R v Immigration Appeal Tribunal, ex p Zanib Bibi* [1987] Imm AR 392; see also *Rosario* (9600). Bibi was a 62-year-old divorced Pakistani citizen. She was dependent on her only son who was resident in the UK. The Tribunal was construing para 52 of HC 169 (the then applicable rule) and noted that it provided for the admission of more remote relations aged under 65, but precluded the admission of a mother. Such outcome was absurd and such absurdity in the rules should be avoided by a purposive construction. It was held that Bibi was entitled to enter if she satisfied the other requirements of the rule. We suggest that this would apply to divorced and single mothers too: see IDI (Sep/04), Ch 8, Annex V.

⁹ *MB (Somalia) v Entry Clearance Officer* [2008] EWCA Civ 102, [2008] Fam Law 383.

¹⁰ Memo from B1 Management Unit, January 1994. This is now set out in IDI (Oct/04), Ch 8, s 6.

Maintenance and accommodation

11.128 There must be a sponsor who is present and settled in the UK (or will be on arrival of the relatives), and there must be adequate accommodation owned or occupied by the sponsor, and adequate maintenance for the new arrivals and any dependants of theirs.¹ The wording of the maintenance and accommodation rule has been taken to suggest that the sponsor does not have to provide the maintenance and accommodation, which can be provided by a third party. This is in contrast to the wording of the rules for children, spouses and partners.² However, the Court of Appeal held that third-party support is

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not allowed under this and other family rules.³ The IDI indicates that joint sponsorship is not acceptable.⁴ Both the IDI and the Entry Clearance Guidance state that sponsors should be required to give formal sponsorship undertakings.⁵

¹ HC 395, para 317(iv) and (iva) as amended by Cm 4851.

² See discussion at 11.52ff above.

³ *AM (Ethiopia) v Entry Clearance Officer* [2008] EWCA Civ 1082, [2008] All ER (D) 150 (Oct).

⁴ IDI (Oct/04), Ch 8, s 6, para 3.2, but see *GG (HC 395 para 317: Joint Sponsorship) Jamaica* [2004] UKIAT 00095.

⁵ DSP 15.5 (Mar 03). The DSP also indicate that the UK sponsor of a parent who has remarried should be able to support any children of the second marriage, whether or not they are coming with the applicant.

REFUGEES, ASYLUM, HUMANITARIAN PROTECTION AND DISCRETIONARY LEAVE

INTRODUCTION

The European Union Qualification Directive

12.22 Among the issues that are likely to arise in the interpretation and application of the Qualification Directive are the following. First of all there is the issue of the relationship between the criteria for qualification for refugee status contained in the Directive and those contained in the Refugee Convention, as interpreted¹ by the courts in the UK. The Directive acknowledges the Geneva Convention and Protocol as the 'cornerstone of the international legal regime for the protection of refugees'² and its substantive provisions quite closely reflect the Geneva Convention. However, the Directive does not purport to interpret refugee status as defined under the Geneva Convention; instead it contains an autonomous definition of a refugee³ and imposes on Member States an obligation under the Directive rather than the Convention to recognise refugee status.⁴ The Directive expressly recognises Member States' other obligations under international law to avoid *refoulement*⁵ and confer refugee status.⁶ Moreover, the purpose of the Directive is to set minimum standards⁷ and it expressly acknowledges that Member States may introduce or retain more favourable standards.⁸ It would seem, therefore, that in circumstances where the UK's interpretation of the Geneva Convention would lead to recognition of refugee status, such status would have to be recognised even if the person did not qualify under the Directive. However, many of the provisions in the Directive are expressed in mandatory terms.⁹ Article 3 which permits Member States to introduce or retain more favourable standards contains the proviso 'in so far as those standards are compatible with this Directive'. It might be argued that where the UK's interpretation of the Geneva Convention is more generous than any of the mandatory requirements of the Directive, the UK interpretation will have to succumb to the Directive. Resolution of this issue is likely to entail consideration of whether a minimum standards Directive can operate so as to impose maximum standards; whether the proviso, contextually and purposively construed can legitimately limit the protection that would otherwise be provided by the UK and whether the proviso which applies to the standards for qualification for refugee status under the Directive has any application at all to the standards for qualification under the separate Geneva Convention regime. This issue may need to be decided in relation to: the capacity of non-state bodies to provide protection capable of obviating the need for refugee status¹⁰ and whether membership of a particular social group requires *both* a shared, innate characteristic *and* social perception of group membership¹¹ and the higher threshold for persecution imposed by the Qualification Directive than by the Refugee Convention.¹²

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- ¹ For the Convention, having a single, autonomous meaning that is authoritatively determined by the court, see *R v Secretary of State for the Home Department, ex p Adan* [2001] 2 AC 477, [2001] 1 All ER 593, [2000] All ER (D) 2357, HL.
- ² Qualification Directive, preamble (3).
- ³ Qualification Directive, Art 2(c). The clearest difference between the Geneva Convention definition and the definition in the Directive is that is that the latter applies only to third country, ie non-EU nationals and stateless people. However, Article 9 is expressed as being interpretive of 'persecution within the meaning of Article 1A of the Geneva Convention.
- ⁴ Qualification Directive, Article 2(d).
- ⁵ Qualification Directive, Article 21(1).
- ⁶ Qualification Directive, Article 20(1).
- ⁷ Consolidated Version of the Treaty Establishing the European Community, Art 63(1)(c).
- ⁸ Qualification Directive, preamble (8) and Art 3.
- ⁹ Eg Qualification Directive, Art 7: 'Protection can be provided by ...'; Art 9(1): 'Acts of persecution ... must'; Art 10(1): 'member states shall ...'; Art 12(1) and (2): 'A third country national or a stateless person is excluded ...'.
- ¹⁰ Qualification Directive, Art 7(1)(b) which mandates a lower standard of refugee protection than does the Geneva Convention as interpreted in *Gardi v Secretary of State for the Home Department* [2002] EWCA Civ 750, [2002] 1 WLR 2755, [2003] Imm AR 39 and *R (on the application of Vallaj) v A Special Adjudicator* [2001] EWCA Civ 782, [2001] INLR 342.
- ¹¹ As per the Qualification Directive, Art 10(1)(d), by contrast to the position under the Geneva Convention as interpreted in the UK where the two are alternative tests.
- ¹² See *SH (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 1150, [2008] All ER (D) 221 (Oct).

THE DEFINITION OF REFUGEE

'Owing to a well-founded fear'

The burden and standard of proof

12.28 The general human rights background of the country in question is important in assessing the objective foundation for the fear.¹ Background human rights data should be collected from a broad cross-section of official and non-governmental sources in order to supplement the claimant's evidence. The Secretary of State has an obligation under the Immigration Rules to obtain 'reliable and up-to-date information' about the 'general situation prevailing in the countries of origin of applicants for asylum' and to make it available to those deciding asylum claims.² The Immigration and Nationality Directorate of the Home Office now has a 'Country of Origin Information Service' which produces sourced country reports on the main refugee-producing countries.³ There is also an Advisory Panel on Country Information, appointed by the Secretary of State to consider and make recommendations about the content of country information reports.⁴ The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country can in itself, but does not necessarily (it depends on all of the facts), constitute a sufficient ground for determining that a person would be in danger on return,⁵ but where human rights reports substantiate that a real risk of ill-treatment exists, a genuine fear of persecution in a country is likely to be well-founded if it is for a Refugee Convention reason.⁶ Where there is a doubt after all the evidence has been placed before the Tribunal of fact, the benefit of it should be given to the applicant.⁷ The absence of positive evidence about a particular practice (eg monitoring of expatriate opposition

groups by a state's foreign legations and intelligence services) should not necessarily result in an applicant's failure to establish its existence; the objective evidence that there is (eg about the state's suppression of opposition activities) may require the existence of the practice to be inferred.⁸

- ¹ UNHCR *Handbook* 12.13 above, paras 196, 204; Hathaway, 12.22 fn 2 above, pp 89–90. See also UN Convention Against Torture, Art 3(2); *Mutumbo v Switzerland* (1994) 15 HRLJ 164. The principle is now incorporated in the Immigration Rules, HC 395, para 339J(i).
- ² HC 395, para 339JA.
- ³ See Home Office website at: www.homeoffice.gov.uk/rds/country_reports.html. See further 12.133.
- ⁴ Established under the Nationality Immigration and Asylum Act 2002, s 142. Its website is at: www.apci.org.uk.
- ⁵ See *Alan v Switzerland* [1997] INLR 29 (UNCAT); *Hariri v Secretary of State for the Home Department* [2003] EWCA Civ 807, (2003) 147 Sol Jo LB 659, [2003] All ER (D) 340; *Batayav v Secretary of State for the Home Department* [2003] EWCA Civ 1489, [2003] All ER (D) 60 (Nov); *Iqbal (Muzafar)* [2002] UKIAT 02239.
- ⁶ Hathaway, 12.24 fn 3 above, cites the Federal Court of Appeal in *Attakora (Benjamin) v Minister for Employment and Immigration* (Decision A-1091–87) (19 May 1989, unreported), at para 3.2.1 (p 80) that 'persons who flee countries that are known to commit or acquiesce in persecutory behaviour should benefit from a rebuttable presumption that they have a genuine need for protection'. For an example of a situation where an appellant had not suffered persecution and relied wholly on evidence of country conditions see *Drrias v Secretary of State for the Home Department* [1997] Imm AR 346, CA.
- ⁷ UNHCR *Handbook* above, paras 196, 203. See also *Kaja v Secretary of State for the Home Department* [1995] Imm AR 1, below.
- ⁸ *YB (Eritrea) v Secretary of State for the Home Department* [2008] EWCA Civ 360, [2008] All ER (D) 195 (Apr).

12.30 It is, however, for the applicant to establish his or her claim, albeit to a lower than normal civil standard.¹ Thus it is for him or her to establish statelessness, if it forms part of the claim.² However, in the context of asylum as elsewhere, where it is the Secretary of State who asserts something, such as that a document produced by an applicant is a forgery, the burden is on him or her to prove it.³ *Karanakaran*⁴ was a case about the 'internal relocation alternative', ie where it is accepted that the applicant faces persecution in part of the country and the issue is whether it would be unduly harsh for him or her to relocate to a safe area.⁵ Again, different divisions of the Tribunal had differed on whether the applicant had to show on the balance of probabilities that it would be unduly harsh,⁶ or only that it was a 'serious possibility'.⁷ The court in *Karanakaran* held that it would be quite impracticable to maintain a regime in which there was one approach to the evidential material relating to historic or existing facts for the purpose of the first part of the definition of 'refugee' in the Convention, and a different approach to such material for the purpose of considering issues of protection and internal relocation.⁸ The question was simply 'would it be unduly harsh', but in answering it, only evidence about which there was no doubt that it was not correct should be excluded. The guidance in *Karanakaran* does not, however, disturb the line of jurisprudence to the effect that where there is no real doubt that the whole story of the applicant is unworthy of belief, issues of standard of proof do not arise.⁹ Even where an applicant has been disbelieved, it is still necessary, as in every case, to determine whether there is a real risk of being persecuted; 'the Court's duty is to vindicate a good asylum claim even though the applicant may have lied or otherwise acted in bad faith'.¹⁰ However, if success in an

12.30 Refugees, Asylum, Humanitarian Protection etc

asylum claim depends upon the applicant establishing that he or she had done something in the past (illegally departed Eritrea) and the applicant is disbelieved on her evidence then the claim fails; in the face of rejection of her evidence, a reasonable likelihood that she had done the act could not be established on the basis that it was implausible or unlikely that she had not done that act.¹¹

- ¹ The burden is not different or lower for someone with mental problems: *Bolat v Secretary of State for the Home Department* (99/6206/C) (23 February 2000, unreported), CA; *Singh v Secretary of State for the Home Department* [2000] Imm AR 340, CA.
- ² *Tikhonov* [1998] INLR 737, IAT. In *Smith (Agartha)* (00/TH/02130) the Tribunal suggested that a more flexible approach to proof of nationality should be adopted in asylum cases (as they were not nationality arbitrations – a criticism of the approach in *Tikhonov*) and that in most cases the decision on nationality has to be made on the same basis as decisions on other elements of the refugee definition. ‘If there is some valid evidence that can be weighed in the balance, even if meagre, then that may suffice to discharge the burden lying on the appellant to prove nationality (or statelessness)’ (paras 54–55). In *Hamza* [2002] UKIAT 05185 (starred) Collins J (the then President) held that in the context of making findings in respect of nationality an adjudicator ‘must bear in mind that if he is going to make a positive finding against the appellant, then he must do so not on the asylum standard, but on a higher standard which would be the balance of probabilities’ (para 12).
- ³ *R v Immigration Appeal Tribunal, ex p Shen* [2000] INLR 389, QBD; *Makozo* (20003) 12 February 1999, IAT; *Escobar* (20553) 26 March 1999, IAT. But see *R v Immigration Appellate Authority, ex p Mohammed (Mukhtar)* [2001] Imm AR 162, QBD. In *Ahmed (Tanveer) v Secretary of State for the Home Department* [2002] UKIAT 00439, [2002] Imm AR 318, [2002] INLR 345, IAT, the IAT held that whether or not a document is a forgery is rarely the real issue and that the real, or indeed only, question is whether the document is one upon which reliance should properly be placed. This approach was approved in *Mungu v Secretary of State for the Home Department* [2003] EWCA Civ 360 at paras 18–19, [2003] All ER (D) 289 (Feb). See also *Zarandy v Secretary of State for the Home Department* [2002] EWCA Civ 153, [2002] All ER (D) 355 (Jan).
- ⁴ *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449, [2000] INLR 122, [2000] Imm AR 271.
- ⁵ *Robinson v Secretary of State for the Home Department* [1997] Imm AR 568; *AE and FE v Secretary of State for the Home Department* [2003] EWCA Civ 1032, [2004] QB 531, [2004] 2 WLR 123. See 12.43 below. Whether ‘internal relocation/flight’ is in issue at all should depend initially on the applicant’s claim, and, just as for other aspects of the refugee claim, the responsibility for putting the factual basis and burden of establishing the case lies on the applicant: see *Aziz v Secretary of State for the Home Department* [2003] EWCA Civ 118; *R v Secretary of State for the Home Department, ex p Salim* [2000] Imm AR 6, [1999] INLR 628, QBD.
- ⁶ A school of thought exemplified by *Manoharan* [1998] Imm AR 455.
- ⁷ *Sachithananthan* [1999] INLR 205.
- ⁸ *Karanakaran v Secretary of State for the Home Department* [2000] Imm AR 271 at 293.
- ⁹ *R v Secretary of State for the Home Department, ex p Kingori (aka Mypanguli)* [1994] Imm AR 539, CA; *Bulut (Huseyin) v Secretary of State for the Home Department* [1999] Imm AR 210, CA.
- ¹⁰ *GM (Eritrea) v Secretary of State for the Home Department* [2008] EWCA Civ 833, Laws LJ.
- ¹¹ *GM (Eritrea)*.

Credibility

12.32 The principle of the benefit of the doubt operates once all the evidence is submitted. In order to benefit from it, the applicant should have co-operated with the investigating authorities and should not attempt to deceive them.¹ Section 8 of the AI(TC)A 2004, and para 341 of the Immigration Rules, HC

395, as substituted by HC 164 from 1 January 2005, list different kinds of behaviour which must be taken into account as potentially² damaging the claimant's credibility. See 12.171 below.

¹ UNHCR *Handbook*, see 12.13 above, para 205.

² The Court of Appeal has read the word 'potentially' into the statute as being necessary in order to respect the constitutional principle of separation of powers which requires the administrative or judicial decision maker to make its own assessment of the facts: *JT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA Civ 878 [2008] All ER (D) 348 (Jul).

'Outside the country of nationality ... residence'

12.37 It may be necessary to determine what the person's true nationality is, since, if it is not that of the country of feared persecution, the claimant can be returned to the country of nationality.¹ Similarly, a person who is a national of more than one country will be expected to satisfy the refugee definition in respect of each country, or seek protection of that country where persecution is not feared.² But the second nationality must be effective, not merely formal, before it disqualifies someone from refugee status vis-à-vis the country of persecution.³ Where there is a dispute as to nationality, the decision of the country of purported nationality will be decisive, rather than the host country's conclusion as to what the nationality should be.⁴ Possession of a passport issued by another state may not be evidence of nationality if it was issued as a travel document to enable the bearer to move elsewhere.⁵ However, possession of such a travel document may be evidence that the person can be removed to a safe third country.⁶ Arbitrary exclusion from the country of nationality, implying cutting off from the enjoyment of all the benefits and rights enjoyed by citizens, can itself amount to persecution.⁷ The Convention definition applies to stateless persons as well as to those who have a nationality. Stateless persons⁸ qualify if they flee from the country of former habitual residence⁹ and cannot go back there because of a well-founded fear of persecution,¹⁰ although if they are unable to return to the country of habitual residence, other international law obligations are engaged.¹¹ Refusal to re-admit a stateless person to the country of his or her former habitual residence is not by itself persecutory because (by contrast to a national) the stateless person does not have a right of admission.¹²

¹ *R v Special Adjudicator, ex p Abudine* [1995] Imm AR 60, QBD. In *Smith (Agartha)* (00/TH/02130) the IAT held that although a failure to make a positive finding as to nationality may be fatal to a determination of an asylum claim, it need not be in every case so long as a particular country is identified as being the one in which persecution is feared.

² Refugee Convention, Art 1A(2); UNHCR *Handbook* 12.13 above, paras 106–107; *A-G of Canada v Ward* [1997] INLR 42, S Ct Can. In the particular context of cases involving possible Ethiopian and/or Eritrean nationality or neither, leading to statelessness, see *Teclé v Secretary of State for the Home Department* [2002] EWCA Civ 1358 (CA permission refusal); *R (on the application of Tewelde) v Immigration Appeal Tribunal* [2004] EWHC 162 (Admin); and *L (Ethiopia)* [2003] UKIAT 00016, to the effect that a claimant asserting statelessness should prove it, if necessary by applying for the relevant nationality.

³ *R (on the application of Milisavljevic) v Immigration Appeal Tribunal* [2001] EWHC Admin 203, [2001] Imm AR 580; and the Australian Federal Court cases of *Jong Kim Koe v Minister for Immigration and Multicultural Affairs* [1997] 306 FCA (Full Court) and *Al-Anezi v Minister for Immigration & Multicultural Affairs* [1999] FCA 355 (per Lehane J).

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- ⁴ See *Oppenheimer v Cattermole* [1976] AC 249, [1975] 1 All ER 538, HL; *Stoeck v Public Trustee* [1921] 2 Ch 67; *Bibi (Mahaboob) v Secretary of State for the Home Department* [1987] Imm AR 340, CA. This also accords with the rule of public international law that in general each state may determine who are its nationals: see R Plender *International Migration Law* (2nd edn, 1998), pp 39ff. But the decision of the purported country of nationality may be ignored if it violates international humanitarian law: *Oppenheimer v Cattermole* [1976] AC 249, HL.
- ⁵ (1993) 5(3) IJRL 466, Case No 156.
- ⁶ *Alsawaf v Secretary of State for the Home Department* [1988] Imm AR 410, CA.
- ⁷ See the decision of the Court of Appeal in *Lazarevic v Secretary of State for the Home Department* [1997] Imm AR 251 at 270–272, per Hutchison LJ, CA and *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809, [2008] 3 WLR 1188. See also *Stula* (14622), though of course it remains for the applicant to establish a discriminatory Convention reason.
- ⁸ See *Samanter* (14520) for circumstances in which statelessness may arise.
- ⁹ A stateless applicant who has lived in more than one country before claiming asylum in yet another should only have to show that he is a refugee in relation to one of the former countries, or at least only in relation to the first of them: see UNHCR *Handbook*, para 104 and *Al-Anezi* (fn 3 above). This is because an applicant with only one nationality is not precluded from refugee status merely by the fact that he has lived in third countries, and as far as possible applicants with and those without nationality should be treated equally under the Convention. For the difference between a country in which a stateless applicant ‘most recently lived’ and one of former ‘habitual residence’, see *Zrilc* (17106). In *Dag* [2001] Imm AR 587 a starred Tribunal held, following the reasoning of *Thje Kwet Koe v MIEA* [1997] FCA 912, that the Turkish Republic of Northern Cyprus, which was not a state in international law, is not capable of being the country of a person’s nationality (paras 30–33), and ‘tentatively’, that although the phrase ‘country of former habitual residence’ was wider, an area which formed part of an unrecognised state could not itself be a country of former habitual residence within the meaning of the Refugee Convention (para 39). On the related issue of ‘protection’, within the meaning of the refugee definition, in the context of de facto, non-internationally recognised, quasi-state entities, see 12.41 below.
- ¹⁰ *Revenko v Secretary of State for the Home Department* [2000] Imm AR 610, [2000] INLR 646, where the Court of Appeal rejected the argument that a stateless person needed only to show inability to return to qualify as a refugee – again, this conforms with the principle that as far as possible applicants with and those without nationality should be treated equally under the Convention (see fn 9 above).
- ¹¹ UN Convention on the Status of Stateless Persons 1954: see 8.117 above. See also *Tjhe Kwet Koe v MIEA* [1997] FCA 912.
- ¹² *MA (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 304, [2008] All ER (D) 123 (Apr); *MT (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 1149, [2008] All ER (D) 215 (Oct); *SH (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 1150, [2008] All ER (D) 221 (Oct).

‘Unable or ... unwilling to avail himself of the protection’

Internal relocation alternative

12.46 Lord Bingham commended the UNHCR Guidelines on International Protection of 23 July 2003 as providing ‘valuable guidance’ on the approach to reasonableness and undue harshness in this context.¹ According to that guidance, internal relocation would be unduly harsh if the person would suffer deprivation of human rights that were fundamental to the particular individual and sufficiently harmful to render the area an unreasonable alternative or if the person could not ‘sustain a relatively normal life at more than just a minimum subsistence level’ or if the person would be denied access to land,

resources and protection because he or she does not belong to the dominant clan, tribe, ethnic or religious or cultural group in the area or if the person was required 'to relocate to areas, such as the slums of an urban area, where [he or she] would be required to live in conditions of severe hardship'.² The Tribunal, relying on an observation of Lord Hope in *Januzi*³ has appeared to treat that case as deciding that nothing less than a breach of Article 2 or 3 of the European Convention on Human Rights would establish that internal flight was 'unduly harsh'.⁴ The House of Lords subsequently revisited the issue of internal relocation and held that to adopt such an approach would have been 'an egregious and inexplicable error' on the part of the Tribunal.⁵ Whilst the terms in which the Tribunal expressed itself in the case that was before the House of Lords indicated that that was indeed the test that the Tribunal had applied, the House of Lords felt able to infer from the fact of the Tribunal's eminence and expertise that it could not have made such an error. Although the conclusion reached by the House of Lords might appear to result from an application of the principle that, 'the worse the apparent error is, the less ready an appellate court should be to find that it has occurred', the Court of Appeal emphasised, in a judgment that considered the House of Lords decision, that there is no such principle.⁶ When assessing the possibility of internal relocation the decision maker is not restricted to comparing conditions for the asylum seeker in his or her home area and the place of relocation (as the Court of Appeal had apparently held in a number of cases⁷) but may have regard to conditions in the country generally. When internal relocation is in issue 'the decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so'⁸ and to that end 'the enquiry must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant. There is no warrant for excluding, or giving priority to, consideration of the applicant's way of life in the place of persecution. There is no warrant for excluding, or giving priority to consideration of conditions generally prevailing in the home country'.⁹ What is required is an 'individualised, holistic assessment' of all relevant factors.¹⁰ Thus, although the Tribunal's country guidance was that in general it was not unduly harsh for persecuted Sudanese to relocate to the appalling conditions of extreme poverty in the IDP camps, that was not a sufficient basis to find that the applicant had an internal relocation alternative. The impact of those conditions on the individual claimant had to be assessed in the light of his particular circumstances which included 'everyday knowledge that those responsible for such conditions are also responsible for the death of his every living relative'.¹¹ In order to determine whether a gay Palestinian could relocate within Lebanon it was necessary to take account of the legal ban on Palestinians owning property; accommodation being too expensive; the legal exclusion of Palestinians from many trades and professions; the difficulty of obtaining a work permit and the difficulties that would be faced by a homosexual living in a Muslim area of the country.¹² An internal flight alternative might be unreasonable if it depended upon an individual having to conceal some aspect of his or her identity or history and having to live with the consequent fear of discovery.¹³

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- ¹ *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 3 All ER 305, [2006] 2 WLR 397 at para 20.
- ² UNHCR Guidelines on International Protection of 23 July 2003, cited in *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 3 All ER 305, [2006] 2 WLR 397.
- ³ *Januzi*, para 54.
- ⁴ *HGMO (Sudan) CG* [2006] UKAIT 00062 (SIJs Hodge, Storey and Lane), the determination of the Sudanese appeals following their remital to the Tribunal by the House of Lords in *Januzi*. In *AB (Jamaica) CG* [2007] UKAIT 00018 the Tribunal's determination (written by Dr Storey, as was the determination in *HGMO*) said 'as clarified by the House of Lords in *Januzi*, unreasonableness or undue hardship under the Refugee Convention as well as under Article 3 of the ECHR can only be shown if there is, in the particular circumstances of the individual's case, a real risk of a violation of a basic, non-derogable human right: see *Januzi* [2006] UKHL'.
- ⁵ *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, Lord Bingham in para 11, [2007] 3 WLR 832.
- ⁶ *ECO, Mumbai v NH (India)* [2007] EWCA Civ 1330, [2007] All ER (D) 199 (Dec), Sedley LJ.
- ⁷ As the Court of Appeal had approached the issue in the instant case, *AH (Sudan) v Secretary of State for the Home Department* [2007] EWCA Civ 297, [2007] All ER (D) 55 (Apr) consistently with earlier decisions of the Court of Appeal such as *AE v Secretary of State for the Home Department* [2003] EWCA Civ 1032, [2004] QB 531.
- ⁸ *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, Lord Bingham in para 21, [2006] 2 AC 426, [2006] 3 All ER 305, cited by Lord Bingham in *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, para 5
- ⁹ *Secretary of State for the Home Department v AH (Sudan)*, para 5.
- ¹⁰ *KH (Sudan) v Secretary of State for the Home Department* [2008] EWCA Civ 887, [2008] All ER (D) 08 (Aug), referring to Baroness Hale's speech in *Secretary of State for the Home Department v AH (Sudan)*.
- ¹¹ *KH (Sudan) v Secretary of State for the Home Department* [2008] EWCA Civ 887, [2008] All ER (D) 08 (Aug).
- ¹² *HC v Secretary of State for the Home Department* [2005] EWCA Civ 893, [2005] All ER (D) 267 (Jul).
- ¹³ *Hysi v Secretary of State for the Home Department* [2005] EWCA Civ 711, (2005) Times, 23 June, [2005] All ER (D) 135 (Jun).

12.47 A further difficulty with internal relocation, or flight, related to the burden and standard of proving whether internal relocation was reasonable or 'unduly harsh'. Who had to prove what, to which standard? In *Manoharan*¹ a Tribunal had held that the burden was on the applicant to show on balance of probabilities that it would be unduly harsh to return him; in *Sachithananthan*² a Tribunal held (following *Thirunavukkarasu*)³ that the test was whether there was a serious possibility that it would be unduly harsh. The issue was resolved in *Karanakaran*⁴ where the Court of Appeal decided that no 'standard of proof' as such applied; the question was simply whether, taking all relevant⁵ matters into account, return of the claimant would be unduly harsh. This was a matter of evaluation and conscientious judgment.⁶ Everything capable of having a bearing on the question was to be taken into account (which might include the need to consider the cumulative effect of a whole range of disparate considerations).⁷ The court commended the methodology of the Tribunal in the case of *Sayandan* where, in considering whether return would be unduly harsh, it had set out some eleven disparate risks as matters worthy of attention and had evaluated both the likelihood of a risk eventuating and the seriousness of the consequences.⁸ The burden remains on the applicant to demonstrate that it would not be reasonable to expect him to relocate internally within his country of origin.⁹ However, internal flight is only a

legitimate issue in an appeal if proper notice that it is to be raised is given.¹⁰ Moreover, notwithstanding that there is no formal burden of proof on the Home Office in relation to internal flight, an otherwise well-founded claim may only be rejected if the evidence satisfies the judge of fact that internal relocation is a safe and reasonable option.¹¹

¹ *Manoharan v Secretary of State for the Home Department* [1998] INLR 519.

² *Sachitananthan* [1999] INLR 205.

³ *Thirunavukkarasu v Minister of Employment and Immigration* (1993) 109 DLR (4th) 682.

⁴ *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449, [2000] INLR 122, CA.

⁵ In *Gnanam v Secretary of State for the Home Department* [1999] INLR 219, CA Tuckey LJ emphasised that what may be relevant factors in one case would not necessarily be so in another, whether considered individually or cumulatively.

⁶ *Karanakaran v Secretary of State for the Home Department* above [2000] 3 All ER 449 at 477 and 479, [2000] INLR 122 at 152 and 154, CA. This approach was expressly approved by Lord Steyn in *R (on the application of Sivakumar) v Immigration Appeal Tribunal* [2003] INLR 457, at para 19, HL. On this approach presumably it would be open to different countries to take different views about what was reasonable: see *R (on the application of Yogathas and Thangarasa) v Secretary of State for the Home Department* [2002] UKHL 36, [2003] 1 AC 920, [2002] INLR 620, at para 115, per Lord Scott. *Gnanam* (above) and *Karanakaran* at INLR 145, per Brooke LJ. Sedley LJ observed at INLR 154–155 that the correct approach coincided with that advocated by Simon Brown LJ in *Ravichandran (Senathirajah) v Secretary of State for the Home Department* [1996] Imm AR 97 at 109, ie consideration of the ‘single composite question’ whether a person has a ‘well-founded fear of being persecuted for Convention reasons’ in the round and with all relevant circumstances brought into account. In Australia a similar wide-ranging approach to internal flight has been adopted: see eg *Randhawa v MILGEA* (1994) 52 FCR 437; *Franco-Buitrago v Minister for Immigration and Multicultural Affairs* [2000] FCA 1525.

⁸ *Sayandan* (16312) 5 March 1998. The risks identified in returning a Tamil to Colombo were arrest and return to the North East because of lack of documents; repeated arrest in round-ups; being subject to extortion; unduly harsh treatment before accessing judicial process; dreadful prison conditions if detained; not being able to find or retain accommodation; not being able to find employment because of discrimination; where the appellant could not speak Sinhalese; being subjected to a regime where racial discrimination was part of everyday life; having no real contacts or ties in Colombo; and previous ill-treatment in Sri Lanka by both the LTTE and the security forces.

⁹ See *Aziz v Secretary of State for the Home Department* [2003] EWCA Civ 118; *R v Secretary of State for the Home Department, ex p Salim* [1999] INLR 628, [2000] Imm AR 6, QBD.

¹⁰ *Daoud v Secretary of State for the Home Department* [2005] EWCA Civ 755, [2005] All ER (D) 259 (May).

¹¹ Sedley LJ’s dissenting judgment in *Jasim v Secretary of State for the Home Department* [2006] EWCA Civ 342, (2006) Times, 17 May. The majority dismissed the appeal on the basis that the immigration judge had been entitled to find on the evidence that internal relocation was safe and reasonable. See also *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, [2008] All ER (D) 300 (May): the Tribunal had been wrong to find the appellant had an internal relocation alternative on the basis that there was no evidence that she would be unable to obtain support from her church in that location. The question it should have addressed was whether, on the evidence, such support would be available to her so as to establish an internal relocation alternative.

Persecution for Convention reasons

Persecution

12.48 The Refugee Convention does not define persecution¹ and, although the term, like the entire refugee definition, has an autonomous meaning,² there

is no universally accepted definition.³ As we shall see in relation to persecution by non-state agents, its meaning is linked to the availability of state protection, at least so far as the UK is concerned.⁴ The *Handbook* indicates that, while a threat to life or freedom for the relevant reason will always amount to persecution,⁵ persecution does not have to involve threats to life or freedom; other serious violations of human rights will also qualify.⁶ In *Jonah*⁷ Nolan J ruled that the word must be given its ordinary dictionary definition 'to pursue with malignancy or injurious action, especially to oppress for holding a heretical opinion or belief'. The case law reveals a tension between (i) the approach which sees the issue solely as one of fact for the decision maker and the immigration judge, subject to challenge in the Administrative Court solely on *Wednesbury* principles,⁸ and (ii) attempts to provide a coherent framework for persecution based on human rights law. The human rights approach dictated by the preamble of the Refugee Convention has been propounded by James Hathaway, who in his seminal book *The Law of Refugee Status* defined persecution as 'the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community',⁹ a definition endorsed by Lord Steyn in *Ullah*.¹⁰ In the influential case of *Gashi*,¹¹ the Tribunal adopted UNHCR's analysis of persecution,¹² which drew heavily on Hathaway's definition,¹³ in relation to three categories of human rights. Breaches of inviolable human rights such as the right of life and the prohibition against torture, cruel, inhuman or degrading treatment would always be persecution. Violation of rights whose limited derogation or curtailment by the state could be justified only in time of public emergency (freedom from arbitrary arrest and detention and freedom of expression) would be persecution if unjustified. The denial of rights reflecting goals for social, economic or cultural development, such as the right to a livelihood, could amount to persecution if it was systematic and discriminatory. More recently, Goodwin-Gill¹⁴ has stated that the 'core meaning' of persecution 'readily includes the threat of deprivation of life or physical freedom' although 'less overt measures may suffice, such as the imposition of serious economic disadvantage, denial of access to employment, to the professions, or to education, or other restrictions on the freedoms traditionally guaranteed in a democratic society'.¹⁵ In *Appellant S*¹⁶ in the Australian High Court McHugh and Kirby JJ made the point that a *threat* of serious harm, with its 'menacing implications', can constitute persecution, especially when it causes a person to alter his or her behaviour.¹⁷ Although mere discrimination is probably not enough, evidence of discrimination will make it easier to demonstrate persecution. And where discrimination is so severe, frequent or protracted that it inhibits freedom to exercise basic human rights such as the right to a livelihood or to practice a religion, it may amount to persecution.¹⁸ Being forced to live in dire social and economic conditions may amount to being persecuted.¹⁹ Arbitrary deprivation of citizenship amounts to persecution without the need further to demonstrate that the loss of citizenship has consequences of sufficient severity to amount to persecution²⁰ although denial to a stateless person of re-entry to the country of his or her former habitual residence would not by itself be persecutory.²¹ The disadvantage of linking the definition of persecution to core human rights is that if the asylum seeker cannot establish the existence of the core right, there will be no persecution.²² The Qualification Directive sets out a definition of 'acts of persecution'²³ in

mandatory terms in Art 9(1) by which they must be ‘(a) sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Art 15(2) of the European Convention for the Protection of Human Rights’²⁴ or ‘(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)’. It lists various forms that acts of persecution may take (eg acts of physical or mental violence, legal, administrative, police or judicial measures which are discriminatory) but it is important to note that the list is illustrative, not exhaustive.²⁵ The individual’s particular characteristics and circumstances including background, gender and age must be taken into account in order to determine whether the acts feared would amount to persecution or serious harm.²⁶ The Court of Appeal has held that the threshold for persecution imposed by the Directive is higher than under the Refugee Convention as interpreted in the authorities.²⁷ Article 9(1)(a) contains an exhaustive, not an illustrative definition of the ‘basic human rights’, which have to be violated for there to be persecution. They are the non-derogable rights contained in Arts 2 (right to life), 3 (freedom from inhuman and degrading treatment and torture), 4(1) (prohibition of slavery) and 7 (prohibition of retrospective penalisation) of the ECHR. Moreover, the violation must be ‘severe’ in order to amount to persecution under the Directive. However, if ‘basic human rights’ are limited to the non-derogable rights in that way it would mean that the Directive contemplates the possibility of violations of those rights which are not severe and therefore are not persecutory. It is difficult to imagine how there can be a violation of, for example, the right not to be tortured or enslaved or unlawfully killed which would be anything other than severe.

¹ This section considers the meaning of ‘persecution’ at the hands of the state – the classic or paradigm case of persecution that would have been foremost in the minds of the drafters of the Refugee Convention in the aftermath of the Second World War and the defeat of the Nazi regime. Following *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, [2000] INLR 239, a modified meaning is required where the allegation relates to persecution by non-state agents: see *Persecution by non-state actors* at 12.53ff below. See also 12.44 above on the differing relevance of the ‘internal relocation alternative’ depending on whether the persecutor is a state or non-state actor.

² See *R v Secretary of State for the Home Department, ex p Adan, R v Secretary of State for the Home Department, ex p Aitseguer* [2001] 2 AC 477, [2001] INLR 44.

³ In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 at para 66, Aust High Ct, Gummow and Hayne JJ (in a joint judgment forming part of the majority) pointed out that ‘It is not of great assistance and is apt to mislead to approach the matter by saying, as did an English court, that “persecution” is a “strong word”’. The English case was *R v Secretary of State for the Home Department, ex p Binbasi* [1989] Imm AR 595 at 599 per Kennedy J. See also 12.47, fn 13 below.

⁴ *Horvath* fn 1 above, at 12.53ff.

⁵ This is clear from the ‘non-refoulement’ provision in Art 33, which prohibits the return of a refugee to the frontiers of territories where ‘life or freedom would be threatened’ for a Refugee Convention reason.

⁶ UNHCR *Handbook* 12.13 above, para 51; *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958, per Lord Goff; *Horvath* above, at 215H, per Lord Lloyd.

⁷ *R v Immigration Appeal Tribunal, ex p Jonah* [1985] Imm AR 7.

⁸ See *Kagama v Secretary of State for the Home Department* [1997] Imm AR 137; *Faraj v Secretary of State for the Home Department* [1999] INLR 451. In *Horvath* above Lord Lloyd described the proposition that persecution should be given its ordinary dictionary meaning as ‘settled law’ (at 251).

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- ⁹ See 12.24 fn 2 above.
- ¹⁰ *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 3 WLR 23, at para 32. See also Lord Hope in *Horvath v Secretary of State for the Home Department* [2000] 3 All ER 577, [2000] 3 WLR 379, HL; Lord Bingham in *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856 (para 7). But see *Amare v Secretary of State for the Home Department* [2005] EWCA Civ 1600, [2005] All ER (D) 300 (Dec) where the Court of Appeal said that Professor Hathaway's definition had to be 'treated with a degree of caution' because it did not give a clear place to the requirement that the human rights violation had to be sufficiently serious by reference either to its intensity or duration. See also *RG (Colombia) v Secretary of State for the Home Department* [2006] EWCA Civ 57 applying what had been said obiter in *Amare*.
- ¹¹ *Gashi v Secretary of State for the Home Department* [1997] INLR 96. See also Schiemann LJ in *Blanusa v Secretary of State for the Home Department* (IATRF 98/1495/4) (18 May 1998, unreported), CA.
- ¹² UNHCR appeared as intervener in the case.
- ¹³ In Hathaway's formulation, the types of harm to be protected against include the breach of any right within the first category, a discriminatory or non-emergency abrogation of a right within the second category, or the failure to implement a right within the third category which is either discriminatory or not grounded in the absolute lack of resources: see *The Law of Refugee Status* (n 9 above) pp 101–116.
- ¹⁴ *The Refugee in International Law*, 12.5 fn 1 above, pp 66–68.
- ¹⁵ Whether such restrictions amount to persecution requires assessment of a complex of factors, including (1) the nature of the freedom threatened, (2) the nature and severity of the restriction, and (3) the likelihood of the restriction eventuating in the individual case: Goodwin-Gill fn 14 above. See *Chen Shi Hai v Minister for Immigration* [2000] INLR 455, Aust HC: adverse treatment which a 'black child' (one born in contravention of the 'one child' policy) is likely to receive in China – denial of access to food, education and health care – could amount to persecution. In *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, Aust HC, McHugh J considered that measures in disregard of human dignity may, in appropriate cases, constitute persecution (a proposition approved in the joint judgment of six members of the High Court in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559). See the judgment of Lady Hale in *R (on the application of Hoxha) v Secretary of State for the Home Department*, *R (on the application of B) v Secretary of State for the Home Department* [2005] UKHL 19, [2005] 1 WLR 1063, (2005) 149 Sol Jo LB 358.
- ¹⁶ See fn 3 above: Gummow and Hayne JJ and McHugh and Kirby JJ, each giving joint judgments, formed the majority.
- ¹⁷ Conversely however, in *R (on the application of Hoxha) v Secretary of State for the Home Department* [2002] EWCA Civ 1403, [2003] 1 WLR 241 the Court of Appeal rejected an argument that the *sequelae* of past persecution can amount to persecution. However, the House of Lords did not rule this out; Lady Hale dealt in particular with the continuing punishment of stigma and ostracism likely to result from a public rape in the context of a deeply patriarchal society; see [2005] UKHL 19 at paras 30ff. She referred to this again in her judgment in *N v Secretary of State for the Home Department* [2005] UKHL 31, para 58, [2005] 2 AC 296, [2005] 4 All ER 1017.
- ¹⁸ UNHCR *Handbook*, at 12.13 above, paras 54–55; *Chen* above, at 24; *Ahmad v Secretary of State for the Home Department* [1990] Imm AR 61 at 66, per Farquarson LJ. Tribunal determinations in which findings of persecution have been made in 'third category' cases include *Padhu* (12318) (inability to work and deprivation of state benefits) and *Lucretianu* (12126) (threatening phone calls in Romania). In *Kadham v Canada* IMM-652-97 (8 January 1998, unreported), FC Moulden J observed that harassment could constitute persecution if it was sufficiently serious or long-lasting as to threaten the claimant's physical or moral integrity. See Pill LJ's judgment in *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809 in which, with reference to the Qualification Directive, Art 9(2)(b) he said that 'persecution may take the form of administrative and other measures which are discriminatory or are implemented in a discriminatory manner. Measures which deprive a national of the opportunity to conduct a business, follow employment and retain documentation on which the conduct of ordinary life depends' may amount to or contribute to a finding of persecution.
- ¹⁹ *HH (Somalia) CG* [2008] UKAIT 00022 and *AM and AM (Somalia) CG* [2008] UKAIT 00091.

- ²⁰ So the majority of the Court of Appeal held in *EB (Ethiopia) v Secretary of State for the Home Department* (Longmore and Jacob LJ; Pill LJ dissenting), disapproving *MA* [2004] UKIAT 00324 and applying the US Supreme Court judgment in *Trop v Dulles* 356 US 86 (1957) which held that deprivation of citizenship was ‘the loss of the right to have rights’ and also *Lazarevic v Secretary of State for the Home Department* [1997] 1 WLR 1107.
- ²¹ *MA (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 304, [2008] All ER (D) 123 (Apr); *MT (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 1149, [2008] All ER (D) 215 (Oct) and *SH (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 1150, [2008] All ER (D) 221 (Oct).
- ²² *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 3 All ER 304, [2003] 1 WLR 856, [2003] Imm AR 428 (no right of conscientious objection to military service).
- ²³ Qualification Directive, Art 9(1), implemented by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525, reg 5(1).
- ²⁴ *Ie* ECHR, Arts 2, 3, 4 and 7.
- ²⁵ Qualification Directive, Art 9(2) and the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, reg 5(2).
- ²⁶ Qualification Directive, Art 4(3)(C), implemented by HC 395, para 339J(iii), as inserted by HC 6918.
- ²⁷ *SH (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 1150.

Persecution by non-state actors

12.61 What of the situation where the feared harm emanates from state agents acting ‘unofficially’ rather than from ‘sections of the population’?¹ It might seem that where mistreatment emanates from police officers, or other state agents, the *Horvath* principle has no application and the very fact of the mistreatment illustrates the lack of protection. After all, governments rarely if ever formally sanction the use of torture or other serious harm by their ‘agents’ and no state is capable of persecuting anyone other than through the actions of its agents. However, the Court of Appeal in *Svazas*² rejected the argument that the *Horvath* principle had no part to play in this situation, and the majority (Simon Brown LJ and Sir Murray Stuart-Smith) effectively held that it was simply a question of degree.³ Sedley LJ, on the other hand, demanded a different and higher standard of domestic protection where the feared mistreatment emanates from state agents misbehaving themselves, holding that evidence of ‘timely and effective rectification of the situation which is allowing the misconduct to happen’ would be necessary to disqualify the victim from international protection.⁴ It was an error of law for the Tribunal to have held that repeated rape by government soldiers was no different from the conduct of civilian rapists where the evidence showed that the soldiers were in a position to commit and repeat their crime with no apparent prospect of detection or punishment.⁵

¹ UNHCR *Handbook* 12.13 above, para 65 and 12.51 above.

² *Svazas v Secretary of State for the Home Department* [2002] EWCA Civ 74, [2002] 1 WLR 1891, which involved police officers in Lithuania physically mistreating detainees who were Communist Party members.

³ *Svazas* at paras 44–46 per Sir Murray Stuart-Smith and at [51]–[53] per Simon Brown LJ, who also held at para 54 that, in cases such as this, the seniority of the police officers involved in the misconduct is relevant to determining whether the system of protection is sufficient.

⁴ *Svazas* at para 37.

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⁵ *PS (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 1213, [2008] All ER (D) 64 (Nov).

'For reasons of'

Refusal to perform military service

12.78 In *Foughali*¹ the Tribunal analysed the principles and identified four broad exceptions to the general rule that draft evasion or desertion does not ground refugee status:

- (i) persecution due to the conditions of life in the military service in question;
- (ii) persecution due to the repugnant nature of military duty likely to be performed;
- (iii) persecution due solely to genuine political, religious or moral convictions, or to valid reasons of conscience;² and
- (iv) persecution due to likely disproportionate punishment.

Paragraphs (i), (ii) and (iv) are not in dispute. The area of contention is (iii), and in *Sepet*³ the House of Lords upheld the judgment of the majority in the CA to the effect that there is as yet no recognised, codified human right to conscientious objection, so that punishment for draft evasion based on such an objection will not per se amount to persecution.⁴ Nonetheless the Court of Appeal in *Sepet*⁵ unanimously held that an objection to serve in the military is inherently an implied expression of political opinion, contrary to governmental authority, and that punishment for refusing to serve in circumstances where there was a likelihood of being forced to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community⁶ could amount to persecution for reason of political opinion. This was not disputed in the House of Lords. Accordingly, while the traditional conscientious objector (such as the pacifist Quaker) may not yet have a right to object based on freedom of conscience which takes priority over the state's right to require performance of military service,⁷ others who object to fighting on principled grounds may have their fundamental rights violated by the requirement to perform military service. For example, they may object to the use of chemical weapons,⁸ or to fighting an oppressed minority or their own people.⁹ Punishment for deserting so as to avoid obeying an order to 'commit a grave violation of human rights' in the form of planting anti-personnel land mines would be persecution.¹⁰ Domestically, *Sepet* is the last word – for the moment. It has, however, to be remembered that human rights are developing all the time and should a right to conscientious objection evolve in the meantime, perhaps in other jurisdictions, the domestic position could change. Internationally, there is uncertainty, however, as to whether the holding of a genuine and principled objection to the performance of military service can of itself substantiate a claim.¹¹ The language of the UNHCR *Handbook* is somewhat cautious, merely stating that it is open to contracting states to grant refugee status to 'persons who object to performing military service for genuine reasons of conscience'.¹²

¹ (00TH01513), para 9.

- ² See UNHCR *Handbook* 12.13 above, para 170. Note in this context that the listing of particular types of conscientious objection has given way to what the Tribunal in *Foughali* described as 'a more flexible "compelling reasons of conscience" ' definition. See eg Council of Europe Committee of Ministers Recommendation R(87)8; UN Commission on Human Rights report 2 March 1995, E/CN.4/1995/L.82, noting the general comment No 22(48) of the Human Rights Committee that 'there should be no differentiation between conscientious objectors on the basis of the nature of their particular beliefs'.
- ³ *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856.
- ⁴ In *Sepet v Secretary of State for the Home Department* [2001] EWCA Civ 681, [2001] Imm AR 452 the Court of Appeal held that the apparent acceptance, without argument on the issue, of a human right to conscientious objection by the Court of Appeal in *Zaitz v Secretary of State for the Home Department* [2000] INLR 346 was not in any way authoritative and that the Tribunal in *Foughali* (above) had erred in treating it as such.
- ⁵ *Sepet v Secretary of State for the Home Department*.
- ⁶ *Sepet v Secretary of State for the Home Department*, Lord Bingham, para 8.
- ⁷ See ECHR Art 9, and the views of Commission members in *Thlimmenos v Greece* (App 34369/97) (2000) 31 EHRR 411, (2000) 9 BHRC 12, at paras 44–45.
- ⁸ *Zolfagharkani v Canada* [1993] 3 FC 540.
- ⁹ *Ciric v Canada* [1994] 2 CF 65. Note however that *Sepet* (above) involved Turkish Kurds who objected to performing military service because it was likely to involve fighting fellow Kurds; the Tribunal ([2000] Imm AR 445) had dismissed the appeals on the ground (not upheld by the Court of Appeal or the House of Lords) that the appellants' objection was partial and contained unacceptable discrimination against non-Kurds.
- ¹⁰ *BE (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 540, (2008) Times, 18 June.
- ¹¹ See the speech of Lord Hoffmann in *Sepet* in the House of Lords (fn 3 above) at paras 39 and 52, and the judgments of Laws and Waller LJ in the Court of Appeal (fn 5) at paras 20–81, 187–200.
- ¹² Note however that the *Handbook* was written in 1979. See also Goodwin-Gill *The Refugee in International Law* (2nd edn, 1996) at p 55ff.

Exclusion

Exclusion for criminal activity

12.92 Article 1F of the Refugee Convention provides that the protection of the Convention does not apply where there are serious reasons for considering that a refugee has committed:

- (a) a war crime or a crime against humanity as defined in the relevant international instruments;¹
- (b) a serious non-political crime committed outside the country of refuge prior to admission to that country as a refugee; or
- (c) an act contrary to the purposes and principles of the UN.²

The terms of Article 1F of the Convention are mandatory; the protective provisions of the Convention 'shall not' apply in these cases.³ Whereas (b) has a geographical and temporal limit in respect of where and when the crime in question must have been committed, no such limits apply to the crimes and acts covered by Article 1F (a) and (c).⁴ The intense focus of governments and international organisations on terrorism since September 2001 has brought wide discussion of these exclusion provisions in the Convention, but in the rush to judgment little notice has been taken of careful analysis in a growing body of literature.⁵ In particular our own government has rushed into legislation which thrusts on to our courts and tribunals an order of working

and a set of presumptions, which flout the spirit and aim of the Convention. We deal with these below. The Qualification Directive reproduces the exclusion clause in Article 1F of the Refugee Convention (exclusion for war crimes, crimes against peace, crimes against humanity, serious non-political crimes and acts contrary to the purposes and principles of the UN) but with a number of substantial alterations and additions that broaden the scope of the exclusion.⁶ Firstly, Article 1F(b) of the Refugee Convention excludes a person who 'has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'. The Directive defines the phrase 'prior to his or her admission as a refugee' as meaning prior to the time of being issued with a residence permit based on the granting of refugee status.⁷ Secondly, the Directive also provides that 'particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes' for the purpose of the exclusion clause.⁸ UNHCR's understanding of 'particularly cruel actions' is 'criminal acts which are particularly egregious'.⁹ Thirdly, the Directive defines 'acts contrary to the purposes and principles of the United Nations' as being acts contrary to the Preamble and Articles 1 and 2 of the Charter of the United Nations.¹⁰ This provision in the Directive may substantially broaden the scope for exclusion beyond the intention of Article 1F(c) in the Refugee Convention which was that it would apply to those who occupied positions of power in their countries.¹¹ The implementing Regulation does not reproduce that part of the Directive defining 'acts contrary to the purposes and principles of the United Nations'. The Directive obliges the Member State to revoke, end or refuse to renew the refugee status of a person who is or should have been excluded from being a refugee.¹²

¹ These are listed in the UNHCR *Handbook* (12.13 above) at Annex VI and include the London Agreement 1945, the charter of the Nuremberg International Military Tribunal (extract in Annex V of the UNHCR *Handbook*), and the Geneva Conventions and additional Protocol relating to the protection of victims of war and international armed conflicts. The Rome Statute of the International Criminal Court 1998, Arts 7 and 8, provides updated definitions of war crimes and crimes against humanity.

² Refugee Convention, Art 1F.

³ See *Gurung* [2002] UKIAT 04870 (starred) and *KK (Turkey)* [2004] UKIAT 00101.

⁴ See *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, 153 Sol Jo (no 7) 32. In *KK* (above) the act relied on as contrary to the purposes and principles of the UN (arson attacks on Turkish businesses), occurred in the UK after the claimant had claimed asylum here: see 12.93 below.

⁵ See, for instance, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, UNHCR 2003 (hereinafter: UNHCR Background Note), UNHCR Executive Committee, Standing Committee sessions of 1997 (8th meeting) and 1998 (10th meeting); UNHCR Global Consultations on International Protection, Lisbon Expert Roundtable (May 2001), Summary Conclusions – Exclusion from Refugee Status, UNHCR Doc. EC/GC/01/2Track/1 (hereinafter UNHCR Lisbon Roundtable); UNHCR *Guidelines on International Protection No 5: Application of the exclusion clauses: Article 1F (HCR/GIP/03/05)* 4 September 2003; Lawyers Committee for Human Rights, Research and Advocacy Project *Safeguarding the Rights of Refugees under the Exclusion Clauses* in *IJRL Vol 12 Special Supplementary Issue 2000 Exclusion from Protection*; and *Refugees, Rebels and the quest for justice*, 2002; PJ van Krieken (ed) *Refugee Law in Context: The Exclusion Clause* (The Hague 1999); ECRE, Position on the Interpretation of Article 1 of the Refugee Convention (September 2000); ECRE, Position on Exclusion from Refugee Status (March 2004).

⁶ Qualification Directive, Art 12(2).

⁷ Qualification Directive, Art 12(2)(b) and the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525, reg 7(2)(b).

- ⁸ Qualification Directive, Art 12(2)(b) and the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, reg 7(2)(a).
- ⁹ UNHCR *Annotated Comments on the EC Council Directive 2004/83/EC* (January 2005).
- ¹⁰ Qualification Directive, Art 12(2)(c).
- ¹¹ UNHCR *Annotated Comments on the EC Council Directive 2004/83/EC* (January 2005).
- ¹² Qualification Directive, Art 14(3) and HC 395, para 339A(vii), as inserted by HC 6918.

War crimes, crimes against humanity and crimes against the purposes and principles of the UN

12.96 Until recently there were almost no UK cases concerned with war crimes, crimes against humanity¹ or crimes against the purposes and principles of the UN.² In *Amberber* the Tribunal, allowing an appeal of an Ethiopian accused of 'wars of aggression' for participation in attacks by Ethiopian organisations, said that Article 1F(a) of the Refugee Convention only applied to waging war across international boundaries.³ The API commends the Statute of the International Criminal Court as containing the definitions of war crimes and crimes against humanity that should be used by caseworkers.⁴ There is extensive Canadian and Australian case law on both sub-paragraphs. The former has been applied to exclude former government officials who have resorted to barbaric methods against civilians in the repression of disorder.⁵ The killing of civilians in the course of internal conflict has been held not to engage the exclusion clause,⁶ but torture, genocide, and arbitrary reprisals do.⁷ It is not sufficient that the act alleged *could* be a crime against humanity; it must be established that it *would* be.⁸ In *Pushpanathan*⁹ the Canadian Supreme Court held that narcotics trafficking was not an act 'contrary to the purposes and principles of the UN'. It reasoned that the rationale of Article 1F was that those responsible for the persecution which creates refugees should not enjoy the benefits of the Convention designed to protect those refugees. The purpose of Article 1F(c) was 'to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting'. It may be applicable to non-state actors although it may be more difficult for non-state actors to perpetrate human rights violations on a scale amounting to persecution without the state thereby implicitly adopting the acts.¹⁰ In *Singh and Singh*¹¹ the Special Immigration Appeals Commission (SIAC) rejected the appellants' contentions that (1) Article 1F(c) applied only to those holding a position of authority in a state or acting on behalf of a state and (2) acts could only fall within Article 1F(c) if they were committed other than for political reasons or in pursuance of a right of self-determination.¹² In *Singh and Singh*¹³ and *KK*¹⁴ the SIAC and the Tribunal respectively held that acts of terrorism are contrary to the purposes and principles of the UN and accordingly come within the ambit of Article 1F(c) wherever and whenever committed.¹⁵ They came to this conclusion by considering not only Articles 1 and 2 of the 1945 Charter of the United Nations (which set out the purposes and principles of the UN), but also, in the light of Article 31 of the Vienna Convention on the Law of Treaties (which sets out general rules of interpretation of treaties), subsequent Security Council and General Assembly resolutions that unequivocally condemn terrorism and terrorist acts.¹⁶ In interpreting the ambit of these decisions, some care is needed, first, because of the very divergent definitions

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of terrorism; and, secondly, because the exclusive focus of the UN Security Council Resolutions after 11 September 2001 has been on Al Qaeda and a long list of named organisations and individuals allegedly associated with it, rather than on Turkish Kurds fighting for self-determination or Muslims in Gujerat, India, fighting against extremist communalism, but who have nevertheless been labelled as terrorists by the EU or under Indian anti-terrorist legislation. Section 54 of the IAN 2006¹⁷ imposes a statutory interpretation of Article 1(F)(c) of the Convention¹⁸ according to which acts contrary to the purposes and principles of the UN includes acts of committing, preparing or instigating terrorism and of encouraging or inducing others to commit, prepare or instigate terrorism. The acts include inchoate offences and terrorism has the meaning given by s 1 of the Terrorism Act 2000.¹⁹ Being a member or supporter of a 'terrorist organisation' or an organisation proscribed under the Terrorism Act 2000 may be sufficient for the Secretary of State to decide to exclude a person in reliance on Article 1F(c).²⁰ The Qualification Directive defines the principles and purposes of the UN as being those set out in the preamble and Articles 1 and 2 of the Charter of the United Nations.²¹

¹ Refugee Convention, Art 1F(a).

² Refugee Convention, Art 1F(c).

³ *Amberber* (OOTH 01570) (13 June 2000, unreported), IAT. The European jurisprudence on Art 1F(a) of the Refugee Convention is set out in Jean-Yves Carlier et al (eds) *Who is a Refugee?* (1997). In *PK (Sri Lanka)* [2004] UKIAT 00089 the Tribunal held that the adjudicator had erred in law in applying Art 1F(a) to a member of the LTTE who had admitted to having killed Sri Lankan soldiers in battle; the adjudicator had mistakenly assumed that the claimant had admitted to killing injured soldiers other than in the course of the battle itself. On the other hand, a member of the LTTE who voluntarily drove an assassination squad to and from the places where they killed civilians, knowing what the assassins were doing was excluded: *AN and SS (Sri Lanka)* CG [2008] UKAIT 00063.

⁴ API Articles 1F and 33(2) of the 1951 Refugee Convention, October 2006, section 3.

⁵ See Article by Feisman (1996) 8 IJRL 111. Goodwin-Gill 12.5 fn 1 above, pp 95–100 suggests a somewhat narrower basis for exclusion under this head relying on the *travaux* and their reference to the principles established by the London Charter of the International Military Tribunal.

⁶ *Polyukhovich v Commonwealth of Australia* (1991) 172 CLR 501 at 669, per Toohey J.

⁷ *Gonzalez v Minister of Employment and Immigration* (1994) FCJ 765.

⁸ *Moreno v Minister of Employment and Immigration* (1993) 159 NR 210.

⁹ *Pushpanathan v MCI* [1998] 1 SCR 982, [1999] INLR 36. The refugee could not be excluded under Art 1F(b) of the Refugee Convention ('serious non-political crime') because the acts were committed inside Canada after recognition.

¹⁰ *Pushpanathan* above.

¹¹ *Singh (Mukhtiar) and Singh (Paramjit) v Secretary of State for the Home Department* (SIAC, 31 July 2000).

¹² As the SIAC rightly pointed out at para 65(b), there are no such caveats expressed in Art 1F(c), as distinct from the specified requirement that the 'serious crime' be 'non-political' in Art 1F(b) (below). Thus, Art 1F(c) is highly relevant to separatist groups who use violence in pursuit of their aims.

¹³ Fn 11 above.

¹⁴ *KK (Turkey)* [2004] UKIAT 00101.

¹⁵ See 12.90, fn 4 above.

¹⁶ Particularly SC Resolutions 1269 (1999) and 1373 (2001); and GA Resolutions 49/60 (1994), 51/210 (1996) and 54/164 (2000). The SIAC was content to use the definition of terrorism now contained in the Terrorism Act 2000, s 1, but the Tribunal in *KK (Turkey)* pointed out that use of such a domestic definition risked offending against the principle of applying an autonomous international meaning to the provisions of the Refugee Convention (see 12.21, fn 2 above). The Tribunal stated at para 74 that the question was 'what does the United Nations mean by "terrorism"?' However, it rejected UNHCR's opinion that the acts in question were not serious enough to found exclusion under Art 1F(c), reasoning that if the UN condemned terrorism and the acts were terrorist, the acts fell

within the exclusion clause – an argument rejected as facile in relation to military actions condemned by the international community so as to found refugee status in *Krotov v Secretary of State for the Home Department* [2004] EWCA Civ 69, [2004] 1 WLR 1825 (12.77 above).

¹⁷ Which came into force on 31 August 2006.

¹⁸ Contrary to the principle that ‘the Convention must be interpreted as an international instrument, not a domestic statute, in accordance with the rules prescribed by the Vienna Convention on the Law of Treaties’ (*Januzi v Secretary of State for the Home Department; Hamid v Same; Gaafar v Same; Mohammed v Same* [2006] UKHL 5, [2006] 3 All ER 305, [2006] 2 WLR 397, per Lord Bingham, para 4).

¹⁹ Which provides: (1) In this Act ‘terrorism’ means the use or threat of action where– (a) the action falls within sub-s (2), (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause. (2) Action falls within this subsection if it– (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person’s life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system. (3) the use or threat of action falling within sub-s (2) which involves the use of firearms or explosives is terrorism whether or not sub-s (1)(b) is satisfied. (4) In this section– (a) ‘action’ includes action outside the UK, (b) a reference to any person or property is a reference to any person, or to property, wherever situated, (c) a reference to the public includes a reference to the public of a country other than the UK, and (d) ‘the government’ means the government of the UK, of a part of the UK or of a country other than the UK. (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

²⁰ API ‘Articles 1F and 33(2) of the 1951 Refugee Convention’, October 2006, section 5.3, citing *Gurung* [2002] UKIAT 04870.

²¹ Qualification Directive, Art 17(1)(c).

UK PRACTICE ON ASYLUM

The application

12.110 One of the few provisions of the Asylum and Immigration Appeals Act 1993 that remains in force defines an asylum claim as a claim that it would be contrary to the UK’s obligations under the Refugee Convention for the person to be removed from or required to leave the UK.¹ Under the Immigration Rules, an asylum applicant is a person who makes a request to be recognised as a refugee under the Geneva Convention on the basis that it would be contrary to the UK’s obligations to remove or require the person to leave the UK or otherwise makes a request for international protection.² The Immigration Rules have been substantially amended³ in order to implement the EU Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.⁴ The Rules now contain detailed procedural provisions which apply to the consideration of applications for asylum and humanitarian protection.⁵ The asylum application will be determined in accordance with the UK’s obligations under the Convention and will be granted if the applicant is in the UK or has arrived at a port of entry in the UK, is a refugee as defined in the Refugee Qualification Regulations⁶, there are no reasonable grounds for regarding the person as a danger to the security of the UK, the person does not constitute a danger to the community of the UK, and refusing his or her application would result (whether immediately or after the expiry of leave) in *refoulement* contrary to the

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Convention.⁷ An application which does not meet those criteria will be refused.⁸ A person who has claimed asylum may not be removed from the UK whilst the claim is pending, ie until he or she is given notice of the Secretary of State's decision on the claim,⁹ unless the application is certified on safe third country grounds (as to which see below under 'Removal to Safe Third Countries'). Nor may the person be removed whilst an appeal against an immigration decision, brought within the UK is pending¹⁰ or whilst the Secretary of State decides whether to treat representations made by a failed asylum seeker as a fresh claim for asylum.¹¹ If an asylum applicant requests the return of his or her passport from the Home Office for the purpose of leaving the UK, the passport will only be returned if the person signs a declaration acknowledging that the asylum claim will be treated as withdrawn upon return of the passport.¹² If an applicant withdraws a claim for asylum or is treated as having done so, consideration of the claim will be discontinued.¹³ Entry clearance officers have a discretion to accept an application for entry clearance to come to the UK as a refugee, albeit there is no provision in the rules for such an application.¹⁴ The discretion would be exerciseable where the applicant has a *prima facie* claim to be a refugee; he or she has close ties with the UK (eg close family in the UK meaning spouse, minor children or parents or grandparents over the age of 65 or in exceptional circumstances, parents or grandparents under 65 or other family members aged 18 or over or periods spent in the UK as a student) and the UK is the most appropriate country of asylum.¹⁵

¹ Asylum and Immigration Appeals Act 1993, s 1;

² HC 395, para 327. There is no specific definition of 'international protection' in the rules. Other definitions of 'asylum claim' appear in other statutory contexts. Eg for the purpose of the appeals provisions of the Nationality, Immigration and Asylum Act 2002, s 113(1) defines an asylum claim as a claim made by a person to the Secretary of State at a place designated by him that to remove the person from the UK would breach the UK's obligations under the Refugee Convention. Section 12 of the IAN 2006 (when it comes into force) will substitute a new definition of 'asylum claim' for the purpose of the appeals provisions which will be similar to the definition in s 1 of the Asylum and Immigration Appeals Act 1993. In contrast to the current definition, it does not specify to whom the claim must be made, nor does it specify where it must be made. The new definition makes provision for subsequent claims to be disregarded in circumstances determined by the Immigration Rules. The provision also substitutes a new definition of 'human rights claim' in similar terms. Other definitions of 'asylum seeker' are provided by Nationality, Immigration and Asylum Act 2002, s 18 relating to the statutory provisions concerned with 'accommodation centres' and Immigration and Asylum Act 1999, s 94(1) in relation to support for asylum seekers.

³ By HC 82, laid before Parliament on 19.11.2007.

⁴ Council Directive 2005/85/EC of 1 December 2005.

⁵ HC 396, para 326A.

⁶ The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, reg 2.

⁷ HC 395, para 334.

⁸ HC 395 para. 336

⁹ Nationality, Immigration and Asylum Act 2002, s 77 and HC 395, para. 329.

¹⁰ Nationality, Immigration and Asylum Act 2002, s 78.

¹¹ HC 395, para 353A.

¹² API 'Travel abroad'.

¹³ HC 395, para 333C, as amended. An application may be treated as impliedly withdrawn if the applicant fails to attend for interview and fails to demonstrate within a reasonable time that the non-attendance was due to circumstances beyond his or her control. A subsequent application would be considered under para 353 of the Rules, ie as to whether it constitutes a fresh claim for asylum. See also API 'Withdrawal of Applications'.

¹⁴ API 'Applications from abroad' (undated).

¹⁵ API 'Applications from abroad'.

Applications at the port

12.115 The NIAA 2002 envisages that those not detained at Harmondsworth (or one of the other fast-track processing centres) or at Oakington will be required to attend at an induction centre, where they will be given an application registration card which may be used to access services provided for them as asylum seekers.¹ The Act sees the induction centres as part of a total system of control of asylum seekers, whose other elements were accommodation centres (see chapter 13), reporting centres to which asylum seekers will report regularly, and removal centres, to which they may be taken for removal at the end of the process, if not there throughout the process.² Temporary admission may be made subject to residence³ and reporting⁴ conditions, including two weeks in an induction centre.⁵ Those granted temporary admission will be referred to the National Asylum Support Service (NASS) for assistance if they appear destitute. Home Office policy enabling asylum seekers to work if their claim remained outstanding for more than six months⁶ was abolished in July 2002, in the belief that it encouraged economic migrants to come to the UK as asylum seekers.⁷ The prohibition on employment was considered in *R (on the application of Q)*.⁸ Pursuant to the provisions of the EC Reception Directive,⁹ asylum claimants who are not EEA nationals may apply to work if the application is outstanding for more than a year.¹⁰ A person who made representations with a view to them being treated as a 'fresh claim' for asylum had not thereby made an 'application for asylum' which would entitle the person to apply for permission to work under the Directive and the implementing immigration rule.¹¹ However, whilst the Secretary of State arranged decision making in response to such representations so that individuals might have to wait years for a decision, the policy that prevented them from obtaining permission to work in the meantime was unlawful.¹² Asylum claimants may not work without an application registration card (ARC) endorsed with permission to work¹³ (unless they are accession state nationals, in which case they may work but must register their employment within a specified period).¹⁴ Voluntary activity is permitted.¹⁵

¹ Nationality, Immigration and Asylum Act 2002, s 70. For the application registration card (ARC) see 12.114 below. Proposals for induction centres at Saltdean (Brighton) and Sittingbourne have been dropped because of local opposition. One opened in Dover in January 2003. The North West Project has been operational since 6 December 2004: see 12.110 fn 11 above.

² See the Nationality, Immigration and Asylum Act 2002, Part 2 (accommodation centres), ss 69–71 (reporting and residence restrictions), 66 (removal centres). The AI(TC)A 2004 introduces electronic monitoring of those with residence restrictions: s 36 (in force 1 October 2004: SI 2004/2523, but no regulations have been made under the section, without which electronic monitoring remains unlawful).

³ Immigration Act 1971, Sch 2, para 21(2), (2B)ff; Asylum Support Regulations 2000, SI 2000/704. Asylum seekers may be prohibited from living in certain areas, as well as being directed to stay in particular accommodation. See further chapter 13 below.

⁴ Immigration Act 1971, Sch 2, para 21(2).

⁵ Nationality, Immigration and Asylum Act 2002, s 70 (fn 1 above).

⁶ The policy is set out in the decision of the Court of Appeal in *R v Secretary of State for the Home Department, ex p Jammeh* [1998] INLR 701 at 713H–714A.

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⁷ The policy was abolished on 23 July 2002.

⁸ *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36, [2003] All ER 905. Considering whether denial of support under s 55 of the 2002 Act constituted 'treatment' for Art 3 ECHR, the court held at para 57: 'The imposition by the legislature of a regime which prohibits asylum seekers from working and further prohibits the grant to them, when they are destitute, of support amounts to positive action directed against asylum seekers and not to mere inaction'.

⁹ Council Directive 2003/9 on minimum standards for the reception of asylum seekers, OJ 2003 L 31/18, Art 11.

¹⁰ HC 395, para 360, inserted by HC 194 from 4 February 2005.

¹¹ *R (on the application of Omar) v Secretary of State for the Home Department* [2008] EWHC 1604 (Admin), [2008] All ER (D) 351 (Jun).

¹² *R (on the application of Tekle) v Secretary of State for the Home Department* [2008] EWHC 3064 (Admin), [2008] All ER (D) 120 (Dec).

¹³ API 'Application Registration Card' para 4.3.

¹⁴ Accession (Immigration and Worker Registration) Order 2004, SI 2004/1219.

¹⁵ Meals, travel and other costs may be reimbursed: API 'Guidance on undertaking voluntary activity', Feb 04.

Children

12.120 No unaccompanied child will be removed from the UK unless there are adequate reception and care arrangements in the country to which he or she is to be removed.¹ The same policy applies where the parent or guardian of an accompanied asylum seeking child cannot be removed with him or her.² In such cases, discretionary leave is to be granted until the child is 17½ or for three years, whichever is the shorter period.³ If the child comes from a listed country the period for which leave is granted is the lesser of the period until the child is 17½ or for one year.⁴ Child asylum seekers (other than those for whom there are satisfactory reception and care arrangements in their country of origin) should not have their asylum claims certified clearly unfounded because they should be given discretionary leave.⁵ A child formerly treated as another asylum seeker's dependant may make a claim for asylum at any time. Delay on the part of a child in making a claim for asylum will be taken into account in assessing credibility but in doing so the case worker must be aware that there may be legitimate reasons why the child failed to apply earlier.⁶ If an unaccompanied child was granted more than one year's leave, the Home Office caseworker should contact the child and the child's social worker or guardian before expiry of the leave to 'discuss available options'.⁷ An application for further leave to remain by a child should be treated as an asylum and human rights application; the 'fresh claims' rule (para 353 of the Immigration Rules) should not be applied and the child's eligibility for asylum, humanitarian protection or discretionary leave should be assessed. However, consideration may be given to certification of the claim as 'clearly unfounded' under the Nationality, Immigration and Asylum Act 2002, s 94. The child should be interviewed if he or she was not interviewed in connection with the original asylum claim or if the caseworker thinks an interview would produce further information that would assist in making a decision.⁸

¹ Asylum Team Guidance – 'Processing Asylum Applications from Children' and APU Notice 3/2007. In *AA (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 12 the Tribunal had erred in law in holding that it was sufficient for there to be a reasonable likelihood that the returned child would be adequately received. It was for the Secretary of State to be satisfied that there would be adequate reception arrangements.

- ² APU Notice 3/2007, Amendment to Discretionary Leave Policy relating to Asylum Seeking Children. For background see *Re Sujon Miah* (CO 3391/1994) (6 December 1994, unreported); API Aug 00, Ch 2, s 5, para 3.5 (not current, see fn 1 above). See also the recommendation given by the Tribunal in *Afrifa* (18392) (24 March 2000, unreported), that before removal of the appellant whose asylum appeal it had rejected, International Social Services, International Red Cross and the British High Commission be asked to report on reception and care arrangements.
- ³ APU Notice 3/2007. Formerly the policy had been to grant leave to remain until the child's 18th birthday; the purported intention of the change in policy is to enable applications to extend leave and appeals against any refusal to be disposed of by the time the child turns 18, thereby 'providing more clarity to the young person about their future'.
- ⁴ APU Notice 3/2007. The countries are listed in Asylum Team Guidance – 'Processing Asylum Applications from Children' and are Albania, Bolivia, Brazil, Ecuador, Ghana (in respect of males only), India, Jamaica, Macedonia, Moldova, Mongolia, Nigeria (in respect of men only), Serbia Montenegro, South Africa and Ukraine.
- ⁵ APU Notice: Application of Non-Suspensive Appeal (NSA) process to asylum seeking children (1 October 2004).
- ⁶ Asylum Team Guidance – 'Processing Asylum Applications from Children'.
- ⁷ API 'Considering applications for further leave (at age 17 and a half) following grants of discretionary leave under the policy on unaccompanied asylum seeking children (active review)', 13 October 2008.
- ⁸ API as in fn 7 above.

Investigation of asylum claims

12.126 The White Paper of July 1998¹ contained an undertaking to reduce the time taken on determination of asylum claims to a total of six months: two months for the initial determination and four months for the appeal. The commitment to reduce the time taken to determine asylum claims has been given even greater prominence in recent years by the fast-tracking of claims at both the Oakington Reception Centre and the Harmondsworth Removal Centre. Previous delays of several years were unjust; they denied refugees the prompt determination of status which they deserved, and created difficulties for those who were ultimately found not to need international protection. But the implementation of the commitment to reduce delays has caused its own problems. The conditions under which asylum determination is now carried out in the UK – in particular, the pernicious combination of an overly ambitious and over-rigid timetable for determining claims and the dispersal or detention of asylum seekers (neither of which is conducive to clarity of recollection or articulation) – make compliance with the duties set out in the *Handbook* extremely difficult, if not impossible, for both the applicant and the examiner. As we have seen above, in many port cases applicants are detained and interviewed within a day or two of arrival,² and have no effective opportunity to submit evidence in support of the claim.³ Many other applicants are sent hundreds of miles to areas where legal, medical, social and linguistic support is scarce and living conditions squalid, and are given 14 days to complete evidence forms in full and in English, obtain all relevant documents and get them translated. The time limit will not be extended except in the rarest of cases.⁴ Illness (evidenced by medical certificate) or a postal strike would constitute good reason for extension, but not the illness or absence of a representative or solicitor, since the view of the Home Office remains that applicants do not need legal assistance in filling the form.⁵ Nevertheless, the Immigration Rules provide for an asylum applicant or a

person whose refugee status may be revoked to be allowed an 'effective opportunity' to consult a lawyer.⁶ Notwithstanding all this, delay in the determination of asylum claims remains a significant problem. The Immigration Rules now contain an express requirement that the Secretary of State decides claims for asylum 'as soon as possible' and that where a decision cannot be taken within six months of the claim being recorded, the Secretary of State is to inform the applicant of the delay or, if asked to do so in writing, provide the applicant with information about the timeframe within which a decision can be expected.⁷ Even without provision in the Immigration Rules as to the time within which a decision should be made it is implicit in the statute that claims should be dealt with within a reasonable time.⁸ However, what is 'a reasonable time' depends on all of the circumstances including the volume of applications, the available resources to deal with them and the different needs and circumstances of different groups of asylum seekers.⁹ A particular period cannot be specified as the limit of what is a reasonable time.¹⁰ A rational policy, operated fairly and consistently, for the deployment of limited resources in the determination of asylum claims would make it difficult to establish unlawful delay unless the time taken was manifestly unreasonable or the Home Office failed to take account of a particular prejudice suffered by an applicant.¹¹ The Home Office policy¹² for dealing with 'the legacy', ie unresolved asylum claims lodged before March 2007 is that they should be concluded by July 2011; that an expedited decision will be made if there are 'exceptional circumstances' but otherwise cases will be decided in accordance with an identified set of priorities. Circumstances in which a decision may be expedited include: the claimant has a criminal conviction; a court judgment requires a decision to be made; there is a suicide risk that might be minimised by expedition; an undertaking to make a decision was given to a Court or MP; the claimant or a dependant is suffering from a serious medical condition and needs treatment that is not available to him or her in the UK; the Home Office accepts that it has made an incorrect decision on the case; an initial decision has not been made on the asylum claim; a case has not been handled consistently with linked cases, eg a family member who has not been granted leave whilst others have; the individual is vulnerable eg to domestic violence or abuse; a relative abroad is seriously ill and there is no-one in the home country to care for him or her or the asylum claimant wants to attend the funeral of a close relative.

¹ *Fairer, faster and firmer: a modern approach to immigration and asylum.*

² A wealth of evidence has been presented to the Home Office showing how exhaustion, fear, linguistic difficulties, confusion and unfamiliarity all combine to render on-arrival interviews less than comprehensive or reliable: see 12.164 below. The Home Office does not generally conduct a substantive asylum interview on the day of arrival, but overnight detention compounds the difficulties. The UNHCR *Handbook* 12.13 above, para 198 points out that non-disclosure at a first interview should not be held against the asylum seeker; see further below. Sedley LJ in *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [2004] All ER (D) 201 (Nov) said that, whether or not an asylum claimant was entitled to an appeal, a fair initial hearing and decision must be provided. The question had to be: 'Does the system provide a fair opportunity for the asylum seeker to put his case?' and held that the three-day timetable at Harmondsworth, while not inherently unfair, had to be used as 'guidance, not a straitjacket'.

³ Fast-track claimants at Oakington are given two working days to submit post-interview representations. Harmondsworth claimants, those who have been through an induction centre, or issued with a SEF form before the interview was arranged, are given no

post-interview period to submit further evidence, in the absence of exceptional circumstances such as awaiting a Medical Foundation report: see API 'Interviewing' para 6.6. Where such a period is given, it is normally limited to five days, with requests for further time frequently rejected on the grounds that the further evidence 'can be produced on appeal'. The API 'Medical Foundation', para 2.1 require written confirmation from the Medical Foundation that it has agreed to provide a report, before an extension of time can be given. See *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* above.

⁴ See fn 3 above and 12.130 below.

⁵ This attitude extends to legal assistance at interviews: see API 'Interviewing', para 3: 'We do not consider that it is necessary for an asylum applicant to be legally represented at the asylum interview, as it is a non-adversarial fact-finding exercise.' See below.

⁶ HC 395, para 333B, implementing Article 15(1) of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

⁷ HC 395, para 333A, implementing Article 23(2) of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. However, the Secretary of State is not obliged to determine the claim within the timeframe.

⁸ *R (on the application of S) v Secretary of State for the Home Department* [2007] EWCA Civ 546, 151 Sol Jo LB 858.

⁹ *R (on the application of S) v Secretary of State for the Home Department*.

¹⁰ As the Tribunal did in: MM [2005] UKIAT 00763, specifying a time of 12 months; see *R (on the application of FH) v Secretary of State for the Home Department* [2007] EWHC 1571 (Admin), [2007] All ER (D) 69 (Jul).

¹¹ *R (on the application of (FH) v Secretary of State for the Home Department* where Collins J was satisfied that there was such a policy so that delays of two or three years in dealing with second claims for asylum, given the overall volume of claims being dealt with, were not so manifestly unreasonable as to be unlawful. A delay of five years, however, was. See also *R (on the application of Ghaleb) v Secretary of State for the Home Department* [2008] EWHC 2685 (Admin), [2008] All ER (D) 80 (Dec). On the other hand, a policy of simply deferring the making of decisions on claims made prior to a particular date in order to comply with a Public Service Agreement made with the Treasury was not a principled, fair and consistent response to the competing demands facing the Home Office making the delay occasioned by that policy unlawful (*R (on the application of S) v Secretary of State for the Home Department*).

¹² API 'Case Resolution Directorate – Priorities and Exceptional Circumstances'.

Asylum interviews

12.131 Since the elaboration of gender guidelines by the Refugee Women's Legal Group in 1998,¹ the Immigration and Nationality Directorate has begun to recognise the importance of gender-sensitive procedures and has elaborated its own gender guidelines for caseworkers.² They confirm that every effort will be made to provide same sex interviewing officers and interpreters where requested.³ They also acknowledge that victims of sexual assault or abuse may need to be interviewed alone, may suffer trauma affecting their, confidence, concentration and memory, and may be reluctant to talk in detail about their experiences,⁴ a reluctance recognised by the High Court in *Ejon*.⁵ Interviewers and decision-makers are required to have 'an active awareness of the vulnerability and mental, emotional and psychological state of an applicant who appears to be a victim of trafficking' and to appreciate that victims of trafficking may be reluctant to go into much detail about the facts of their cases and find their experiences difficult to disclose.⁶ Consequently they should 'not automatically draw adverse inferences from a woman's inability to recount details of [her] experience when assessing credibility'.⁷ The policy

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instructions on interviewing accept that victims of torture generally may face particular difficulties in recounting their experiences, both because of the nature of the experiences to be recounted and because of their previous experience of officialdom,⁸ and that in extreme cases there may be compelling medical reasons for not interviewing at all.⁹ The Home Office recognises the particular expertise of the Medical Foundation for the Care of Victims of Torture and endorses its 'Guidelines for the examination of survivors of torture' which describes medical and psychological effects of torture and their impact on asylum seekers' ability to present their case.¹⁰ Instructions on interviewing state that it might be appropriate to read over the record of interview at the end (a practice otherwise largely abandoned) where an applicant is clearly traumatised.¹¹ Special arrangements have been agreed to allow requests for an extension of a period for post-interview representations to enable the Medical Foundation to prepare and submit a medical report.¹² Where such a report supports the claimant's account of torture, this conclusion should be accepted in the absence of significant reasons for rejecting it.¹³

¹ Refugee Women's Legal Group Gender Guidelines for the Determination of Asylum Claims in the United Kingdom (July 1998). The guidelines were referred to with approval by Lord Hoffmann in *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal* [1999] 2 AC 629; [1999] INLR 144, HL. See now the Asylum Gender Guidelines issued by the IAA in November 2000, and see also H Crawley *Refugees and gender: law and process* (Jordans, 2001) chs 1 and 10. The Court of Appeal in *C v Secretary of State for the Home Department* [2006] EWCA Civ 151, [2006] All ER (D) 122 (Feb) approved the statement in para 5.40 of the AIT Guidelines that women may face additional problems in demonstrating that their claims are credible.

² API, 'Gender issues in the asylum claim'.

³ API, 'Gender issues' above, para 8. This is subject to operational requirements, and may not be possible when the request is made on the day of the interview.

⁴ Ibid. The API acknowledge that feelings of guilt and shame may inhibit full disclosure and that incentive to provide information should not affect credibility. They also acknowledge that many forms of abuse do not leave physical signs. The API on gender issues should be read and re-read by Home Office caseworkers, presenting officers and by AIT members, who are on occasion all too ready to disbelieve women's accounts of sexual abuse.

⁵ *R v Secretary of State for the Home Department, ex p Ejon (Molly)* [1998] INLR 195, QBD: psychiatric as much as physical injury may prevent early disclosure of evidence.

⁶ API 'Victims of Trafficking'.

⁷ API 'Victims of Trafficking'.

⁸ API 'Interviewing', para 7.3.

⁹ API 'Interviewing', para 7.6. This applies not just to disturbed torture victims but to all claimants with medical or psychiatric problems making interview problematic.

¹⁰ API, 'Medical Foundation' para 1. Caseworkers are expected to be familiar with 'best practice' guidelines before interviewing possible torture victims and to appreciate that genuine victims of torture may not be prepared to go into much detail about the ill-treatment they have experienced (perhaps because of cultural barriers, or simply due to the traumatic or humiliating nature of the mistreatment they suffered, and that failure to do so should not affect credibility. See our comment at fn 4, which applies equally here. See also Kock and Winter, *The psychological sequelae of torture – use of evidence in the asylum procedure*, available from RLC database, and other research cited in Henderson: Best Practice Guide to asylum and human rights appeals (ILPA/RLG, 2003) at [26.13]. In a number of cases, the Tribunal has accepted psychiatric evidence as helping to explain discrepancies: see eg *Kaygisiz* [2002] UKIAT 03283; *Muhoro* (00TH01502).

¹¹ API 'Interviewing' para 7.4 ('traumatised victims'). For read-overs see 12.123 text and fn 18 above.

¹² API, 'Medical Foundation', para 2.1. Such requests should be refused only in exceptional circumstances. Although the Medical Foundation is the only organisation for which special arrangements have been made, there is no reason in principle why an extension should not be granted for the preparation and submission of a report from any reputable medical practitioner. Where, after an extension, no report is produced and no explanation offered

for its non-production, the Home Office cannot demand a report, but the API allow an adverse inference to be drawn on the claimant's account of torture: para 2.2.

¹³ API, 'Medical Foundation', para 2.3.

Confidentiality

Non-compliance refusal

12.137 HC 395, para 339M provides that a failure without reasonable explanation to make a prompt disclosure of material facts or to assist the Secretary of State in establishing the facts of the case may lead to refusal. It includes failure to comply with a requirement to report for fingerprinting, failure to complete an asylum questionnaire and failure to attend for interview or to report for an immigration officer for examination.¹ The rule that provided for the actions of an agent to be taken into account for these purposes has been deleted.² Failure to return Statement of Evidence (SEF) forms in time³ leads to refusal of the claim for non-compliance, even (in one case) where the asylum seeker concerned was in hospital having a baby when the form was due.⁴ Late receipt of the form does not result in cancellation of the refusal decision or to interview on the claim, merely to 'consideration' of the material in the form.⁵ Failure to attend or late attendance for either screening or substantive interview may also lead to non-compliance refusal depending on the explanation, if any, given by the applicant; in the case of substantive asylum interviews, the Home Office is required to make immediate contact with the applicant to find out why he or she did not attend and the interview should be rearranged if there is a reasonable explanation.⁶ In *Haddad*, a starred Tribunal held that an application may not be refused on non-compliance grounds alone; in each case the Home Office is obliged to decide the asylum claim, and the appellate authority the appeal, on the material available.⁷ Home Office practice is now to consider all available information and make a substantive decision on the claim instead of or as well as refusing for non-compliance.⁸ In *Busuulwa* the Tribunal lamented that the words of the statute forced the appellate authority to exercise original jurisdiction over asylum claims which have never been considered substantively,⁹ although it was wrong in principle for the primary decision to be taken other than in accordance with the UNHCR guidelines. It called on the Secretary of State to withdraw non-compliance refusals which failed to review the merits of the asylum claim.¹⁰ In *Nori*¹¹ the Tribunal reviewed flawed non-compliance refusals, ie, refusals on non-compliance grounds where the Statement of Evidence form was received in time, or where a claimant's failure to attend an interview was occasioned by error on the part of the Home Office.¹² It noted that once an incorrect decision had been withdrawn (which it had to be), there was nothing left to appeal against.¹³ After *Nori*, the Home Office reviewed its procedures, and the policy instructions state that where the claim was made in-country, a flawed non-compliance decision will be withdrawn;¹⁴ decisions regarding port claims will be cancelled.¹⁵ Where an appeal has been lodged, the appellant is invited to withdraw the appeal.¹⁶ The Immigration Rules have been amended so that failure to attend an asylum interview will result in the asylum claim being treated as withdrawn unless within a reasonable time the person demonstrates that the failure to attend

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was due to circumstances beyond his or her control.¹⁷ After deemed withdrawal of the claim any further claim (including reinstatement of the original claim) will be considered under the 'fresh claim' rule.¹⁸ It can be anticipated that the Secretary of State will say (wrongly we think) that unless the claim has a 'realistic prospect of success', the person will not be someone who 'has made an asylum claim' so as to be entitled to an in-country right of appeal.¹⁹

¹ HC 395, para 339M which replaced para 340 from 9 October 2006.

² HC 395, para 342, deleted from 9 October 2006.

³ The Statement of Evidence form must be returned within ten working days. Requests to extend the time limit should be considered and discretion exercised reasonably where there are exceptional circumstances, but an extension will not be granted to enable the applicant to instruct a representative to complete the form: API 'Non-compliance' October 2006, para 4.2. Even if the SEF is late, the application should only be refused on non-compliance grounds if not received by the time the decision is made – API, para 4.3. Note that non-compliance may also lead to withdrawal of asylum support: see Asylum Support Regulations 2000, SI 2000/704, reg 20 as amended by SI 2005/11 pursuant to the Reception Directive 2003/9/EC, from 5 February 2005.

⁴ Judicial review proceedings were lodged but were withdrawn when the Home Office accepted the late Statement of Evidence. There was a flood of non-compliance refusals during 2000, including many issued when forms had been returned either within or only just outside the period; it was widely believed that had more to do with political priorities (production of statistics showing vastly improved rate of decision-making) than with proper refugee determination.

⁵ See correspondence between ILPA and Barbara Roche, 24 October 2000.

⁶ API 'Non-compliance' October 2006, para 5.

⁷ *Haddad (Ali) v Secretary of State for the Home Department* [2000] INLR 117. Earlier cases such as *Davies (Sandra)* (17797), holding that the correct course for the appellate authority finding good reason for non-compliance was to allow the appeal and remit to the Secretary of State for substantive consideration of the asylum claim, were not referred to. In *Shreef* (01TH00476) another Tribunal held that the course adopted in *Davies* was correct. But the Court of Appeal approved *Haddad* in *R (on the application of Zaier) v Secretary of State for the Home Department* [2003] EWCA Civ 937, [2003] All ER (D) 153 (Jul) at paras 31 and 37 per Auld LJ. Since *Haddad*, refusal letters relying on non-compliance also refer to the Refugee Convention claim not being made out (HC 395, para 336).

⁸ API 'Non-compliance' October 2006, para 2.2 and 5.5.

⁹ *Busuulwa* (01TH00239). By March 2001, nearly one-third of all claims were refused without consideration of the merits, for alleged non-compliance with time limits. A fair proportion of these were erroneous, eg there was evidence that the Statement of Evidence form had been returned in time.

¹⁰ *Busuulwa* above.

¹¹ *Nori (Rasheed)* [2002] UKIAT 01887.

¹² See API 'Non-compliance' para 8.

¹³ *Nori* above, para 19. The Tribunal pointed out that once the decision to refuse asylum had been withdrawn, the refusal of leave to enter or remain (ie, the immigration decision against which the appeal was brought) could not stand.

¹⁴ API 'Non-compliance' para 8.4.

¹⁵ API 'Non-compliance' para 8.3, advising that the refusal of leave to enter will be cancelled and the claimant advised that they are required to attend for further examination (to prevent the deemed six months' leave which would otherwise arise by statute: Sch 2, para 6 of the Immigration Act 1971, see 3.41 above).

¹⁶ API 'Non-compliance' para 8.4. This is unnecessary: the appellate authority would no longer have jurisdiction as there is no longer an immigration decision, and so no extant appeal: Nationality, Immigration and Asylum Act 2002, s 82(1); see also *Nori* above para 19.

¹⁷ Paragraph 333C of the Rules, as substituted by HC 420 which came into force on 7 April 2008.

¹⁸ Paragraph 353 of the Rules, as amended by HC 420.

¹⁹ By virtue of the Nationality, Immigration and Asylum Act 2002, s 92(4).

REMOVAL TO SAFE THIRD COUNTRIES

Introduction

Asylum and Immigration (Treatment of Claimants, etc) Act 2004

12.148 The third country regime is substantially re-cast (again) by the provisions of the AI(TC)A 2004 which further develop the main ideas of the 1999 and 2002 Acts (a lava flow of presumptions of safety and relentless removal of in-country appeal rights). Sections 11 and 12 of the IAA 1999 (as amended) were repealed with effect from 1 October 2004 and replaced by the provisions in the AI(TC)A 2004, Sch 3, although the previous provisions continue to have effect in relation to those already subject to certificates under the 1999 Act regime.¹ Part 2 of the Schedule contains a list of 28 countries, the 'First List of Safe Countries (Refugee Convention and Human Rights)', which presently comprise the other 26 EU Member States (UK excepted) together with Iceland and Norway.² For the purposes of the determination by any person, tribunal or court whether an asylum or human rights claimant may be removed from the UK to a state of which he is not a national or citizen the First List countries are to be treated as places:

- (i) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion;
- (ii) from which a person will not be sent to another State in contravention of his [Human Rights] Convention rights; and
- (iii) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.³

One consequence of this provision is that even if the Secretary of State was to be presented with clear and compelling evidence that an asylum seeker's removal to a listed country would result in his or her further removal in breach of the ECHR, the Secretary of State, being a 'person' within the meaning of para 3(1) of Sch 3, would be bound to ignore that evidence in deciding whether to remove the person.⁴ That consequence led the Administrative Court to make a declaration under s 4 of the Human Rights Act 1998 that para 3 of Sch 3 is incompatible with the obligation under Art 3 of the ECHR to investigate a potential breach of Art 3 resulting from the claimant's removal from the UK to a country on the first list of safe countries.⁵ However, the Court of Appeal reversed the Administrative Court's decision, holding that the provision was saved from incompatibility by the Secretary of State's obligation to scrutinise the law and practice of the states concerned and to promote legislation to remove them from the list of safe countries if not satisfied as to their compliance with their Convention obligations. The Court could make a declaration of incompatibility if on the facts of a particular case it apprehended there would be a breach of the Convention.⁶ The prohibition on removal while a claim for asylum is pending under s 77 of the NIAA 2002 does not prevent removal from the UK to one of the First List countries, provided that the Secretary of State certifies that in his opinion the person is not a national or citizen of the destination state.⁷ Further, a certificate to the same effect issued by the Secretary of State prevents an in-country appeal

being brought even on the basis of a claim that the country is not safe in refoulement terms as regards either the Refugee Convention or the Human Rights Act 1998.⁸ As regards any other human rights claims, there is no in-country appeal where the Secretary of State certifies the claim ‘clearly unfounded’.⁹ What is new here is the requirement to certify unless satisfied that the claim is not clearly unfounded, extending the provisions of s 94(3) of the NIAA 2002 to human rights claims in third country cases.¹⁰ Moreover, even where a person appeals after removal, an appeal cannot be brought on any ground that is inconsistent with the presumptions of safety as regards First List countries – either asserting that life or liberty are threatened for Refugee Convention reasons in the country, or asserting a risk of *refoulement* under the Refugee Convention or engaging the Human Rights Act 1998.¹¹ Finally, although the position as regards suspensive appeals does not preclude a challenge by judicial review, it would still be necessary to contend with the statutory presumptions of safety and the position adopted by Simon Brown LJ in *Ibrahim*.¹² There is no reason to suppose that a different approach would be taken to the statutory presumption of safety now that it has been extended by Parliament as regards human rights claims.

¹ AI(TC)A 2004, s 33(2) repeals ss 11 and 12 of the IAA 1999, s 33(3) repeals ss 80 and 93 of the NIAA 2002, and s 33(1) refers to the detailed provisions of Sch 3. For commencement see SI 2004/2523. Article 3 of the Order provides that ss 11 and 12 of the 1999 Act and ss 80 and 93 of the Nationality, Immigration and Asylum Act 2002 continue to have effect in relation to a person who is subject to a certificate under s 11(2) or s 12(2) or (5) of the 1999 Act issued before 1 October 2004. See above at 12.135–12.138.

² The countries are those which are subject or have agreed to be bound by the Dublin arrangements. Additional countries joining the Dublin arrangements may be added by order: see Sch 3, Part 6, providing for amendment by statutory instrument of the Sch 3, para 2 list by addition of states. Bulgaria and Romania were added to the original list of 26 countries by SI 2006/3393 with effect in relation to decisions refusing leave to enter or to remove made on or after 1 January 2007 in response to asylum and human rights claims even if made before 1 January 2007. Curiously, unlike the position with the Second and Third Lists in Sch 3, paras 7 and 12, there is no power to remove a State from the First List.

³ AI(TC)A 2004, Sch 3, para 3.

⁴ *R (on the application of Nasser) v Secretary of State for the Home Department* [2007] EWHC 1548 (Admin), [2008] 1 All ER 41.

⁵ *R (on the application of Nasser) v Secretary of State for the Home Department*.

⁶ *R (on the application of Nasser) v Secretary of State for the Home Department* [2008] EWCA Civ 464 [2008] EWCA Civ 464, [2009] 1 All ER 116.

⁷ AI(TC)A 2004, Sch 3, para 4.

⁸ AI(TC)A 2004, Sch 3, para 5(2) precludes, any appeal which would otherwise be in-country under NIAA 2002, s 92(2) including a variation appeal, and a deportation appeal, or under NIAA 2002, s 92(3) an appeal against refusal of leave to enter where the person concerned holds an entry clearance: AI(TC)A 2004, Sch 3, para 5(2). Sch 3, para 5(3) precludes an in-country appeal relying on s 84(1)(g) of the 2002 Act.

⁹ AI(TC)A 2004, Sch 3 para 5(4), (5).

¹⁰ See Explanatory Notes to the AI(TC)A 2004 at para 148.

¹¹ AI(TC)A 2004, Sch 3, para 6.

¹² *R (on the application of Ibrahim) (Ayman) v Secretary of State for the Home Department* [2001] EWCA Civ 519, [2001] Imm AR 430; see also *R (on the application of Hatim) v Secretary of State for the Home Department* [2001] EWHC Admin 574, [2001] Imm AR 688 and see above at 12.136 fn 9 above.

ASYLUM APPEALS

Procedure on asylum appeals

12.170 Asylum appeals used to be subject to different time limits and procedures, and had their own procedure rules.¹ The procedure rules now embrace all immigration and asylum appeals,² except for those of detained claimants in the ‘fast-track’ procedure, who are single male asylum applicants considered to come from ‘safe’ countries and to have straightforward claims.³ Their appeals are subject to special procedure rules, with very tight time limits and with restricted powers to extend time and to adjourn.⁴ Details of appeal procedures are to be found at 18.76ff below. Although asylum appeals are subject to the same appeal procedures as other immigration appeals, the fundamental importance of what is at stake means that the courts are particularly concerned that the highest standards of fairness apply and that procedural and evidential requirements are not over-stringently applied. Thus, where a decision has potentially grave consequences for an asylum seeker, it may be proper to grant an adjournment for further evidence to be adduced,⁵ and neither the *Ladd v Marshall*⁶ principles governing the reception of fresh evidence, nor the rule in *Al-Mehdawi*⁷ apply with their full rigour in asylum or human rights appeals.⁸ The Tribunal’s own obligations to prevent *refoulement* under the Refugee Convention meant that it must be alive to obvious points of Convention law even when these are not adverted to by the appellant.⁹ In asylum cases where the most anxious scrutiny is required,¹⁰ it would only be in an extreme case that a procedural error depriving the appellant of an opportunity to present the case in full could be treated as of no practical effect.¹¹

¹ Asylum Appeals (Procedure) Rules 1993, SI 1993/1661; Asylum Appeals (Procedure) Rules 1996, SI 1996/2070.

² Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230.

³ See 12.110 above.

⁴ See the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005, SI 2005/560; 18.80 below.

⁵ *R (on the application of F) v Special Adjudicator* [2002] EWHC Admin 777, [2002] Imm AR 407.

⁶ [1954] 3 All ER 745, [1954] 1 WLR 1489 (CA).

⁷ *Al-Mehdawi v Secretary of State for the Home Department* [1989] 3 All ER 843, [1990] 1 AC 876, [1989] 3 WLR 1294, HL, which established that a procedural failure caused by an appellant’s own representative did not lead to an appeal hearing being in breach of the rules of natural justice so as to found a judicial review.

⁸ *R (on the application of Haile) v Immigration Appeal Tribunal* [2002] INLR 283, CA; *R (on the application of Azkhosravi) v Immigration Appeal Tribunal* [2001] EWCA Civ 977, [2002] INLR 123 (failure to explain late submission of evidence, approving *R v Immigration Appeal Tribunal, ex p Aziz* [1999] INLR 355). The Court of Appeal gave guidance on the admission of evidence demonstrating a mistake of fact and the role of the Tribunal in *E v Secretary of State for the Home Department, R v Secretary of State for the Home Department* [2003] EWCA Civ 49. See also *R (on the application of Tofik) v Immigration Appeal Tribunal* [2003] EWCA Civ 1138, [2003] INLR 623 (extension of time).

⁹ *R v Secretary of State for the Home Department, ex p Robinson* [1997] Imm AR 568, CA, applied in *R (on the application of Naing) v Immigration Appeal Tribunal, R (on the application of Eyaz) v Immigration Appeal Tribunal* [2003] EWHC 771 (Admin), [2003] All ER (D) 337 (Mar).

¹⁰ The ‘most anxious scrutiny’ is a quotation from Lord Bridge in *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, HL.

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¹¹ However, in *Secretary of State for the Home Department v Makke* [2005] EWCA Civ 176 the CA observed that relief should not be granted unless the underlying claim has merit.

Credibility

12.171 English courts have not given the same assistance to appellate authorities dealing with credibility in the context of asylum claims¹ as has been given by the Canadian courts,² which have held that ‘when an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness’,³ and that ‘a reasonable margin of appreciation be applied to any perceived flaws in the claimant’s testimony’.⁴ But decisions based on adverse credibility have been subjected to careful scrutiny by the Tribunal and the Administrative Court to ensure that they are properly reasoned and take account of relevant evidence,⁵ and appellate bodies’ unsupported assertions that a witness is not credible are no longer acceptable. Questions of credibility are, however, matters for the Tribunal of fact, which should be cautious in rejecting as incredible an account by an anxious and inexperienced asylum seeker, whose reasons for seeking asylum may well be expected to contain inconsistencies and omissions in the course of its revelation to the authorities and investigation on appeal,⁶ as Mr Justice Blake observed:

‘most people who have experience of obtaining a narrative from asylum seekers from a different language or different culture recognise that time, confidence in the interviewer and the interview process and some patience and some specific direction to pertinent questions is needed to adduce a comprehensive and adequate account. This is particularly the case where sexual assaults are alleged and all kind of cultural and gender sensitive issues may be in play as to why the full picture is not disclosed early on’.⁷

The Tribunal has noted that ‘It is perfectly possible for an adjudicator to believe that a witness is not telling the truth about some matters, has exaggerated the story to make his case better, or is simply uncertain about matters, but still to be persuaded that the centrepiece of the story stands’.⁸ The API acknowledge this: ‘Discrepancies, exaggerated accounts, and the addition of new claims of mistreatment may affect credibility. However, they may equally reflect a concern on the part of the applicant, or their advisers, to bolster a claim due to a very real fear of return. Applicants should be given the opportunity to explain any apparent discrepancies and the reasons for any changes in their accounts.’⁹ A person may be disbelieved entirely about his or her claimed history of persecution but still be found to be at risk of being persecuted in the future.¹⁰

¹ The Refugee Legal Centre has produced a useful training document: ‘Issues arising from “credibility”, procedure and evidence before the appellate authorities’ containing references to Canadian, US, New Zealand and Australian case law to supplement that of the UK courts. See further Catriona Jarvis *The Judge as Juror revisited* [2003] Immigration Law Digest (Winter) p 7; Amanda Weston *A Witness of Truth – Credibility Findings in Asylum Appeals* (1998) INLP, vol 12, No 3; Dr Stuart Turner *Discrepancies and Delays in Histories Presented by asylum seekers: Implications for Assessment, Traumatic Stress Clinic*, 18 Dec/1996; Herlihy et al ‘Discrepancies in autobiographical memories: implications for assessment of asylum claims’, *BMJ* 2002, 324–7 (available on BMJ website); Regina Graycar *The Gender of Judgments: An Introduction*, in *Feminist Legal debates*, ed

- Margaret Thornton, OUP 1995; Professor Patricia J Williams *The Obliging Shell (An informal Essay on Formal Equal Opportunity)* in After Identity, ed. Danielson and Engle, Routledge 1995; Sir Thomas Bingham *The Judge as Juror: Judicial Determination of Factual Issues 1985 Current Legal problems*; and the Canadian Guidelines, below.
- ² The Immigration and Refugee Board has produced a useful guide 'Assessment of credibility in the context of CRDD hearings' (October 1999), setting out all relevant Federal Court of Appeal decisions on various aspects of credibility. It is available on the Immigration and Refugee Board website www.irb.gc.ca.
- ³ *Maldonado v Canada (Minister of Employment and Immigration)* [1980] 2 FC 302, CA, cited in Hathaway 12.22 fn 2 above, p 84.
- ⁴ *Attakora (Benjamin) v Minister of Employment and Immigration*, FCA Decision A-1091-87, 19 May 1989, cited in Hathaway above, p 85. The UN Committee Against Torture has made the same point, saying that 'complete accuracy is not to be expected from victims of torture', in *Alan v Switzerland* [1997] INLR 29. And in *Hrickova* (00TH 02034) (9 August 2000, unreported), IAT, inconsistencies in the account of a Slovak Roma of stabbing and gang rape were 'properly explained by the nature of human recollection, particularly dealing with traumatic incidents'.
- ⁵ See cases cited at 18.135ff below.
- ⁶ Hathaway above, pp 84-88; *Re SA*, NZRSAA 1/92 (NZ); *Matter of SMJ* Interim Decision 3303 (BIA) 1997 (US); *Kopalapillai v Minister for Immigration and Multicultural Affairs* [1997] 1510 FCA (24 December 1997) (Aus).
- ⁷ *R (on the application of Ngrincuti) v Secretary of State for the Home Department* [2008] EWHC 1952 (Admin).
- ⁸ *Chiver* (10758); see also *Guo v Minister for Immigration and Ethnic Affairs* (1996) 64 FRC 151 at 194, a decision of the full court of the Federal Court of Australia. Elevation of peripheral matters into matters of determinative weight was held unlawful in *R (on the application of Choudrey) v Immigration Appeal Tribunal* [2001] EWHC Admin 613, [2001] All ER (D) 04 (Aug).
- ⁹ API on 'Assessing the Asylum Claim', section 11.
- ¹⁰ *Daoud v Secretary of State for the Home Department* [2005] EWCA Civ 755, [2005] All ER (D) 259 (May).

12.174 Section 8 of the AI(TC)A 2004 lists various behaviours which must be taken into account as potentially¹ damaging the claimant's credibility. These include:

- (i) behaviour which the deciding authority² thinks is designed or likely³ to conceal information or to mislead, or to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant;⁴
- (ii) failure to take advantage of a reasonable opportunity to make an asylum or human rights claim⁵ while in a safe country;⁶
- (iii) failure to make an asylum or human rights claim before notification of an immigration decision (unless the claim relies wholly on matters arising after the notification);⁷
- (iv) failure to make an asylum or human rights claim before arrest under an immigration provision (unless there was no reasonable opportunity to do so or the claim relies wholly on matters arising since the arrest).⁸

Failure without reasonable explanation to produce a passport on request to an immigration officer or to the Secretary of State, the production of a document which is not a valid passport as if it were, the destruction, alteration or disposal, without reasonable explanation, of a passport, ticket or other document connected with travel, and failure without reasonable explanation to answer a question asked by a deciding authority, are to be treated as designed or likely to conceal information or to mislead.⁹

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- ¹ *JT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA Civ 878, [2008] All ER (D) 348 (Jul).
- ² I.e., an immigration officer, the Secretary of State, the AIT (or, before the coming into force of s 26 of the Act, the adjudicator or Immigration Appeal Tribunal), or the SIAC: s 8(7). The section came into force on 1 January 2005: SI 2004/3398. A determination which fails to indicate that the Tribunal has had regard to the statutory matters would be vulnerable to setting aside for error of law, although the weight to be attached to them is clearly for the Tribunal to assess.
- ³ This formulation is on its face objectionable, since behaviour not designed to deceive, mislead or obstruct, but merely having that effect, should not affect the credibility of the actor. We suggest that the section must be read subject to exceptions on reasonable grounds, in order to be compatible with basic requirements of fairness. See fn 1 above.
- ⁴ AI(TC)A 2004, s 8(2).
- ⁵ As defined by the Nationality, Immigration and Asylum Act 2002, s 113(1): AI(TC)A 2004, s 8(7).
- ⁶ I.e., in a country of transit: AI(TC)A 2004, s 8(4). In *Ozmico* [2002] UKIAT 00484, the Tribunal held that failure to claim in any safe country passed through in the back of a lorry was not a realistic credibility point.
- ⁷ AI(TC)A 2004, s 8(5). An 'immigration decision' means refusal or grant of leave to enter or remain in the UK, a decision to remove the claimant under the Immigration and Asylum Act 1999 s 10 (persons unlawfully in the UK) or the Immigration Act 1971, Sch 2, paras 8–12 (persons refused leave to enter, illegal entrants, and their family members), a decision to make a deportation order or an extradition decision: s 8(7). 'Notification' is defined in the Immigration (Claimant's Credibility) Regulations 2004, SI 2004/3263 to include decisions given orally or by email, by hand or by fax, and provides that notification which would not be valid under the Notices Regulations is valid for the purposes of s 8(5). The Regulations also contain presumptions about receipt of notice which is posted or sent to a representative. It is hard to relate these provisions rationally to claimants' credibility.
- ⁸ AI(TC)A 2004, s 8(6). An 'immigration provision' means the Immigration Act 1971, ss 28A–28CA (immigration offences), Sch 2, para 17 (control of entry), s 14 of the 2004 Act (immigration officers' powers of arrest for offences of fraud etc) and the Extradition Act 1989: AI(TC)A 2004, s 8(7).
- ⁹ AI(TC)A 2004, s 8(3). A passport is valid if it relates to the person producing it, has not been altered except by or with the permission of the issuing authority, and was not obtained by deception: AI(TC)A 2004, s 8(8). In the asylum context, it can be extremely dangerous to treat the production of a passport obtained by deception as damaging the credibility of the person producing it, which reinforces the suggestion that the provision must be read as subject to a general exonerating clause on reasonable grounds.

Fresh claims for asylum

12.177 A person who has previously been refused asylum in the UK or has withdrawn his or her claim for asylum¹ will not normally have an appeal against refusal of a second application. Acquisition of such an appeal depends upon the making of an immigration decision to which the Nationality, Immigration and Asylum Act 2002, s 92 applies. There are a number of situations in which that may happen:

- (i) an immigration decision of a kind that attracts an in-country appeal is made against the individual, for example, a refusal to vary leave or a variation of leave having the consequence that the person has no leave or a decision to make a deportation order;
- (ii) under the Immigration Rules, the second application may be accepted as a fresh claim for asylum, as opposed to further representations on the old claim, in order to generate a further right of appeal.² Where an asylum applicant has previously been refused asylum in the UK, the Secretary of State will decide whether further representations should

result in a grant of asylum or leave in some other capacity and if not, whether they should be treated as a fresh claim for asylum. A person who has made further representations will not be removed from the UK before the Secretary of State has considered whether to accept a fresh claim for asylum.³ Representations will be treated as a fresh claim if they are significantly different from the material that has previously been considered. The rule indicates that submissions will only be significantly different if the content has not already been considered, and taken together with the previously considered material, it creates a realistic prospect of success, notwithstanding its rejection.⁴ A reasons for refusal letter will always be given if asylum is not granted and written reasons for not accepting a fresh claim must be given;⁵ if the Secretary of State accepts that a fresh claim has been made, a new, appealable immigration decision will be made.⁶ It is for the Secretary of State to decide if a fresh claim has been made, subject to Wednesbury review.⁷ On an application for judicial review of a refusal by the Secretary of State to accept a fresh claim, the court will first consider whether the Secretary of State has asked himself the correct question which is not whether the Secretary of State thinks that the claim should succeed but whether there is a realistic prospect that a Tribunal, giving anxious scrutiny to the claim, might find in the applicant's favour.⁸ In addressing that question, the court must be satisfied that the Secretary of State has satisfied the requirement of anxious scrutiny in evaluating the facts and drawing legal conclusions from them.⁹ The decision of the majority of the House of Lords in *ZT (Kosovo) v Secretary of State for the Home Department*¹⁰ means that an even higher standard of review is required (at least where the primary facts are not in dispute)¹¹ than that allowed for by the Court of Appeal in *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* and described in the preceding sentences of the main text. The Court has to ask itself the same question as the Secretary of State – is the claim clearly unfounded? If it answers 'no' then it must find the Secretary of State's conclusion to the contrary irrational; there is no scope for the Court to reach the conclusion that the claim has a realistic prospect of success but that the Secretary of State could rationally conclude that it did not.¹² Some authorities suggest that where evidence of a relevant and substantial change in circumstances, or new evidence is advanced which could not reasonably have been advanced earlier, the Secretary of State is obliged to entertain the new claim, whatever the reasons for rejecting the previous one, unless the new evidence is not credible or is not capable of producing a different outcome.¹³ Cases under the old fresh claims provisions continue to be relevant. They indicate that the new evidence would need to have an important influence on the result of the case, although it need not be decisive, and it must be apparently credible, although it need not be incontrovertible.¹⁴ The fact that the person making the fresh claim has previously been disbelieved by an immigration judge does not by itself mean that everything put forward thereafter must equally be disbelieved.¹⁵ The requirement that the claim be 'sufficiently different' from the old one does not require a change in the factual basis of the application; convincing fresh evidence of the

same persecution previously alleged is capable of giving rise to a fresh claim,¹⁶ since it will amount to 'content which has not already been considered'. The rule, unlike its predecessor, does not specify that the new material should have been previously unavailable.¹⁷ The same criteria have been applied to second human rights claims¹⁸ and will be applied to claims for humanitarian protection made after refusal of asylum.¹⁹ The Court of Appeal has said that 'by restricting the remedial route of an appellant both within the AIT and to the Court of Appeal to legal error, Parliament has increased the burden on the Secretary of State to give the most careful consideration to fresh claims'.²⁰

- (iii) If the decision on the asylum application was taken before 2 October 2000 (when the statutory provisions enabling human rights to be raised in an appeal came into force) the person would not have been able to rely on human rights grounds in any appeal that he or she may have had.²¹ The Secretary of State undertook, in such cases, not to apply para 353 of the Immigration Rules and to accept a human rights claim so as to enable the person to bring an appeal on human rights grounds.²²
- (iv) The Secretary of State has a policy as to when fairness requires a subsequent application to trigger further appeal rights even where the application is not regarded as a fresh one. It includes previous loss of appeal rights by error or a serious miscarriage in procedure.²³ The policy may be prayed in aid where there is no change in the nature of the application or the evidence adduced, but where it would be unjust not to give the applicant an opportunity to appeal. A request for the Secretary of State to issue a fresh refusal to give rise to a fresh appeal on *Kazmi* grounds should be made promptly after the claimed miscarriage of procedure.²⁴ The case law on s 21 of the Immigration Act 1971, now repealed, is also relevant. This allowed the Secretary of State to refer a dismissed appeal back to the appellate authority for an advisory opinion in certain circumstances.²⁵ If the statutory appeal route had failed because of an adverse decision following a full hearing or because the applicant had taken a calculated risk in not attending, nothing short of potentially decisive evidence, reasonably capable of acceptance, would be required to prompt further consideration of the claim. Where, however, it had or may have failed because of lack of notice for which the applicant bore no personal or imputed blame, that was a relevant, though not a decisive, consideration for the Secretary of State in deciding whether to exercise the power.²⁶
- (v) where an unaccompanied asylum-seeking child who was refused asylum but granted discretionary leave pursuant to the policy relating to such children, makes an application for further leave to remain on reaching 18, the application will be treated as an asylum and human rights claim without having to satisfy the 'fresh claim' rule;²⁷
- (vi) a person refused asylum but granted leave in some other capacity will be able to appeal, if at all, on asylum grounds only (under the Nationality, Immigration and Asylum Act 2002, s 83 if the grant was for more than a year). If such a person then makes human rights submissions, the fresh claim rule should not be applied to the human rights submissions;²⁸

- (vii) Even if the Secretary of State does not accept further representations as amounting to a fresh claim, there are circumstances where she is nevertheless required to make a further immigration decision against which an appeal may be brought. For example, if an asylum seeker leaves the UK after having been refused asylum and then returns to the UK and makes a further asylum claim, para 353 of the Rules will be applied to determine whether to accept a fresh claim.²⁹ Even if such a claim is not accepted, he or she would not be removeable from the UK until after being refused leave to enter or until a decision was made to give directions for the person's removal as an illegal entrant, each of which is an appealable decision.³⁰ Another example is that a person against whom a deportation order has been made may apply for the deportation order to be revoked (even before deportation has occurred); a refusal to revoke a deportation order is an appealable decision.³¹ According to the API³² there would be no in country right of appeal against such decisions if the Secretary of State did not accept that a fresh asylum claim had been made. However, the Court of Appeal has now held that an asylum or human rights claim need not be accepted by the Secretary of State as being a fresh claim for the appeal against the immigration decision to be in-country.³³
- (viii) The Secretary of State may accept a fresh claim for asylum but issue a certificate under Nationality, Immigration and Asylum Act 2002, s 96 on the ground that the claim relates to a matter that could have been raised in a previous appeal. According to the API,³⁴ there is a 'strong presumption' in favour of such certification in a 'non-compliance case' where the applicant produces material in support of an asylum claim only after appeal rights in respect of the original claim are exhausted. There is also a 'strong presumption' in favour of such certification if a person who applied for asylum in one identity makes another claim for asylum which is accepted as a fresh claim because significantly different from the first.³⁵ If a fresh claim is accepted on humanitarian protection grounds, the Secretary of State will also consider certifying the claim.³⁶

¹ HC 395, para 353 as amended so as to apply 'when a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules'.

² Unless and until the Secretary of State accepts the application as a fresh claim, no decision falls within the section and no right of appeal arises: *R v Immigration Appellate Authority, ex p Secretary of State for the Home Department* [1998] Imm AR 52. Nor is NASS support available until it has been accepted as a fresh claim: see chapter 13. IAN 2006, s 12, when it comes into force will introduce a new definition of 'asylum claim' for the purpose of the appeals provisions. It makes provision for subsequent asylum claims (and human rights claims) to be disregarded in accordance with the Immigration Rules, thereby giving statutory expression to the long established practice.

³ HC 395, para 353A.

⁴ HC 395, para 353, inserted by HC 1112 on 18 October 2004. The rule replaces para 346, deleted by HC 1112. The case of *R v Secretary of State for the Home Department, ex p Onibiyo* [1996] Imm AR 370, CA established that a second asylum claim could be made following the rejection of an earlier one, according to the test of 'a reasonable prospect that a favourable view could be taken of the new claim'.

⁵ API 'Further representations and fresh claims' (updated, accessed 17 October 2007), section 1.1 and 6.1.

⁶ API 'Further representations and fresh claims', section 5.

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- ⁷ *R v Secretary of State for the Home Department, ex p Ravichandran* (No 3) [1997] Imm AR 74; *Cakabay v Secretary of State for the Home Department* (No 3) [1999] Imm AR 176, [1998] INLR 623, CA; *R v Secretary of State for the Home Department, ex p Bell* [2000] Imm AR 396.
- ⁸ *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, (2006) Times, 1 December. In *AK (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 535 the Secretary of State made the error of assessing the credibility and potential impact of new evidence from his own point of view only without addressing the question how an immigration judge might assess the evidence. See *TR (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 1549: 'there is in reality not a great deal of room for deference in the judicial exercise. The primary question for the Court is whether, whatever the Secretary of State thinks of it, there is a fresh claim capable of succeeding before an Immigration Judge'.
- ⁹ *WM (Democratic Republic of Congo) v Secretary of State for the Home Department*.
- ¹⁰ [2009] UKHL 6, [2009] 1 WLR 348, Lords Phillips, Brown and Neuberger (although Lord Neuberger qualified his agreement with Lord Phillips on that issue by saying he would be reluctant to suggest a hard and fast rule to that effect).
- ¹¹ Lord Phillips, para 23 'where, as here, there is no dispute of primary fact' and Lord Neuberger, para 83 'in a case where the primary facts are not in dispute'. Lord Brown entered no such caveat in his own analysis of the Court's role in judicial review in this context but did express agreement with para 23 of Lord Phillips's opinion.
- ¹² The Court of Appeal in *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, (2006) Times, 1 December had held that the requirement of judicial deference to the statutorily assigned decision maker meant that such an outcome was possible.
- ¹³ *R v Secretary of State for the Home Department, ex p Habibi* [1997] Imm AR 391, QBD.
- ¹⁴ *R v Secretary of State for the Home Department, ex p Boybeyi* [1997] Imm AR 491, [1997] INLR 130, CA.
- ¹⁵ *R (on the application of Naseer) v Secretary of State for the Home Department* [2006] EWHC 1671 (Admin), [2006] All ER (D) 227 (Jun) (Collins J). This is clearly recognised in the API, Further representations and fresh claims', section 3.
- ¹⁶ *R v Secretary of State for the Home Department, ex p Ravichandran* (No 2) [1996] Imm AR 418; *Ward v Secretary of State for the Home Department* [1997] Imm AR 236; *R (on the application of Senkoy) v Secretary of State for the Home Department* [2001] EWCA Civ 328.
- ¹⁷ The courts might imply such a condition, although it would need to be applied carefully, so as not to defeat good claims. Failure to adduce evidence earlier may be relevant in relation to certification of claims under s 96, for which see below. The failure of advisers to obtain evidence earlier does not make that evidence 'previously unavailable'; *Kabala v Secretary of State for the Home Department* [1997] Imm AR 517, CA, but evidence was not 'available' if the giver of it was physically or psychologically unable to give it: *R v Secretary of State for the Home Department, ex p Ejon* [1998] INLR 195 (traumatised rape victim); cf *R v Secretary of State for the Home Department, ex p Khan (Saleem)* (CO 647/1999) (17 May 1999, unreported), QBD (evidence of the applicant's homosexuality was 'previously available' despite the taboo in Muslim society preventing disclosure to family members who were helping him on his first claim); see also *R (on the application of Maci) v Secretary of State for the Home Department* [2003] EWHC 1123 Admin.
- ¹⁸ Jackson J in *R (on the application of Ratnam) (Savasoba) v Secretary of State* [2003] EWHC 398 Admin held that although the relevant rule (then HC 395, para 346) applied only to asylum applications, the same principles should be applied by analogy to a fresh claim based on human rights issues. See also *Djebbar v Secretary of State for the Home Department* [2004] EWCA Civ 804, [2004] 33 LS Gaz R 36.
- ¹⁹ API 'Humanitarian Protection' October 2006, para 6. According to the API, even if asylum was refused before 9 October 2006 (when the present humanitarian protection regime was instituted) or before April 2003 (when humanitarian protection did not exist) the applicant would have been able to raise and have considered in the context of a human rights claim all of the issues relevant humanitarian protection. We consider (for reasons explained below) that at least in respect of its provision for those at risk of serious harm in a situation of armed conflict there are matters which would not have been considered under the pre 9.10.2006 asylum and human rights regime.
- ²⁰ *Kaydanyuk v Secretary of State for the Home Department* [2006] EWCA Civ 368, [2006] All ER (D) 26 (Apr).

- ²¹ *Paredeepan v Secretary of State for the Home Department* [2002] INLR 447
- ²² API 'Further representations and fresh claims', section 9. Although this would not apply if the human rights issue had in fact been considered in the earlier appeal or if there were findings of 'basic fact' in the asylum appeal against the person and on which the human rights claim depended.
- ²³ Home Office letter, 22 July 1994, cited in *R v Secretary of State for the Home Department, ex p Kazmi* [1995] Imm AR 73.
- ²⁴ *R v Secretary of State for the Home Department, ex p Kone* [1998] Imm AR 291.
- ²⁵ See *R v Secretary of State for the Home Department, ex p Bello* [1995] Imm AR 537, QBD; *Kbaldoun v Secretary of State for the Home Department* [1996] Imm AR 200, CA.
- ²⁶ *R v Secretary of State for the Home Department, ex p Yousaf, Jamil* [2000] INLR 432, CA.
- ²⁷ API 'Considering applications for further leave (at age 17 and a half) following grants of discretionary leave under the policy on unaccompanied asylum seeking children (active review)'.
- ²⁸ API 'Further submissions'. Inconsistently with the principle animating that part of the policy (that an individual should have at least one opportunity to appeal), the API goes on to say that para 353 of the Rules should be applied to further submissions made by a person refused asylum but granted leave to remain for a year or less at least to the extent that the Secretary of State should be satisfied that an appeal would have a realistic prospect of success.
- ²⁹ API 'Further representations and fresh claims', section 4.
- ³⁰ Under the Nationality, Immigration and Asylum Act 2002, s 82(2)(a) in the case of refusal of leave to enter and s 82(2)(h) in respect of a decision to give removal directions in respect of an illegal entrant.
- ³¹ Nationality, Immigration and Asylum Act 2002, s 82(2)(k).
- ³² API 'Further representations and fresh claims'.
- ³³ *R (on the application of BA (Nigeria)) v Secretary of State for the Home Department* [2009] EWCA Civ 119, 153 Sol Jo (no 7) 32.
- ³⁴ Further representations and fresh claims
- ³⁵ API 'Further representations and fresh claims'.
- ³⁶ API 'Humanitarian Protection' October 2006, section 6.1.

Refugee leave

12.179 An application for refugee status in the UK is pursued in the context of the statutory provisions for the grant or variation of leave to enter and remain in accordance with the practice laid down in the Immigration Rules.¹ The Immigration Rules provide for the grant of asylum to a person in the UK who is a refugee and in respect of whom there are no reasonable grounds for regarding him or her as a danger to the security of the UK, who is not as a consequence of having been convicted of a particularly serious crime a danger to the community of the UK and who, if refused asylum would be required to go to a country in which his or her life or freedom would be threatened for a Refugee Convention reason.² The Rules further provide that where asylum is granted, a person who does not already have leave to enter will be given such leave³ and for the variation of leave which a person already has or the grant of leave to remain to a person who entered without leave.⁴ However, whilst a person who is exempt from immigration control⁵ can apply for asylum and be recognised as a refugee, they cannot be granted (or refused) leave to enter or remain for as long as they remain exempt.⁶ Where concurrent applications are made for refugee status and for leave to enter or remain in some other capacity, current policy states that the asylum claim should be considered first and asylum granted if the applicant qualifies; if he or she does not, consideration should then be given to the Rules-based application, then to humanitarian protection and finally to discretionary leave.⁷ Those recognised as refugees on

or after 30 August 2005 are normally granted five years' leave to enter or remain rather than indefinite leave as previously.⁸ However, 'the specific situation of a vulnerable person with special need' may result in a grant of a longer period of leave.⁹ There is no statutory provision as to how quickly leave should be granted once refugee status is recognised (whether by the Secretary of State or by the Tribunal upon a claimant succeeding in an appeal) but it must be done within a reasonable period which would be 28 days absent complicating factors.¹⁰ The Secretary of State is required to issue a UK Residence Permit, valid for five years and renewable thereafter, as soon as possible following a grant of asylum.¹¹ At the end of five years, the refugee will be eligible to apply for indefinite leave to remain, subject to any review of his or her status and to any policies then applicable, including the likely introduction of a requirement to pass 'English language and knowledge of British life tests'.¹² If a person makes an 'in-time' application for indefinite leave to remain, the Secretary of State would not normally have to determine whether the person is still a refugee as long as a review should not have been triggered because of information about the person's conduct or a ministerial statement relating to a change of circumstances in the country of origin.¹³ An 'out of time' application for indefinite leave to remain will lead to a review of whether an cessation clause is applicable.¹⁴

¹ *Saad, Diriye and Osorio v Secretary of State for the Home Department* [2001] EWCA Civ 2008, referring to the Immigration Act 1971, s 3.

² HC 395, para 334.

³ HC 395, para 330.

⁴ HC 395, para 335.

⁵ Under the Immigration Act 1971, s 8(2)(3) and (4) and the Immigration (Exemption from Control) Order 1972, SI 1972/1613.

⁶ API 'People who are exempt from immigration control' October 2006, para 3.

⁷ Guidance for Asylum Team Case Owners 'Processing Hybrid Applications', updated (accessed on the IND website, 17 October 2007). See also API 'Refugee leave' October 2006.

⁸ The change of policy was foreshadowed in the White Paper 'Controlling our Borders: Making migration work for Britain', February 2005 and set out in a written Ministerial Statement by Tony McNulty on 19 July 2005. An IND Guidance Note 'Changes to Refugee Leave and Humanitarian Protection from 30 August 2005' was issued on 25 August 2005. It stated that regardless of when the decision to grant leave was taken, grants made after 30 August 2005 would be for five years, not indefinite save where the Home Office had previously undertaken to grant indefinite leave or there had been significant delay in actioning an appeal which was out of step with other appeals of a similar nature, for reasons attributable to the Home Office and resulted in leave being granted after 30 August 2005. In *R (Rechachi, Kalobi, Fodil and Yusuf) v Secretary of State for the Home Department* [2006] EWHC 3513 Admin Davies J held that this change of policy was lawful and that claimants who won appeals on asylum grounds before 30 August 2005 did not thereby have a legitimate expectation of being granted indefinite leave in accordance with the then applicable policy.

⁹ API 'Refugee Leave', as amended. The aim is to give effect to Art 20(3) of the Qualification Directive (Council Directive 2004/83/EC) which requires states to 'take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence'.

¹⁰ *R (on the application of Rechachi, Kalobi, Fadil and Yusuf) v Secretary of State for the Home Department* following *Arbab v Secretary of State for the Home Department* [2002] EWHC 1249 Admin. See also *R v Secretary of State for the Home Department, ex p Mersin* [2000] INLR 511 and *R (on the application of Mambakasa) v Secretary of State for the Home Department* [2003] EWHC 319 Admin.

¹¹ HC 395, para 339Q.

¹² API 'Refugee leave' October 2006, section 8.1.

¹³ API 'Refugee leave' October 2006, section 7.1.

¹⁴ API 'Refugee leave' October 2006, section 7.2.

12.180 This paragraph and the next three paragraphs in the main text describe the UK's policy with regard to the withdrawal of refugee status and do so by reference to the Asylum Policy Instruction 'Cessation, cancellation and revocation of refugee status'. That instruction has been rewritten¹ but is substantially similar in effect to that described in the main text; it should be consulted for the detail of current policy. It is worth highlighting one novelty in the new Instruction which says "Where a situation arises where a former refugee who has been naturalised is found to have obtained refugee status by deception and thus fall within the cancellation provisions or where they have engaged in conduct which would have brought them within the scope of the exclusion clauses, then UKBA may review that person's continuing entitlement to British Citizenship". The grant of asylum may be reviewed during the initial period of five years (in consequence of information about the conduct of the individual or a change of circumstances in the country of origin) or when the person applies for indefinite leave to remain or on the expiry of the five year period.² Such a review may result in asylum being revoked or not renewed³ if the Secretary of State is satisfied that the person's refugee status has ceased⁴ or the person should have been⁵ or is to be excluded from being a refugee⁶ or the use of deception was decisive for the grant of asylum⁷ or there are reasonable grounds for regarding the person as a danger to the security of the UK⁸ or the person, having been convicted of a particularly serious crime constitutes a danger to the community of the UK.⁹ Immigration officers are instructed to inform the IND if a refugee is found to have travelled on his or her national passport or to have returned to the country of feared persecution¹⁰ and entry clearance officers are instructed to inform IND if a refugee applies for a returning resident's visa in circumstances that may indicate reavailment of protection.¹¹ Asylum will not normally be revoked on the 'voluntary cessation grounds' (reavailment of protection; reacquisition of nationality; acquisition of another nationality or re-establishment in the country of feared persecution) if it was granted over five years previously unless there are exceptional circumstances.¹² Revocation of refugee status on the ground of a change of circumstances in the country from which asylum was sought is normally done only when a Ministerial Statement has been issued announcing that significant and non-temporary changes have occurred in the country as a whole, in a particular part of the country or in relation to a specific category of refugees.¹³ Prior consultation with UNHCR is necessary before such a statement is made.¹⁴ If a Ministerial Statement is made, the refugee status of all those falling within the scope of the statement and who were granted limited leave five years or less prior to the Statement being made will be reviewed on a case-by-case basis to determine whether the cessation provision applies.¹⁵ A refugee with indefinite leave or who was granted limited leave over five years previously would not have refugee status revoked on grounds of a change of circumstances in the country of origin unless there were 'exceptional circumstances'.¹⁶

¹ Operational Policy and Process Policy, Guidance and Casework Instruction: 'Cancellation, Cessation and Revocation of Refugee Status', 18 December 2008.

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- ² API 'Refugee leave' October 2006, section 4.
- ³ HC 395, para 339A. The APIs ('Cessation, cancellation and revocation of refugee status' October 2006 and 'Refugee leave', October 2006) refer to 'cessation of refugee status' (where the individual ceases to be a refugee owing to a change in country conditions or in the individual's own circumstances), 'cancellation of refugee status' (where circumstances come to light that indicate that the person should not have been recognised as a refugee in the first place) and 'revocation of refugee status' (where the seriousness of a refugee's subsequent conduct warrants revocation of status). The rules use only the single term, referring to asylum being 'revoked', in all of these situations.
- ⁴ HC 395 para 339A(i)–(vi) which broadly reflect the cessation clauses in Article 1C(1)–(6) of the Refugee Convention. Under these provisions of the rules asylum is to be revoked or not renewed if the person voluntarily reavails him or herself of the protection of the country of nationality; voluntarily reacquires a lost nationality; acquires a new nationality and enjoys the protection of the country of the new nationality; voluntarily re-establishes him or herself in the country of feared persecution or can no longer refuse to avail him or herself of the protection of the country of nationality or (in the case of stateless refugees) refuse to return to the country of former habitual residence because the circumstances in connection with which the person was recognised as a refugee have ceased to exist.
- ⁵ The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* at para 117 and 141 acknowledge that refugee status may be cancelled if information comes to light indicating that an individual should have been excluded.
- ⁶ HC 395, para 339A(vii) referring to exclusion in accordance with reg 7 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525 which provides that a person is not a refugee if he or she falls within the scope of Article 1D (exclusion of persons receiving protection or assistance from other UN organs or agencies), Article 1E (exclusion of persons recognised by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to possession of nationality of that country) or Article 1F (exclusion of persons in respect of whom there are serious reasons to consider that they have committed a crime against peace, war crimes, crimes against humanity, a serious non-political crime or acts contrary to the purposes and principles of the UN) of the Refugee Convention.
- ⁷ HC 395, para 339A(viii). The Refugee Convention makes not such provision but the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, para 117 envisages the cancellation of refugee status in such circumstances.
- ⁸ HC 395, para 339A(ix), reflecting Article 33(2) of the Refugee Convention and Article 21(2)(a) of the Qualification Directive.
- ⁹ HC 395, para 339A(ix), reflecting Article 33(2) of the Refugee Convention and Article 21(2)(b) of the Qualification Directive.
- ¹⁰ API 'Cessation, cancellation and revocation of refugee status' October 2006, section 3.6.
- ¹¹ API 'Cessation, cancellation and revocation of refugee status' October 2006, section 3.7.
- ¹² API 'Cessation, cancellation and revocation of refugee status' October 2006, section 2.1.
- ¹³ API 'Cessation, cancellation and revocation of refugee status' October 2006, section 2.1.
- ¹⁴ API 'Refugee leave' October 2006, section 6.
- ¹⁵ API 'Refugee leave', October 2006, section 6.
- ¹⁶ API 'Cessation, cancellation and revocation of refugee status' October 2006, section 2.1 (articles 1C(5) and (6) not normally applied to refugees with ILR) and API 'Refugee leave', section 6 for the requirement that limited leave was granted within the five years prior to the statement.

12.184 The Home Office's policy is that 'every effort should be made' to remove a person to whom Art 1F or Art 33(2) of the Convention applies¹ but that if such removal is not possible, eg because it would result in a breach of the person's human rights, discretionary leave for six months should normally be granted.² However, there are provisions in the Criminal Justice and Immigration Act which will, if and when brought into force create a 'special immigration status' which the Secretary of State may impose on such persons.³ The Secretary of State may designate a person for 'special immigration status' if the person is a 'foreign criminal' or a member of the family of a 'foreign criminal'.⁴ 'Family' includes a person's spouse or civil partner and children

under the age of 18.⁵ A person may not be designated if he or she has the right of abode in the UK⁶ or the effect of such designation would breach the UK's obligations under the Refugee Convention or the person's rights under the Community treaties.⁷ A 'foreign criminal' is a non-British person who has been convicted of a 'particularly serious crime' within the meaning of Art 33(2) of the Refugee Convention as construed by the Nationality, Immigration and Asylum Act 2002, s 72⁸ or a person to whom Art 1F of the Refugee Convention applies.⁹ A designated person does not have leave to enter or remain in the UK¹⁰ although, whilst subject to immigration control¹¹ is not in the UK in breach of the immigration laws.¹² It is not clear what effect designation is to have on leave to enter or remain that a person has at the time of being designated. If its effect is to bring to an end any such leave, then designation would be an 'immigration decision' (variation of a person's leave to enter or remain in the UK if when the variation takes effect the person has no leave to enter or remain)¹³ against which the person may appeal to the Asylum and Immigration Tribunal.¹⁴ Time spent in the UK as a designated person cannot be relied on in relation to an application for naturalisation in the UK.¹⁵ Conditions may be imposed on a designated person by the Secretary of State or an immigration officer relating to residence, employment or occupation or reporting to the police, the Secretary of State or an immigration officer¹⁶ and may include electronic monitoring.¹⁷ Non-compliance with a condition is an offence punishable by a fine and imprisonment of up to 51 weeks.¹⁸ It is likely that imposition of any (save perhaps the lightest of) conditions would breach the UK's obligations under the Refugee Convention; a person to whom Art 33(2) applies may not claim the benefit of Art 33 of the Convention (prohibition on *refoulement*) but for as long as he or she remains in the UK is entitled to the benefit of the other provisions of the Convention (relating, for example, to freedom of movement;¹⁹ employment²⁰ and self-employment²¹). A person subject to 'special immigration status' may be supported by the Secretary of State under a modified asylum support regime.²² Designation 'lapses' if the person is granted leave to enter or remain, is notified by the Secretary of State or an immigration officer of a right of residence under the Community treaties, leaves the UK or is made the subject of a deportation order.²³

¹ API 'Article 1F and 33(2) of the 1951 Refugee Convention' October 2006, section 11.

² API 'Discretionary leave' (undated).

³ Criminal Justice and Immigration Act 2008, Pt 10.

⁴ Criminal Justice and Immigration Act 2008, s 130.

⁵ Criminal Justice and Immigration Act 2008, s 137(3).

⁶ Criminal Justice and Immigration Act 2008, s 130(4).

⁷ Criminal Justice and Immigration Act 2008, s 130(5).

⁸ *I.e.* conviction in the UK and sentence to at least two years' imprisonment; conviction outside the UK and sentence to at least two years' imprisonment if the person could have been convicted and sentenced to two or more years in prison for a similar offence if convicted in the UK; conviction in the UK of an offence specified by order of the Secretary of State (presently, the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004, SI 2004/1910) or conviction outside the UK for an offence which the Secretary of State certifies as being similar to such an offence.

⁹ Criminal Justice and Immigration Act 2008, s 131.

¹⁰ Criminal Justice and Immigration Act 2008, s 132(1).

¹¹ Criminal Justice and Immigration Act 2008, s 132(2)(a).

¹² Criminal Justice and Immigration Act 2008, s 132(2)(c).

¹³ Nationality, Immigration and Asylum Act 2002, s 82(2)(e).

¹⁴ Nationality, Immigration and Asylum Act 2002, s 82(1).

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¹⁵ Criminal Justice and Immigration Act 2008, s 132(3).

¹⁶ Criminal Justice and Immigration Act 2008, s 133.

¹⁷ Criminal Justice and Immigration Act 2008, s 133(3) applying the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s 36.

¹⁸ Criminal Justice and Immigration Act 2008, s 133(5) and (6).

¹⁹ Article 26.

²⁰ Article 17.

²¹ Article 18.

²² Criminal Justice and Immigration Act 2008, ss 134, 135.

²³ Criminal Justice and Immigration Act 2008, s 136.

SUBSIDIARY PROTECTION AND HUMANITARIAN PROTECTION

12.186 The Qualification Directive creates a legal obligation on Member States to provide ‘subsidiary protection’ to third country nationals and stateless people who do not qualify as refugees but who face a real risk of suffering serious harm, who are not excluded from protection and to whom protection is not available in their home country.¹ Reference is made in this and the succeeding paragraphs in the main text to the Asylum Policy Instruction ‘Humanitarian Protection’. The Policy Instruction has been re-written but is substantially similar in effect to that described in the main text. Effect is given to this obligation in the UK by means of ‘humanitarian protection’.² Serious harm consists of the death penalty or execution, torture or inhuman or degrading treatment or punishment or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.³ The provisions of the Directive relating to assessment of facts and circumstances,⁴ international protection needs arising *sur place*,⁵ actors of persecution or serious harm,⁶ actors of protection⁷ and internal protection⁸ which are applicable to determination of refugee status also apply to the determination of entitlement to subsidiary protection. Eligibility for subsidiary protection ceases if there has been a significant, non-temporary change of circumstances of such a degree that protection is no longer required⁹ and in such circumstances, the Member State is obliged to revoke, end or refuse to renew the status.¹⁰ A person is excluded from subsidiary protection if he or she has committed a crime against peace, a war crime or a crime against humanity, a serious crime, has been guilty of acts contrary to the purposes and principles of the UN or constitutes a danger to the community or to the security of the Member State.¹¹ A person may be excluded from subsidiary protection if he or she committed one or more other crimes which would be punishable by imprisonment had they been committed in the Member State and the person left his or her country of origin solely to avoid sanctions resulting from those crimes.¹²

¹ Qualification Directive 2004, Arts 2(e) and 18.

² HC 395, paras 339C–339Q, as inserted by HC 6918, make provision for applications for subsidiary protection in the form of humanitarian protection.

³ Qualification Directive 2004, Art 15.

⁴ Qualification Directive 2004, Art 4.

⁵ Qualification Directive 2004, Art 5.

⁶ Qualification Directive 2004, Art 6.

⁷ Qualification Directive 2004, Art 7.

⁸ Qualification Directive 2004, Art 8.

⁹ Qualification Directive 2004, Art 16.

¹⁰ Qualification Directive 2004, Art 19(1).

¹¹ Qualification Directive 2004, Art 17.

¹² Qualification Directive 2004, Art 17(3).

12.188 From the 9 October 2006, the policy relating to ‘humanitarian protection’ was reformulated and incorporated into the Immigration Rules¹ as the means by which the UK complies with its obligation under European Community law² to provide ‘subsidiary protection’³ to certain people who do not qualify for refugee status. If a person does not qualify for refugee status consideration is to be given to whether he or she qualifies for humanitarian protection⁴ and if ineligible for humanitarian protection, whether the person may qualify for discretionary leave.⁵ Humanitarian protection is leave granted to a person who is in the UK, does not qualify for refugee status and in respect of whom substantial grounds have been shown for believing that he or she would face a real risk of suffering serious harm in the country of return.⁶ The person must also be unable or, owing to the risk, unwilling to avail him or herself of the protection of that country.⁷ Humanitarian protection will not be granted to a person who would face a real risk of serious harm if removed but who can make a voluntary return without such a risk.⁸ Serious harm is defined as the death penalty or execution,⁹ unlawful killing,¹⁰ torture or inhuman or degrading treatment or punishment of a person in the country of return¹¹ or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.¹² This last category of ‘serious harm’ is novel. Its application is limited to situations of armed conflict. A situation of armed conflict (international or internal) is a term of art in international humanitarian law, and exists when there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state and it continues even whilst no actual combat takes place until there is a peaceful settlement.¹³ According to the API the main effect of this category of serious harm is to clarify the instances in which Article 3 of the ECHR can be engaged in a situation of armed conflict and in accordance with the Strasbourg jurisprudence.¹⁴ We think this provision goes much further because it requires only a real risk of a ‘serious threat’ to life or person as opposed to the real risk of an actual violation of life or person that is needed to fall within the other categories. Whilst the threat must be individual we think that that means only that the applicant must demonstrate that he or she would be exposed to the requisite risk, not that the person faces a unique, differential or greater risk than others in a similar situation. Similar principles in relation to ‘sufficiency of protection’¹⁵ and internal relocation¹⁶ and ‘sur place’ claims¹⁷ apply to humanitarian protection as to Refugee Convention claims. Those granted humanitarian protection are given leave to enter or remain for five years in the first instance with an opportunity then to apply for settlement.¹⁸

¹ Cm 6918, inserting new paras 339C–339H into HC 395.

² The Qualification Directive, Art 38.

³ Defined in the Qualification Directive, Art 2(e).

⁴ HC 395, para 339C(ii) and API ‘Humanitarian protection’ October 2006, ‘Introduction’.

⁵ API ‘Humanitarian protection’ October 2006, Introduction and section 5. A person refused asylum but granted humanitarian protection is to be given a ‘reasons for refusal letter’ explaining why asylum has been refused. The letter should also make clear whether humanitarian protection was granted on grounds of fear of the authorities or of non-state

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agents because if the latter, the person would be expected to rely on a national passport and would not be issued with a Home Office travel document.

- ⁶ HC 395, para 339C(i)–(iii). The ‘country of return’ is said in the API ‘Humanitarian protection’, section 3 to mean a country or territory listed in paragraph 8(1)(c) of Schedule 2 to the Immigration Act 1971, i.e. a country of which the applicant is a national or citizen; a country or territory in which the applicant has obtained a passport or other identity document; a country or territory in which the applicant embarked for the UK or a country or territory to which there is reason to believe that the applicant will be admitted. This is not entirely consistent with the Qualification Directive which defines a person eligible for subsidiary protection by reference to return ‘to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence’ (Art 2(e)).
- ⁷ HC 395 para 339C(iii). The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525, reg 4 defines ‘actors of protection’ in the same way in relation to protection from persecution and serious harm. The discussion of ‘protection’ above in relation to refugee claims is equally applicable here.
- ⁸ API ‘Humanitarian protection’ October 2006, section 1.1. This would be consistent with *AA v Secretary of State for the Home Department* [2006] EWCA Civ 401 in the analogous Refugee Convention context.
- ⁹ HC 395, para 339C(i) reflecting protocols 6 and 13 to the ECHR.
- ¹⁰ HC 395, para 339C(ii) reflecting ECHR, Art 2 which is discussed further in chapter 8. By including ‘unlawful killing’ in the definition of serious harm the Immigration Rules go further than the Qualification Directive, which defines ‘serious harm’ in Art 15. The API on Humanitarian Protection says that ‘unlawful killing’ ‘would include a person who if returned to a war/conflict situation would face a real risk of being killed’. In some respects that provides wider protection than the specific provision in the Rules and the Qualification Directive relating to situations of international or internal armed conflict because the killing need not be by reason of ‘indiscriminate violence’.
- ¹¹ HC 395, para 339C(iii). This of course reflects Art 3 of ECHR as to which see chapter 8. However, the API makes the point that the treatment referred to is ‘in the country of return’ and so it would not apply to inhuman or degrading treatment in the UK where such treatment is a consequence of being removed. Moreover, the API considers that even if the impact of removal was sufficient to breach Art 3 because of its effect on a person’s medical condition or because of severe humanitarian conditions in the country of return (eg lack of food, water, shelter) the person would not thereby qualify under the rule but might qualify for discretionary leave.
- ¹² HC 395, para 339C(iv).
- ¹³ *Prosecutory v Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (1995) IT-94–1, Appeals Chamber of the International Criminal Tribunal for Yugoslavia.
- ¹⁴ API ‘Humanitarian protection’ October 2006, section 3.5, citing *Vilvarajah v United Kingdom* (1991) 14 EHRR 248 and *HLR v France* (1997) EHRR 29.
- ¹⁵ SI 2006/2525, reg 4.
- ¹⁶ HC 395, para 339O.
- ¹⁷ HC 395, para 339P.
- ¹⁸ API ‘Humanitarian protection’ October 2006, section 1.1.

12.188A Article 15(c) of the Qualification Directive¹ defines one kind of serious harm as ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’. This has been considered in detail by the Tribunal in three determinations,² the latter two agreeing with their predecessors. The Tribunal rejected the Secretary of State’s contention that Art 15(c) did not extend existing international protection obligations but merely codified them, particularly Arts 2 and 3 ECHR³ and the European Court of Justice subsequently confirmed that the content of Art 15(c) is different to Art 3 ECHR.⁴ However, the Tribunal has not satisfactorily identified the additional scope of the protection provided by Art 15(c) and the approach actually taken in its

decisions effectively leaves none. The Tribunal has also decided that international humanitarian law 'provides an objective framework for interpreting Art 15(c)'.⁵ An international or internal armed conflict exists where '(a) any difference between states leads to intervention of members of the armed forces ...; or (b) whenever there is a resort to armed force between states ...; or (c) whenever there is protracted armed violence between governmental authorities and armed groups or between such groups within a state'.⁶ Whether an internal armed conflict exists depends on there being⁷ 'parties' to the conflict; upon the parties having 'some degree of organisation' (emphasis being on the word 'some'; the requisite level of organisation can be inferred from indicia such as numbers of combatants; their capacity to mount attacks and to acquire and use numerous weapons of various types⁸); the conflict having a level of intensity higher than 'situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence, or other acts of a similar nature'; some degree of 'protraction' and other 'relevant factors' including whether the conflict has been formally considered of concern to the United Nations (eg as the subject of Security Council Resolutions) and any official views expressed by the International Committee of the Red Cross. 'Indiscriminate violence' is violence which fails to discriminate between military and civilian objects, either because of deliberate targeting of civilians or because of failure to take sufficient precautions to avoid civilian casualties when attacking a military object.⁹ The harm against which Art 15(c) protects is not limited to the direct infliction of violence and includes harm of which indiscriminate violence is the effective cause¹⁰ (eg the conditions endured in an IDP camp, assuming them to be sufficiently harmful, if the person is present in the camp 'by reason of' flight from indiscriminate violence). The Tribunal has construed 'life or person' very narrowly so as to exclude not only threats to moral and physical integrity¹¹ but inhuman and degrading treatment as well.¹² This results from the Tribunal relying exclusively on the prohibition of 'violence to life and person' in Common Article 3(1)(a) of the 1949 Geneva Conventions to construe 'threat to a civilian's life or person'. Had the Tribunal applied its own method of using international humanitarian law (rather than one part of one provision) as an interpretive framework it would, we think, have construed Art 15(c) as protecting against a broader range of violations of human rights including at least the rights to respect for moral and physical integrity.¹³ Article 15(c) protects against a threat of harm by contrast to Arts 15(a) and (b), which protect against the infliction of actual harm; the Tribunal has interpreted threat to mean a communicated intention to harm,¹⁴ rejecting the submission that threat referred to a likelihood of actual harm eventuating.¹⁵ The European Court of Justice in *Elgafaji* distinguishes between the protection provided by Arts 15 (a) and (b) from 'a particular type of harm' and that by Art 15(c) from 'a more general risk of harm'¹⁶ supporting the contention that 'threat' relates to 'risk' rather than 'communicated intention to harm'. 'Serious' refers to the cogency and credibility of the threat,¹⁷ not to the gravity of the harm threatened.¹⁸ The threat has to be 'individual' in the sense of affecting the applicant personally but that does not mean that it has to be directed solely at the person concerned or based on a completely personalised set of facts and it may indeed result from a general risk.¹⁹ If in a particular case the general risk is not sufficient then something more relating to the person's specific characteristics or profile or circumstances has to be

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shown.²⁰ The ECJ confirmed in *Elgafaji* that the requirement of an individual risk can, in an 'exceptional situation' be satisfied by the risk faced by a civilian merely by being present there. Otherwise, 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'.²¹ Article 3 of the ECHR may be breached by expulsion resulting in mere presence in an exceptional situation of generalised violence.²² Therefore, for Art 15(c) to provide protection over and above Art 3 as the Tribunal and ECJ say it does, then it must protect against some lesser form of harm than Art 3 or it must protect against a lesser likelihood of the specific harm eventuating or both. The Tribunal insists upon a 'differential impact' being established.²³ Such a requirement is not supported by the ECJ or the Strasbourg Court and we would say that the only proper place for differential impact is in the analysis of Refugee Convention reasons for apprehended harm in situations of generalised risk; we think that its presence in this area does nothing to elucidate the tests to be applied and will only cause confusion and error.

¹ Council Directive 2004/83/EC.

² *HH (Somalia)* CG [2008] UKAIT 00022; *KH (Iraq)* CG [2008] UKAIT 00023 and *AM and AM (Somalia)* CG [2008] UKAIT 00091.

³ *HH* para 314; *KH* para 29.

⁴ C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] All ER (D) 157 (Feb).

⁵ *KH* para 39. See also *HH* para 316.

⁶ *HH* para 320.

⁷ *KH* para 81ff for the list of criteria.

⁸ *AM and AM* para 135.

⁹ *KH* para 93.

¹⁰ *AM and AM* para 93ff.

¹¹ *KH* para 107.

¹² *KH* para 103.

¹³ Eg the additional prohibitions of 'outrages upon personal dignity, in particular, humiliating and degrading treatment' in Common Article 3(1)(c) of the 1949 Geneva Conventions; Article 27 of Geneva Convention IV referring to the entitlement of protected persons to 'respect for their persons', and the ICRC commentary on that article which says 'the right of respect for the person must be understood in its widest sense: it covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers; it includes, in particular, the right to physical, moral and intellectual integrity'; the reference in the preamble to Additional Protocol II to the Geneva Conventions of 1949 'recalling furthermore that international instruments relating to human rights offer a basic protection to the human person' and article 4 setting out 'fundamental guarantees' including 'respect for their person' of those taking not direct part in hostilities.

¹⁴ *KH* para 127.

¹⁵ *AM and AM* para 91.

¹⁶ *Elgafaji v Staatssecretaris van Justitie* (2009) Case C-465/07 (ECJ).

¹⁷ *KH* para 111.

¹⁸ *KH* para 112 and *AM and AM* para. 92.

¹⁹ *KH* para 121ff.

²⁰ *KH* para 123.

²¹ *Elgafaji*.

²² *NA v United Kingdom* [2008] ECHR 616.

²³ *HH* para 331, *KH* 123.

FAMILY REUNION

12.196 The Final Act of the Conference which adopted the 1951 Convention recommended that governments took measures to ensure the unity of the

refugee's family.¹ According to the UNHCR *Handbook* 'family' usually means spouse and unmarried dependent children,² unless special circumstances exist, such as recognition of a broader family unit in certain societies.³ The Refugee Convention does not incorporate family unity in the definition of the refugee, and family unity is not an obligation of the UK under the Convention, but the Final Act of the UN Conference on the Status of Refugees recommended governments to take the necessary measures for the protection of the refugee's family,⁴ and the UK, in common with most other signatory states, makes provision for family reunion in its practices. Since October 2000 the Immigration Rules have made provision for the admission of the pre-existing spouse and minor children (but not de facto adopted children⁵) of a refugee and that provision has been extended to cover a refugee's civil partner⁶ and the unmarried partner or same sex partner of a person granted asylum on or after 9 October 2006.⁷ In order to qualify under the refugee family reunion rules, the sponsor must have refugee status; it is not sufficient that he or she had refugee status but subsequently naturalised as a British citizen.⁸ The rules require that the marriage, civil partnership, same sex or unmarried partnership commenced before the refugee left the country of his or her former habitual residence to seek asylum; the Tribunal has held that that requirement in respect of spouses can be satisfied even if the marriage took place in a third country to which the refugee fled from the country of feared persecution as long as the refugee was habitually resident in that third country.⁹ The spouses, civil, same sex or unmarried partners must intend to live permanently together.¹⁰ Children under the age of 18 may join or remain with a parent granted asylum as long as the child is not leading an independent life, is unmarried and is not a civil partner and has not formed an independent family unit.¹¹ The child must have been part of the refugee's family unit before the refugee left the country of former habitual residence to seek asylum.¹² Whether a child was a member of the refugee's family unit is a question of fact and does not necessarily depend upon them ever having lived together.¹³ The normal maintenance and accommodation criteria are not applied to them. Family members of refugees will normally themselves be recognised or admitted as refugees.¹⁴ The spouse, civil, same-sex or unmarried partner and the child must show that they would not be excluded from protection by virtue of Art 1F of the Convention were they to apply for asylum themselves.¹⁵ The rules provide that leave to enter on family reunion grounds is to be refused if the applicant does not have entry clearance in that capacity.¹⁶

¹ UNHCR *Handbook* 12.13 above, Annex I.

² UNHCR *Handbook* above, Annex I.

³ See UNHCR *Handbook* above, para 185; Somali Family Reunion Policy, set out in [1993] Imm AR 40. The UNHCR has formulated a very broad definition including anyone in fact dependent on the principal: see 'Family Protection Issues', ExCom Sub-Committee 15th meeting, para 3, in (1999) 11(3) IJRL 582. See also ExCom Conclusion No 88 (1999) 'The Protection of the Refugee's Family', which calls on states to consider 'liberal criteria in identifying those family members who can be admitted, with a view to promoting a comprehensive reunification of the family'.

⁴ The Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (set out in the UNHCR *Handbook* above). See *DS Abdi v Secretary of State for the Home Department* [1996] Imm AR 148, disapproving *Ali* (10520), where the Tribunal had held that refugee family reunion was an obligation under the Refugee Convention and therefore within the rules (HC 395, para 327). The debate is no longer so important now that refugee family reunion has been brought within the Immigration Rules.

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⁵ *DL (DRC) v The Entry Clearance Officer, Pretoria* [2008] EWCA Civ 1420, [2008] All ER (D) 209 (Dec).

⁶ HC 395, paras 352A.

⁷ HC 395, para 352A. The parties have to have been living together in a relationship akin to marriage or a civil partnership which has subsisted for two years or more and which existed before the person granted asylum left the country of former habitual residence in order to seek asylum.

⁸ *MK (Somalia) v Entry Clearance Officer* [2008] EWCA Civ 1453, [2008] All ER (D) 252 (Dec). De facto adopted children have to satisfy para 309A of the Rules which requires, inter alia, that they should have been living with the adoptive parents for at least 12 months immediately prior to making the entry clearance application – a condition that a refugee sponsored child will be unlikely to satisfy.

⁹ *A (Somalia)* [2004] UKIAT 00031.

¹⁰ HC 395, paras 352A(iv), 352AA(v).

¹¹ HC 395, para 352D.

¹² HC 395, para 352D(iv).

¹³ *BM (Colombia)* [2007] UKAIT 0055 adopting a purposive construction of the rule having regard to the principle of refugee family unity.

¹⁴ It may not always be possible to recognise the family as refugees: they may have a different nationality to the sponsor or they may not wish to be recognised as refugees. However, if they meet the criteria they will still be admitted to join the sponsor.

¹⁵ HC 395, para 352A(iii), 352AA (iv), 352D(v).

¹⁶ HC 395, para 352C, 352CA, 352F.

12.197 Other family members such as the parents and minor siblings of children recognised as refugees may be admissible, but not under the Rules and only where there are compelling compassionate circumstances in accordance with the policy applicable to other family members.¹ The requirement for ‘compelling compassionate circumstances’ is distinguishable from and not as demanding as the requirement in paragraph 317 of the Immigration Rules of ‘the most exceptional compassionate circumstances’.² The family reunion rights of those granted exceptional leave to remain³ are not set out in the Immigration Rules either, but under current Home Office policy they have to wait for four years before exercising them, unless there are compelling compassionate circumstances justifying waiver of the qualifying period,⁴ and they have to satisfy the normal maintenance and accommodation requirements.⁵ Where the sponsor was granted humanitarian protection before 30 August 2005, family members qualify for family reunion only after the sponsor has been granted settlement in the UK unless there are exceptional compassionate circumstances.⁶ The Immigration Rules now make provision for a person granted humanitarian protection on or after 30 August 2005 to be joined by his or her spouse, civil partner or child⁷ and to be joined by his or her unmarried or same sex partner if granted humanitarian protection on or after 9 October 2006.⁸ The requirements to be satisfied mirror those for refugee family reunion described in the preceding paragraph. Family reunion for those with discretionary leave must normally await the settlement of the sponsor, which in this case is six years.⁹ All applicants for family reunion must apply for entry clearance.¹⁰ Refusal of entry clearance is an ‘immigration decision’ against which an appeal may be brought to the AIT.¹¹ There are legislative provisions which may result in exclusion of the right of appeal if the decision is taken on particular grounds, including that the applicant for entry clearance does not satisfy a requirement of the rules as to age, nationality or citizenship; does not have an immigration document (eg a passport); is seeking to be in the UK for a longer period than permitted by the rules or for a

purpose other than one for which entry is permitted in accordance with the rules.¹² However, those provisions do not prevent the bringing of an appeal on human rights or race discrimination grounds.¹³ See further the chapters on appeals and human rights.

- ¹ UK Border Agency: Entry Clearance Guidance – General Instructions, chapter 16.2. The API on Family Reunion said: ‘We may exceptionally allow other members of the family (eg elderly parents) to come to the UK if there are compelling, compassionate circumstances. The parents and siblings of a minor who has been recognised as a refugee are not entitled to family reunion. Such applications are considered under the criteria above, i.e. there must be compelling, compassionate circumstances in order for the family to be granted entry to the UK’. Unfortunately the API on Family Reunion disappeared from the Home Office website some time ago to be replaced by a note saying ‘this API is currently being revised’. The resulting and continuing failure to publish its policy for deciding applications for family reunion is probably not lawful, bearing in mind the obligation under Article 8(2) of the ECHR to make decisions interfering with family life in accordance with the law, including by reference to transparent and accessible criteria. The policy described in the API on family reunion reflected what was said in a statement made in the House of Commons on 17 March 1995 by the then Minister, Nicholas Baker. ‘People recognised as refugees immediately become eligible to be joined by their spouse and minor children, provided that they had lived together as a family before the sponsor travelled to seek asylum. Families of refugees are not required to satisfy the maintenance and accommodation requirements that normally apply when families seek admission to join a sponsor here. *Other dependent relatives may be admitted if there are compelling compassionate circumstances*’ (emphasis added). (Hansard 17.3.1995, col 1215.) It is inconceivable that the Home Office or anyone else concerned with refugee family reunion could think that the mere removal of an ‘asylum policy instruction’ from the Home Office website could have the effect of withdrawing or negating the Ministerial Statement.
- ² *Miao v Secretary of State for the Home Department* [2006] EWCA Civ 75. The obiter dictum to the opposite effect in *Senanayake v Secretary of State for the Home Department* [2005] EWCA Civ 1530 was said to be wrong.
- ³ Even although the status was abolished with effect from 1 April 2003 many persons still have exceptional leave to remain, and will be seeking to exercise family reunion rights..
- ⁴ See *Warsame v Entry Clearance Officer, Nairobi* [2000] Imm AR 155.
- ⁵ API ‘Family reunion’ para 3.2. The API state that in all cases the sponsor will be expected to satisfy the maintenance and accommodation requirements as set out in the Immigration Rules (paragraphs 240 (iii) and (iv) of HC 395,), thus reversing the policy of discretionary waiver mentioned in the last edition at 12.183 fn 6 (referring to a 30 June 2000 letter from an immigration minister to Lord Archer).
- ⁶ API ‘Humanitarian protection’ October 2006.
- ⁷ HC 395, para 353FA and 352FG (inserted by HC 28, 7 November 2007).
- ⁸ HC 395, para 352FD (inserted by HC 28, 7 November 2007).
- ⁹ API ‘Family reunion’ para 3.4. The dependants of those with exceptional leave to remain may not seek entry as dependants of those in the UK with a view to settlement under para 301 of the rules; ‘settled’ in the context of the rules means ‘settled under the rules’: *R (on the application of Acan) v Immigration Appeal Tribunal* [2004] EWHC 297.
- ¹⁰ API ‘Family reunion’ para 4. The best known concessionary policy, the Somali Family Reunion Policy, enabled sponsors to apply informally to the Home Office in the UK, who would indicate how a formal application would be decided by the ECO. It was withdrawn in 1996. A similar concession allowed Vietnamese nationals who were refugees in the UK to apply direct to the Home Office by letter for relatives in Vietnam to join them. This concession was withdrawn on 1 November 1999. See API Aug 00, Ch 6, s 2, para 4.
- ¹¹ Nationality, Immigration and Asylum Act 2002, s 82(2)(b).
- ¹² Nationality, Immigration and Asylum Act 2002, s 88.
- ¹³ Nationality, Immigration and Asylum Act 2002, s 88(4).

WELFARE BENEFITS, ASYLUM SUPPORT AND COMMUNITY CARE

ELIGIBILITY FOR WELFARE BENEFITS

Subject to immigration control

13.3 Those who fall within the definition of being ‘subject to immigration control’ are non-EEA nationals:

- who require leave to enter or remain in the UK but have no such leave;¹
- whose leave is subject to a condition of no recourse to public funds;²
- who were given leave as the result of a ‘maintenance undertaking’;³
- who have statutory leave pending an appeal under the IAA 1999.⁴

People who fall into these categories, other than those people with transitional protection, will not be eligible for most welfare benefits. Each category is considered in more detail below but it should be noted that the immigration status test does not affect British Citizens or those with a right of abode.⁵ Nor does it affect nationals of countries within the EU⁶, and EEA and their family members. EEA nationals may still be excluded under the regulations as a ‘person from abroad’ if they do not satisfy the right to reside test (see 13.23 below). A mistaken grant of leave to enter to a person who does not require it will *not* render that person ‘subject to immigration control’.⁷

See also Commissioner’s decision *R(IS) 3/08* which held that temporary admission granted to an asylum seeker under domestic law did not give a right of residence as the Immigration (EEA) Regulations made a clear distinction between a right of admission and mere lawful presence and a right of residence. A right to reside was restricted to those who are not subject to immigration control: eg UK citizens and EEA nationals exercising EC rights. In *R(IS) 6/08* the Commissioner said some EEA nationals who did not have a right of residence by virtue of EEA citizenship might be able to apply for leave to remain under the Immigration Act 1971. Such claimants would need a decision from the domestic immigration authorities before claiming benefit as a grant of leave would not operate retrospectively to the date of a claim for benefit: see also *CIS/2635/2008*.⁸

¹ IAA 1999, s 115(9)(a).

² IAA 1999, s 115(9)(b). The Home Office’s decision as to the conditions upon which leave is granted is conclusive: Commissioner’s Decisions *R(SB) 25/85* and *R(SB) 2/85*.

³ IAA 1999, s 115(9)(c).

⁴ IAA 1999, s 115(9)(d).

⁵ Commissioner’s Decision *CPC/4317/2006* held that the DWP had been wrong to refuse benefit to a claimant with a right of abode on the mistaken basis that she was someone who could be subject to immigration control (para 5–7).

⁶ Ie, nationals of the EU Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Republic of Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the UK; from 1 May 2004 the Czech Republic, Cyprus, Estonia,

Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia; and from 1 January 2007 Bulgaria and Romania), together with Norway, Liechtenstein and Iceland: IAA 1999, s 167(1), European Union (Accessions) Act 2003.

⁷ Commissioner's Decision *R(SB) 11/88* (under earlier regulations).

⁸ [2008] UKUT 5 (AAC).

Leave given as the result of a maintenance undertaking

13.6 A person given leave to enter or remain in the UK as the result of a maintenance undertaking is 'subject to immigration control'.¹ A maintenance undertaking for these purposes means a 'written undertaking given by another person in pursuance of the Immigration Rules to be responsible for that person's maintenance and accommodation'.² This wording is almost identical to that used under the regulations in force prior to 3 April 2000.³ It used to be thought that only formal undertakings entered into under the Immigration Rules excluded a person from benefit entitlement, but the courts have now held that an undertaking does not need to be on any prescribed form (such as a RON 112 or SET(F)) and need only be a document expressing, in reasonably clear language, a future promise or agreement to maintain a sponsored immigrant.⁴ The principles governing 'maintenance undertakings' established in case law can be summarised as follows:

- the fact that the appropriate official form in use at the time is not actually used is not necessarily fatal to a finding that there has been an undertaking;
- the statement in question must be sufficiently formal and definite to constitute an undertaking;
- an undertaking entails something in the nature of a promise or an agreement which obliges a sponsor to maintain and accommodate the dependent relative;

Ultimately, whether a document amounts to an undertaking is a question of fact.⁵

¹ IAA 1999, s 115(9)(c). They are still eligible to claim disability allowances and child benefit (see 13.18 below). See also Commissioner's decision *CPC/1872/2007* which held that the burden was on the Secretary of State for Work and Pensions to show that leave to remain was granted 'as a result of' a maintenance undertaking. The case concerned a Chinese national whose original application under para 317 of the Immigration Rules had been refused, but leave was later granted outside the Immigration Rules based on the applicant's compelling circumstances. The Commissioner held that while it was open to the DWP to find that leave had been granted as a result of the maintenance undertaking given by her daughter, the DWP had to establish the necessary causal link. On the evidence available it was not possible to say what part the maintenance undertaking had played in the IND's decision to grant leave. In the light of Baroness Hale's observations in *Kerr v Department for Social Development* [2004] UKHL 23, [2004] 1 WLR 1372 the responsibility for obtaining that information lay squarely with the DWP rather than the claimant. The issue should therefore be decided against the DWP and in favour of the claimant.

² IAA 1999, s 115(10).

³ See, inter alia, the Income Support (General) Regulations 1987, SI 1987/1967, reg 21(3)(i); the change from the words 'upon' an undertaking being given to 'as a result of [an undertaking]' emphasises the requisite causal connection; see Commissioner's decision *CIS/6608/1999* but compare *CIS/3508/2001*.

⁴ *Shah v Secretary of State for Social Security* [2002] EWCA Civ 285, *R(IS) 2/02*, the court must look at the substance, not the form of an undertaking, but the phrase 'I am able and willing' is insufficient for the purpose as it signifies current, not future ability and

13.6 Welfare Benefits, Asylum Support and Community Care

willingness); *R (Begum) v Social Services Commissioner* [2003] EWHC 3380 (Admin), *R(IS)* 11/04; *Ahmed v Secretary of State for Work and Pensions* [2005] EWCA Civ 535, *R(IS)* 8/05. See HC 395, para 35.

⁵ Summary taken from *CIS/1697/2004*.

Exemptions from 'subject to immigration control' test

13.11 The final exempt group are nationals of states which have ratified either of the two Treaties of the Council of Europe, the European Convention on Social and Medical Assistance (ECSMA)¹ or the Council of Europe Social Charter (CESC)² and who are 'lawfully present' in the UK.³ Other than EEA Member States, Albania, Armenia, Moldova and Turkey have ratified the Revised Social Charter, and Turkey has in addition ratified the ECSMA. Their nationals must also be 'lawfully present' in the UK to benefit from this exemption. Those lawfully present for temporary purposes (visitors, students, au pairs, etc) are protected.⁴ In the past the DWP maintained that an ECSMA/CESC national was not lawfully present for benefit purposes⁵ if their only status in the UK was 'temporary admission'. In *Szoma v Secretary of State for Work and Pensions*⁶ the House of Lords has now ruled that a person with temporary admission is lawfully present for benefit purposes; thereby effectively overruling *Kaya*.⁷ Lawful presence does not require the claimant to have been granted 'leave to enter or remain'. It is enough that the claimant is at large in the UK pursuant to the express written authority of an immigration officer. Thus nationals of the EEA Member States, Albania, Armenia, Moldova and Turkey present in the UK with temporary admission should not be treated as 'subject to immigration control' for the purpose of determining eligibility for income support, jobseeker's allowance, social fund payments, housing benefit, council tax benefit and state pension credit.⁸ But those claiming benefits after 1 May 2004 will have to satisfy the right to reside test, unless they have transitional protection (see 13.23 below). See also Commissioner's decision *CH/2321/2007* in which a Turkish national sought to argue that the right to reside requirement was confined to EU citizens and others not subject to immigration control under s 115 of the Immigration and Asylum Act 1999. The Court of Appeal granted permission on 1 December 2008 on the issue of whether the claimant, as a Turkish asylum seeker on temporary admission and as a national of an ECSMA ratifying state, had a right to reside for the purposes of the housing benefit regulations. The case will be heard under the name *Aykac v LB Camden and Secretary of State for Work and Pensions*.

¹ European Treaty Series (ETS) No 14, Paris, 11 December 1953.

² ETS No 35, Turin, 18 October 1961.

³ Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636, Sch, para 4.

⁴ See Lenia Samuel *Fundamental Social Rights: Case law of the European Social Charter* (1997) Council of Europe p 325 citing the Conclusions of the Committee of Experts at Conclusions XIII-2, p 142, Norway; Conclusions XIII-3, p 367, Finland.

⁵ Paragraph 4 of the Schedule to the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636.

⁶ *Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64 [2006] 1 AC 564, [2006] 1 All ER 1, *R(IS)* 2/06.

⁷ *Kaya v Haringey London Borough Council* [2001] EWCA Civ 677 [2001] All ER (D) 15 (May) [2002] HLR 1.

⁸ ECSMA/CESC nationals are also eligible to claim child tax credits and working tax credits; see 13.19 below.

⁹ (8 December 2008, unreported).

Attendance allowance, severe disablement allowance, carer's allowance, disability living allowance, social fund payments, child benefit

13.18 Four classes of people are exempted from the 'subject to immigration control' test for these benefits:¹

- (a) Those given leave to enter or remain in the UK upon a maintenance undertaking.² This wide exemption re-includes that whole class of claimant primarily excluded by one of the limbs of s 115 of the IAA 1999;
- (b) Family members of EEA nationals.³ Family members where a claim is made on or after 1 May 2004 (including nationals of Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia), who will not be entitled to child benefit unless they have a right to reside in the UK;⁴
- (c) Those nationals, and their family members who are living with them, of countries with which the EC has concluded an agreement⁵ which provides for the equal treatment of workers who are nationals of the signatory state in the area of social security.⁶ The exemption extends to association agreements and to Association Council decisions made under them.⁷
- (d) Those nationals from Barbados, Canada, Israel, Mauritius, New Zealand, Croatia, Bosnia-Herzegovina, Serbia and Montenegro, and the Republics of the former Yugoslavia who have reciprocal social security agreements with the UK⁸ which allowing those nationals to claim these benefits despite being subject to immigration control.⁹ However, those claiming child benefit also need to show that they have a right to reside in the UK.¹⁰

In addition, transitional protection applies to persons entitled to or receiving the benefits as a result of the transitional provisions of the February 1996 changes.¹¹ The claimant must have been entitled to the benefit in question prior to 5 February 1996,¹² and protection continues until *either* any claim to asylum is recorded as having been determined or is abandoned *or* entitlement to that benefit is revised or superseded by the social security determining authorities.¹³ Unlike income support, protection only applies to the benefit award made before 5 February 1996 and not to renewal claims made after that date.¹⁴ For child benefit, the claimant needs to have been paid the benefit immediately prior to 7 October 1996,¹⁵ and the conditions for cessation of benefit are similar.¹⁶ In *CIS/1096/2007* the Commissioner rejected a submission that the transitional protection in reg 6 of the Habitual Residence (Amendment) Regulations 2004, SI 2004/1232 was inconsistent with the claimant's Convention rights under ECHR.

¹ Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636, reg 2(2), Sch, Pt II.

² SI 2000/636, Sch, Pt II, para 4. See 13.6 above.

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- ³ Sch, Pt II, para 1. 'Family members' is not defined, but it is suggested that it should be understood to include at least those who are treated as family members under EC free movement provisions. See also Commissioner's decision CDLA/708/2007 which held that the phrase 'member of the family' of an EEA national had to be interpreted in accordance with the EEA Agreement rather than its ordinary English meaning. A claimant will not come within the exemption in Pt II of the Sch to SI 2000/636 unless s/he is a 'family member' in accordance with EC law.
- ⁴ Child Benefit (General) (Amendment) Regulations 2004, SI 2004/1244, Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219 and the Accession (Immigration and Worker Authorisation) Regulations 2006, SI 2006/3317.
- ⁵ Under Art 310-EC (ex Art 238).
- ⁶ Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636, Sch, Pt II, paras 2-3.
- ⁷ Commissioner's Decision CFC/2613/97. The exemption applies to nationals of Algeria, Morocco, Slovenia, Tunisia and Turkey.
- ⁸ Section 179 of the Social Security Administration Act 1992, Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636, reg 2(3).
- ⁹ See 'A-Z listing for social security agreements' and the Law Relating to Social Security, Volume 10 on 'Other international bilateral or multilateral conventions applying to social security' on the DWP website, <http://www.dwp.gov.uk>. See also the *Migration and Social Security Benefits Handbook* CPAG (4th edn, 2007), chapter 25, for further details.
- ¹⁰ Child Benefit (General) Regulations 2006, SI 2006/223, reg 23(4).
- ¹¹ SI 2000/636, regs 2(4), 12(10) and Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996, SI 1996/30, reg 12(3).
- ¹² *R v Secretary of State for Social Security, ex p Vijeikis, Zaheer and Okito* (10 July 1997, unreported), QBD, Dyson J, upheld by the Court of Appeal on 5 March 1998; for the need for entitlement immediately prior to 5 February 1996 see Commissioner's Decisions CIS/16992/96, CIS/2809/97 and CFC/1580/97.
- ¹³ SI 2000/636, reg 12(10), Social Security Act 1998, ss 9-10.
- ¹⁴ *R v Chief Adjudication Officer, ex p B* [1999] 1 WLR 1695, confirmed in *M v Secretary of State for Social Security* [2001] UKHL 35, [2001] 4 All ER 41 R(DLA) 7/01.
- ¹⁵ When the Asylum and Immigration Act 1996 removed entitlement from anyone 'subject to immigration control' by inserting s 146A into the Social Security Contributions and Benefits Act 1992.
- ¹⁶ SI 2000/636, regs 2(4)(b), 12(10), Child Benefit (General) Regulations 1976, SI 1976/965, reg 14B(g).

Tax credits

13.19 The general rule is that to be eligible for either working tax credits or child tax credits, the claimant must not be a person subject to immigration control and must be ordinarily resident in the UK.¹ In addition they must have a right to reside in the UK.² Subject to being eligible, child tax credit can be claimed by either member of a couple so long as one of them is responsible for a child. The regulations provide that certain classes of persons who are subject to immigration control are nevertheless entitled to claim child tax credit.³ These are persons who were given leave to enter or remain upon the undertaking of another person to be responsible for their maintenance and accommodation, who have been resident in the UK for a period of at least five years commencing on or after the date of their entry into the UK or the date on which the undertaking was given, whichever is the later. A person can also claim earlier if the person giving the undertaking dies. A person with limited leave to enter the UK subject to a condition of no recourse to public funds, who has complied with the condition, is entitled to claim child tax credit for up to 42 days in aggregate within the period of leave granted (including any extension) if he or she is temporarily without funds because remittances from

abroad have been disrupted and there is a reasonable expectation that they will be resumed.⁴ Nationals of a state which has ratified the European Convention on Social and Medical Assistance or the Council of Europe Social Charter⁵ and who are lawfully present⁶ may claim working tax credit, and child tax credit subject to further conditions.⁷ Nationals of states with which the EEA has concluded a Co-operation Agreement and who are able to work lawfully in the UK may claim child tax credit.⁸ Where one member of a married or unmarried couple is subject to immigration control and the other is not, or is within one of the exempted classes described in the five cases above, the calculation of the amount due and the methods of applying the credit will be the same as for couples not subject to immigration control.⁹ But where the exemption arises through being a national of a state which has ratified the European Convention on Social and Medical Assistance or the Council of Europe Social Charter or is a national of a state which is party to a Co-operation Agreement, the concession in relation to partners only applies if the partner is entitled to apply for a child tax credit him- or herself.¹⁰

See also Home Office guidance in the Immigration Directorate Instructions on Public Funds at Chapter 1, Section 7, para 5.1.3 under the heading: 'Partner is allowed to claim tax credits':

'Claims for child and working tax credits must be made jointly in the case of a couple. If only one member of a couple is subject to immigration, then for tax credits purposes neither are treated as being subject to immigration control. (This is unlike other benefits such as child benefit, which are assessed and paid individually).'

¹ Tax Credits (Immigration) Regulations 2003, SI 2003/653, reg 3(1).

² Tax Credits (Immigration) Regulations 2003, SI 2003/654, reg 3(4) and the Tax Credits (Residence) Regulations 2003, SI 2003/654, reg 3(4).

³ Tax Credits (Immigration) Regulations 2003, SI 2003/653, reg 3(1).

⁴ SI 2003/653, reg 3(1), Cases 1–3.

⁵ See 13.11 above.

⁶ See 13.11 text and fns 5–8 above.

⁷ Child tax credit is available to this class only from 6 April 2004, and only if immediately before that date they were eligible for additional income support or income-related jobseekers' allowance in respect of the child: Tax Credits (Immigration) Regulations 2003 SI 2003/653, reg 3(1), Case 4.

⁸ SI 2003/653, reg 3(1), Case 5. Countries with which the EC has Cooperation Agreements in this field are Algeria, Morocco, Tunisia and Turkey, but the agreements confer no right to reside or to work in the UK, so to qualify, nationals would have to have leave to enter or remain in the UK which permitted them to work.

⁹ Tax Credits (Immigration) Regulations 2003, SI 2003/653, reg 3(2).

¹⁰ Tax Credits (Immigration) Regulations 2003, SI 2003/653, reg 3(3).

The habitual residence test

(i) *Actual habitual residence*

13.20 The 'habitual residence' test was introduced in August 1994 in order to combat what the then government viewed as 'benefit tourism'¹ on the part of EEA nationals. In principle it applies to nationals of all countries, including EEA nationals and British citizens, who wish to claim means-tested benefits: income support, income-based jobseeker's allowance, housing benefit and

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council tax benefit² and state pension credit. Claimants who have recently arrived in the UK³ are required to show that they are habitually resident in the common travel area⁴, otherwise they will be treated as a person from abroad who is not eligible for mainstream benefits. To satisfy the test, the claimant must have (i) a settled intention to remain in the UK for the time being *and*; (ii) have actually resided here for an ‘appreciable period’ that shows that the residence has become habitual, see *Nessa*.⁵ The period that will amount to an appreciable period is not fixed but it can be as short as one month; each case must be decided on its facts. There may be special cases where a person who has previously been habitually resident in the UK resumes that habitual residence immediately when he or she returns to the UK following a period of living abroad.⁶ In the ordinary case, where a settled intention has been established, the appreciable period is likely to be between one and three months,⁷ although there may be exceptional cases in which a shorter period will be sufficient.⁸ According to one Commissioner, the period of residence should be long enough to show that the claimant is becoming integrated into UK society but it should not be so short as to treat welfare benefits on the same footing as emergency assistance which is available under community care legislation.⁹ The length of the period of residence is not itself decisive. What matters is the steps that the claimant has taken during that period to become settled in the UK. Becoming habitually resident involves taking steps such as finding accommodation, looking for work, registering with a doctor, finding a school for children, becoming established within a community, opening a bank account and so on.¹⁰

¹ See eg the speech of Rt Hon Peter Lilley MP, Secretary of State for Social Security, to Conservative Party annual conference, Autumn 1993.

² The definition for a ‘person from abroad’ for these benefits was amended to include the habitual residence requirement by the Social Security (Persons from Abroad) (Miscellaneous Amendments) Regulations 1996, SI 1996/30. These were superseded by SI 2004/1232, which included state pension credits and more recently by SI 2006/1026 which included social fund payments.

³ According to official guidance, the test should be applied to claimants who have come to the UK within the last two years. See Circular HB/CTB A22/2000 and Hansard 14 Jun 1999: Column 37.

⁴ I.e. the UK, Channel Islands, Isle of Man, Republic of Ireland: see chapter 6 above.

⁵ *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937, R(IS) 2/00.

⁶ *Nessa v Chief Adjudication Officer*, Lord Slynn – ‘There may indeed be special cases where the person concerned is not coming here for the first time, but is resuming an habitual residence previously had (*Lewis v Lewis* [1956] 1 WLR 200.’ See Commissioners’ decision R(IS) 6/96, where a British national who was temporarily absent in Burma did not cease to be habitually resident in the UK. In *CIS/1304/1997* and *CJSA/5394/1998* – decided after *Nessa* – the claimants had left the UK to live for a period in Pakistan and Malaysia respectively. The Commissioner held that, on the facts, both resumed their previous habitual residence here immediately on their return. See also Decision Maker’s Guide, Vol 2, Chapter 7, Part 3, para 071348, available on: www.dwp.gov.uk.

⁷ Commissioner’s decision *CIS/4474/2003* para 19. See also the Decision Maker’s Guide, Vol 2, para 071246.

⁸ Commissioner’s decision *CJSA/1223/2006* and *CJSA/1224/2006* paras 40–43. The case concerned the arrival of a group of Chagos Islanders. The Tribunal erred in law when it used the political background as a justification for reducing the appreciable period to a matter of days. Most of the claimants during that initial period were living in temporary accommodation arranged by social services. The Commissioner said that the political background could not compensate for the claimants’ lack of any significant steps to establish a life in the UK, when these were an integral part of habitual residence. Using the advance award provisions the Commissioner decided that the claimants became habitually resident after two months. In *CIS/1138/2006* a Commissioner said that it would be

'inconceivable that an EEA national, who had come to the UK for the first time and was not looking for work, could acquire actual habitual residence within one month of their arrival. A period of between two to three months would be more consistent with the approach in para 15 of R(IS) 7/06.

- ⁹ National Assistance Act 1948, ss 24(1) and (3) provide that assistance can be made available immediately to someone who is within the jurisdiction.
- ¹⁰ Commissioner's decision C/JSA/1223/2006 and C/JSA/1224/2006 para 46. The Decision Maker's Guide, Vol 2, at para 071246 states – 'It is not necessary to have permanent or private accommodation to establish habitual residence. A person may be resident in a country whilst having a series of temporary abodes.'

13.21 In May 2007, the government amended the regulations¹ to exclude the actual habitual residence test from the advance claim provisions thereby reversing the effect of the Court of Appeal's decision in *Bhakta*.² For claims decided after 23 May 2007, the claimant's circumstances can only be considered up to the date the claim is decided.³ The decision maker cannot take into account whether the claimant's settled intention would continue to exist for a further period under the advance award provisions. The Social Security Advisory Committee⁴ expressed concern that people who initially failed the test and subsequently appealed would not appreciate the need to make a further claim for benefit pending the appeal being heard.⁵ The Department told the Committee that it was going to carry out a review to ensure claimants were made aware of the implications of failing the habitual residence test. In particular, the fact that they had an outstanding appeal did not prevent them from making a fresh claim for benefit.⁶ A broader meaning was applied to the term 'habitual residence' in *Swaddling v CAO*.⁷ having regard to the meaning given to the term within EC law. *Swaddling* concerned a claimant who was previously habitually resident in the UK and moved to live and work in another Member State and then returned to resume his residence in the UK. The court held that in this type of case, the claimant could be habitually resident immediately on their return. When deciding whether a person is habitually resident for EC law, the court said the following factors should be taken into account: the person's main centre of interest, the length and continuity of residence in a particular country, the length and purpose of the absence from that country, the nature of the employment found in the other country to which the person moved for a time and the intention of the claimant.⁸ Note that EEA nationals who have recently arrived in the UK and claim benefit as work seekers may be subject to the actual habitual residence test if they have no established link with the UK employment market.⁹ On the other hand, if an EEA worker arrives in the UK having paid contributions towards unemployment benefit in their own Member State they can argue that the EC version of the test should apply if they need to claim jobseeker's allowance.

¹ Social Security, Housing Benefit and Council Tax Benefit (Miscellaneous Amendments) Regulations 2007, SI 2007/1331.

² *Bhakta v Secretary of State for Work and Pensions* [2006] EWCA Civ 65, R(IS) 7/06.

³ If the actual habitual residence test is excluded from the advance award provisions then the Tribunal only has jurisdiction to consider the claimant's circumstances up to the date the claim is decided: Social Security Act 1998, ss 8(2)(a) and 12(8)(b). The average waiting time for an appeal to be heard is 24 weeks (13.3 weeks from receipt of appeal to the Tribunal Service (Report by President of Appeal Tribunals on the standards of decision-making by the Secretary of State for 2005/06) and 9.6 weeks before the appeal is heard (Tribunal Service Annual Report 2006/07). Accordingly, if the Tribunal dismisses their

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appeal the claimant must submit a new claim. The gap between the two claims will result in a loss of entitlement as the provisions for backdating DWP benefits are limited to a maximum of three months: Social Security (Claims and Payments Regulations 1987, SI 1987/1968, reg 19.

⁴ Report of the Social Security Advisory Committee May 2007, Command Paper Cm 7073.
⁵ Cm 7073 para 19.

⁶ Cm 7073 para 20.

⁷ *Swaddling v Chief Adjudication Officer* [1999] All ER (EC) 217 (Case C-90/97), also reported as R(IS) 6/99. See also CIS/3216/2006 where a Social Security Commissioner said that the decision in *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2004] ECR I-2703 (also reported as R(JSA) 3/06) showed that requiring a 'short, fixed period' of residence did not contravene EC law. Accordingly, a claimant who was a Dutch national could not rely on *Swaddling v Adjudication Officer* (Case C-90/97) [1999] ECR I-1075 (also reported as R(IS) 6/99) to argue that an appreciable period of residence was not determinative of the question whether they were habitually resident under EC law.

⁸ See Decision Maker's Guide, Vol 2 para 071354. In *R(IS) 3/00* the Commissioner held that the EC test applied to an Italian national who had previously lived and worked in the UK before joining her husband to live in Spain. She returned to the UK with her baby having separated from her husband and claimed income support ten days after her arrival. The Commissioner said the fact that she had not worked in Spain did not alter his conclusion that she became habitually resident from the date of her claim. Note the EC test does not apply to persons who have returned to the UK from a country which is not an EC Member State (*R(IS) 11/01*). In *Gingi v Secretary of State for Work and Pensions* [2001] EWCA Civ 1685 [2001] 1 CMLR 587 *R(IS) 5/02* the Court held that the EU meaning did not 'trump' the meaning given to the term habitual residence in domestic legislation.

⁹ *Collins v Secretary of State for Work and Pensions* (C-138/02) [2006] EWCA Civ 376, also reported as R(JSA) 3/06.

(iii) The right to reside requirement

13.23 The actual habitual residence test introduced in 1994 did not exclude claims by persons who came to the UK intending to stay indefinitely. On 1 May 2004, the regulations were amended so that no person could be treated as habitually resident if they did not also have a right of residence in the UK.¹ The change was introduced in response to the expansion of the EU to limit accession nationals' access to benefits (see below) but the test can affect all EEA nationals² who are unable to work due to sickness, disability or childcare responsibilities, unless they show that they are a 'qualified person' with a right to reside under EEA law as applied in UK law.³ In *Abdirahman v Secretary of State for Work and Pensions*⁴ the Court of Appeal considered the position of newly arrived EEA nationals who had never worked in the UK. The Court accepted that the claimants had entered the UK lawfully and were entitled to reside here lawfully unless and until action was taken by the Home Office to remove them. The Court nevertheless held that their lawful presence was not equivalent to them having a right to reside in the UK.⁵ It also rejected the argument that the claimants could acquire a right of residence directly under Community law as citizens of the Union.⁶ The Court therefore rejected the argument that the requirement to have a right to reside was discriminatory based on Article 12 of the EC Treaty. As European law drew a distinction between rights of presence and rights of residence the guarantee of equal treatment was limited to those who have a right of residence. The Court's overall conclusion is that the 'right to reside' test represents a proportionate response to the perceived need to prevent EEA nationals from placing an unreasonable burden on the UK's social security system. The practical effect of

Abdirahman is that claimants are likely to be refused benefit unless they can show that they have a positive qualifying right to reside within the terms of the relevant benefit regulation. Questions that are likely to arise in future cases on the right to reside and eligibility for welfare benefits include:

- When does a claimant retain the status of a worker?⁷
- When does a claimant have a derived right to reside as a dependant of an EU worker in accordance with the principles in *Lebon* (Case C-316/85) and *Jia*, (Case C-1/05)?
- When does the estranged spouse of an EU worker retain a right to reside having regard to the principles established in *Diatla* (Case C-267/83)?⁸
- When does the primary carer of the child of an EU citizen who is in education retain a right to reside in accordance with the principles established in *Baumbast* (Case C-413/99)?⁹
- When is the application of the ‘right to reside’ test disproportionate when applied to EU citizens who have been living in the UK for a significant period but are not economically active at the time they claim income support or state pension credit?¹⁰
- In what circumstances can Article 18(1) of the Treaty and the principle of proportionality confer a right of residence on a claimant who has ceased work to become a carer?¹¹

In *CIS/2100/2007* the Commissioner rejected the Secretary of State’s submission that *Jia v Migrationsverket*¹² has changed or narrowed the scope of the meaning of ‘dependent’. The Commissioner said the case law showed that the support being received from another must be material, in the sense that it must provide for, or contribute towards, the basic necessities of life.

In *Jeleniewicz v Secretary of State for Work and Pensions*¹³, the father of the claimant’s daughter was a French national who came to the UK to attend an International Business Studies course. He had ceased to live with the claimant but he had contact with his daughter about twice a week. He paid the claimant an average of £10 a week in child maintenance. The Court refused to disturb a finding that the father was not providing material support, such that the daughter was not the father’s ‘dependent child’ for EC law purposes. The Commissioner had been entitled to conclude that it would not be disproportionate to deprive the daughter of the right of residence as she was likely to need public financial support for a substantial period and would therefore become a burden on the social assistance system.

See also Commissioner’s decision *CIS/0612/2008* in which the claimant argued that he had a derived right to reside based on Art 3(2)(b) of Directive 2004/38/EC as someone who was the partner of a Union citizen and that there was a durable relationship. The Upper Tribunal Judge (the new name for a Social Security Commissioners after 3 November 2008) held that ‘durable relationship’ was an EC concept but that the durability of the relationship was an issue of fact. The Tribunal had been entitled to find that the relationship had not been shown to be durable, given the past history and the current strains on it. Moreover, even if the claimant was in a durable relationship, Art 3(2) did not confer a right of residence; it was procedural only and the

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right could only arise if the host State gave it: *AP and FP (Citizens Directive Article 3(2); discretion, dependence) India*¹⁴ applied.

- ¹ Social Security (Habitual Residence) (Amendment) Regulations 2004, SI 2004/1232, subsequently replaced by the Social Security (Persons from Abroad) Amendment Regulations 2006, SI 2006/1026, on 30 April 2006. The right to reside requirement also applies to tax credits and child benefit; see the Tax Credits (Immigration) Regulations 2003, SI 2003/654, reg 3(4) and the Tax Credits (Residence) Regulations 2003, SI 2003/654, reg 3(4)) and the Child Benefit (General) Regulations 2006, SI 2006/223, reg 23(4) respectively.
- ² I.e. nationals of the EU Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Republic of Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the UK, from 1 May 2004 the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia and from 1 January 2007 Bulgaria and Romania, together with Norway, Liechtenstein and Iceland: IAA 1999, s 167(1), European Union (Accessions) Act 2003.
- ³ The concept of a right to reside inserted into the definition of a 'person from abroad' is linked to the definition of a 'qualified person' in regs 6 & 14 of the Immigration (European Economic Area) Regulations 2000, SI 2000/2326. These were revoked and replaced by SI 2006/1003.
- ⁴ *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657 (reported as *R(IS)* 8/07).
- ⁵ *R v City of Westminster, ex p Castelli* (1996) 28 HLR 616 and *Chief Adjudication Officer v Wolke* [1997] 1 WLR 1640, *R(IS)* 13/98, but see *Barnet London Borough Council v Abdi* [2006] EWCA Civ 383.
- ⁶ The Court placed particular reliance on the fact that Mrs Martinez Sala had a right to reside under German law (*Martinez Sala* Case C-85/96), Mr Baumbast was economically active (*Baumbast* Case C-413/99) and Mr Trojani's right to reside was derived from the permit he obtained from the Belgian authorities (*Trojani* Case C-456/02). However, these cases had previously been understood to hold that an individual who did not enjoy a right of residence in a host Member State under EU legislation could nevertheless rely on the non-discriminatory provision in the EC Treaty as a citizen of the Union. The Court of Appeal's ruling that the claimants do not come within the scope of the Treaty appears to run contrary to the ECJ's rulings in *Collins* (Case C-138/02) also reported as *R(JSA)* 3/06, paras 5–64 and *Trojani*, see para 42. However, the effect of the ruling in *Abdirahman* is that until it is overruled, claimants cannot seek to rely on the direct effect of Articles 12 and 18 of the EC Treaty before Tribunals or the commissioners to argue that the right to reside test is discriminatory on grounds of nationality. See also *CPC/1072/2006* in which the claimant argued that because all UK nationals automatically satisfy the right to reside condition it gives rise to direct discrimination contrary to Art 3 of Regulation (EEC) 1408/71 and a difference in treatment based on nationality cannot be objectively justified. The claimant's appeal is listed for a hearing on 1 April 2009 and will be heard under the name *Patmalniece v Secretary of State for Work and Pensions*.
- ⁷ *CIS/3182/2005* held that a claimant who gives up work in the later stages of pregnancy cannot rely on the Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 5, to retain the status of a worker because the incapacity contemplated by that provision did not cover those who temporarily cease to be economically active because they need to look after children; see also *CIS/4010/2005* and *CIS/731/2007*. A controversial interpretation was given to the EU meaning of a 'worker' in *CH/3314/2005*. A Dutch national, who was a lone parent, said she could work for two to three hours a day in the morning while her children were at school and nursery. The Commissioner said there was nothing in *Kempf v Staatssecretaris van Justie* (Case C-139/85) which precluded a national court from considering whether work is 'effective' by reference to the extent to which the claimant has recourse to social assistance. He held that the claimant could only be regarded as retaining her status as a 'worker' if she was seeking work that, with working tax credit, would produce an income equivalent to income support, plus her rent. As the hours she was prepared to work and the range of work being sought was very narrow, she could not be regarded as having a reasonable prospect of securing 'effective' employment. It is submitted that the Commissioner's analysis is inconsistent with *Kempf* because it has the effect of imposing a more stringent requirement on work-seekers compared to those actually in part-time employment who receive housing benefit to cover their rent. The Commissioner in *CIS/4304/2007* said he did not agree with the analysis in

CH/3314/2005 and CIS/3315/2005, where Mr Commissioner Rowland decided that work was marginal and ancillary if the claimant had to rely on a social security benefit for 'additional' support. See also *Barry v London Borough of Southwark* [2008] EWCA Civ 1440, [2009] NLJR 118 where the Court of Appeal held that employment for a period of two weeks as a steward at the Wimbledon tennis championships was sufficient to acquire the status of a worker: see 13.155.

In *CIS/1934/2006* the Commissioner considered the provision for retaining worker status after giving up employment under reg 5(2)(b) of the EEA Regulations 2006. The Commissioner held that a short gap between employment and a person starting to seek work again would not necessarily be fatal to reliance on reg 5(2)(b) as it was arguable that the provision could still be relied upon where a person has taken a short time away from the labour market, eg for a short holiday or after giving birth. In *CIS/0519/2007* a deputy Commissioner decided that a delay of two months between the ending of the claimant's employment and claiming benefit did not prevent the claimant from retaining the status of a worker.

CIS/686/2008 confirms that where an EEA national is residing in the UK for more than three months solely on the basis that they are a jobseeker and they have never actually worked in the UK then they cannot qualify for Income Support as a jobseeker as it is an excluded category under reg 21AA(3). *CIS/3779/2007* considered the difficulty facing jobseekers who wished to claim income support as a jobseeker under reg 21AA(3), namely the requirement to register as a jobseeker with the relevant employment office under Art 7(3) of the Citizens' Directive. Given these legal hurdles, the proper course for an EEA national would be to claim jobseeker's allowance and not income support (see *R(IS) 8/08*). Where an EEA national has been misadvised by Jobcentre staff to apply for income support rather than jobseeker's allowance, eg because they are lone parents, *CIS/4144/2007* held that where the EEA national had been *in receipt* of jobseeker's allowance when they were advised to claim income support instead, then the claimant has the right to appeal against two decisions: (i) the decision terminating jobseeker's allowance; and (ii) the decision refusing income support. If, on the other hand, the EEA national was *not in receipt* of jobseeker's allowance when they were advised to claim income support, then a Tribunal has no power to treat the claim for income support as a claim for jobseeker's allowance. Such a claimant may be able to claim compensation in the form of an ex-gratia payment for the period they were wrongly claiming income support from the DWP for bad advice: see Guide to Financial Redress for Maladministration on the DWP website. In *CIS/4304/2007* the Commissioner held that situations can arise where a claimant does not retain the status of a worker as a jobseeker under Art 7(3) of the Directive but they may still have a right to reside conferred on them by reg 6(2) of the EEA Regulations 2006 which is more generous than the Directive. While this right was outside the scope of reg 21AA(4), as it is not provided for by the Directive, it was still sufficient to satisfy the requirement under reg 21AA(2). In *CIS/4304/2007* the Commissioner decided that worker status can survive when someone who was seeking work became unable to work. See also *CIS/1951/2008* which considers a number of situations in which the status of a worker can be retained for income support purposes.

⁸ See *CIS/2431/2006*.

⁹ A Commissioner refused to apply *Baumbast* to the facts in *CIS/1121/2007*; see also *CIS/3441/2006*. See also *Ibrahim v London Borough of Harrow* [2008] EWCA Civ 386, [2008] 2 CMLR 841, a decision on homelessness assistance, in which the Court of Appeal made a reference to the European Court of Justice (ECJ) on the question of whether Ms Ibrahim, who was the primary carer of a child of an EU citizen who was in education, could rely on Art 12 of Regulation (EEC) No 1612/68 after the coming into force of the Citizens' Directive, given that she was not self-sufficient and her spouse had departed the UK. The Court of Appeal made a further reference on the same issue in *Teixeira v London Borough of Lambeth* [2008] EWCA Civ 1088, [2008] All ER (D) 91 (Oct) where the applicant was the former worker and her child entered education in the UK at a time when she was not a worker: see 13.155.

¹⁰ In *CIS/2358/2006* the claimant was a Polish national who had been residing in the UK for three and a half years; first as a student then as an Accession state worker. She was unable to return to work at the end of her maternity leave. The Commissioner held that Article 18(1) of the EC Treaty and the principle of proportionality could not confer a right of residence except where it could be shown there was a lacuna (gap) in the Directive. The new Directive 2004/38/EC and the right to permanent residence after five years set the benchmark against which any assessment of proportionality should be made. The appeal was dismissed. See also *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310, (2008) Times, 4 December, which was the claimant's appeal against

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CIS/2358/2006. The Court rejected the argument that denying income support to the appellant was contrary to Art 12 as she had been lawfully resident in the UK for three years at the time of her claim, and for the majority of that time she had been active as a student or an employee and had demonstrated the sort of social integration that the ECJ had in mind when it referred to lawful residence 'for a certain time' in para 43 of *Trojani v Centre Public d'aide sociale de Bruxelles* (Case C-456/02) [2004] ECR I-7573. The Court said *Trojani* did not open the door to eligibility based on residence of unspecified but significant duration in the host Member State. Eligibility was primarily a matter for normative regulation, rather than a subjective evaluation on a case-by-case basis. As to Art 18, the Court said that the facts of *Baumbast* were more susceptible to 'lacuna filling' than the facts of the present case, as at the material time, the appellant was no longer a worker nor was she self-sufficient. The Court endorsed the Commissioner's view that Art 18(1) cannot be relied upon to remove limitations necessarily implicit in a Directive. The Court said that the recent Citizens' Directive 2004/38/EC and the five-year period necessary to establish permanent residence provided a useful benchmark for proportionality in this type of case. The appellant is petitioning the House of Lords for leave to appeal. The Commissioner in *CPC/3767/2007* said that the concept of proportionality required him to ask whether excluding the claimant from a right to reside was reasonably necessary to protect the social assistance system. As the claimant was likely to rely on state pension credit for the remainder of his life, due to his age and deteriorating health, the Commissioner concluded that the case was not sufficiently exceptional to justify ignoring the terms of the legislation governing the right to reside.

¹¹ *CIS/408/2006* held that where a worker is obliged to cease work due to a need to care for his or her spouse, who is not a citizen of the Union, who is temporarily seriously disabled, they both retain rights of residence in the UK. The claimant was diagnosed with bowel cancer but was able to return to work after treatment. The Commissioner said his analysis would not apply where the disablement and the need for care were permanent.

¹² C-1/05 [2007] QB 545.

¹³ [2008] EWCA Civ 1163.

¹⁴ [2007] UKAIT 00048.

13.24 According to the regulations¹ the following EEA nationals have the right to reside in the UK and are therefore eligible for means-tested benefits:

- EEA nationals who are workers, self-employed, self-sufficient or students for the purposes of Directive 2004/38/EC;²
- family members of any of the above and family members who retain the right of residence;³
- EEA nationals who have acquired a permanent right of residence for the purposes of Directive 2004/38/EC;⁴
- family members of EEA nationals with a permanent right of residence;⁵
- extended family members, accepted as family members of qualified persons;⁶
- A8 nationals in registered or otherwise lawful employment;⁷
- A2 nationals in authorised or otherwise lawful employment.⁸

An EU citizen has an initial right to reside for up to three months under the Directive 2004/38/EC, Art 6. If they are economically inactive, however, they will be treated as ineligible to benefit⁹ save where they are a jobseeker signing on for income-based jobseeker's allowance.¹⁰ Note that the housing and council tax benefit regulations treat persons in receipt of income support or income-based jobseeker's allowance or state pension credit as satisfying the residence test and therefore eligible for housing and council tax benefit.¹¹ There is some transitional protection for EEA nationals who were in receipt of one of the main means-tested benefits prior to the change in the law in May 2004. The right to reside test will not apply if the claimant was entitled to one

of those benefits on 30 May 2004 and they have had continuous entitlement to one of those benefits since 30 April 2004.¹²

The following non-EEA nationals also meet the right to reside test:

- British nationals, including all British citizens, who have the right of abode and Commonwealth citizens who have the right of abode;
- persons exempt from immigration control under s 8 of the Immigration Act 1971 (see 13.4 above).

¹ Social Security (Persons from Abroad) Amendment Regulations 2006, SI 2006/1026 came into force on 30 April 2006.

² Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 6(1)(a)–(e) and reg 14(1).

³ SI 2006/1003, reg 10.

⁴ SI 2006/1003, reg 15. *CPC/2134/2007* held that a Lithuanian who had come to the UK to claim asylum more than five years prior to making a claim for state pension credit did not have a permanent right of residence. The claimant had not exercised any EC rights when she came to the UK to claim asylum, nor had she exercised any EC rights since Lithuania acceded to the EU in 2004. The Commissioner referred to *GN (EEA Regulations: Five years' residence) Hungary* [2007] UKAIT 00073 as authority for the proposition that rights of residence held under domestic law before a person becomes a citizen of the union are not relevant for the purposes of Art 16(1). In *CIS/4299/2007* the Commissioner held that a period of residence prior to the Immigration EEA Regulations 2000, SI 2000/2326 coming into force could count towards permanent residence under Art 16 of the Citizens' Directive 2004/38/EC. The Secretary's appeal on this point was heard in *Secretary of State for Work and Pensions v Lassal* [2009] EWCA Civ 157, [2009] All ER (D) 120 (Mar). The Court of Appeal concluded that the temporal scope of the right to permanent residence in the Directive was unclear and referred the issue to the European Court of Justice.

⁵ SI 2006/1003, reg 15.

⁶ SI 2006/1003, reg 7(3), (4), reg 8(2)–(5). DWP guidance indicates that the DWP will liaise with the Home Office when deciding claims by extended family members: Decision Maker's Guide, Vol 2, chapter 7, para 071238. In *CPC/3588/2006* a French national claimed state pension credit and argued that he had a derived right to reside because he was being financially supported by his nephew who was Dutch and a worker. The Commissioner held that the claimant did not acquire a right to reside merely by virtue of having a right to a family or residence permit under reg 10 of the Immigration (EEA) Regulations 2000, SI 2000/2326 as the rights conferred were procedural only. The only right that arose under EC law was the right to have the documents issued, not the right to reside: *KG (Sri Lanka) and AK (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 13, [2008] WLR (D) 11 applied.

⁷ See Section 13.24 below and chapter 7.

⁸ See Section 13.25 below and chapter 7.

⁹ SI 2006/1003, reg 13(3)(b).

¹⁰ SI 2006/1003 reg 6(1)(a), (4) and reg 14 and the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 85A(3)(b).

¹¹ SI 2006/213, reg 10 (3B)(k), SI 2006/14, reg 10, (4A)(k), SI 2006/215, reg 7(4A)(k), SI 2006/216, reg 7(4A)(k).

¹² Social Security (Habitual Residence) Amendment Regulations 2004, SI 2004/1232, reg 6. The specified benefits are income support, income-based jobseeker's allowance, state pension credit, housing benefit and council tax benefit. SI 2006/1026 preserves the transitional protection for those entitled to benefit prior to the 2004 changes. The saving provisions are also preserved for claimants in receipt of state pension credit who are claiming housing benefit and/or council tax benefit in the Housing Benefit and Council Tax Benefit (Consequential) Provisions) Regulations 2006, SI 2006/217, Sch 3, para 6(5)–(7).

(iv) A8 country nationals

13.25 Following accession of new states to the EU, from 1 May 2004, the UK government passed immigration regulations¹ to restrict nationals from eight of

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the accession states (known as A8 nationals)² from the right to access the UK labour market. Nationals of A8 states still have a right to reside in the UK if they are exercising a treaty right, eg as a person with an initial right of residence for up to three months, as a student, as a self-sufficient person, as a self-employed person, or as a person with a permanent right of residence. The family members of such persons also enjoy connected rights to reside. However, the definition of a 'person from abroad' was amended to limit A8 nationals' access to benefits.³ A government spokesperson has said these changes 'ensured people came to work and not claim benefits'.⁴ Subject to certain exemptions,⁵ A8 nationals will only be treated as having the right to reside as workers if they are in registered employment under the Worker Registration Scheme.⁶ This means A8 nationals can only claim income-related benefits whilst in registered employment.⁷ They lose any entitlement to benefits once they cease working.⁸ A8 nationals have no access to benefits whilst seeking work.⁹ A8 nationals gain the same rights as EU nationals once they have been continuously employed as a registered worker for a period of 12 months. Accordingly, if they become unemployed they will retain their worker status in circumstances in which other full EEA workers can retain that status.¹⁰ These restrictions do not apply to A8 nationals who are self-employed.¹¹ In *Zalewska v Department for Department for Social Development*¹² the Court of Appeal in Northern Ireland considered a legal challenge to the compatibility of the Worker Registration Scheme and the restriction on benefits paid to A8 nationals under the derogation contained in the Act of Accession Treaty. The case concerned a Polish national who claimed income support for herself and her daughter when she entered a women's refuge after being subject to domestic violence. Benefit was refused on the basis that whilst she had been in work for a year she had only been covered under the Worker Registration Scheme for some six months so she had no right to reside. The Court held that the Annex to the Act of Accession Treaty permitted discrimination in access to the labour market and this included discrimination in the provision of benefits. The Court agreed with the reasoning in the case of *D v Secretary of State for Work and Pensions*¹³ that the term 'worker' did not necessarily extend to a work seeker and this included those who had worked and subsequently became unemployed and sought out-of-work benefits.

The House of Lords dismissed the claimant's appeal in *Zalewska v Department for Social Development (Northern Ireland)*.¹⁴ Their Lordships did not accept that as the national measures were within the derogation given by the Treaty of Accession this meant that the UK had a complete discretion to determine the conditions under which nationals from the A8 states could obtain access to its labour market. Those measures were still subject to the EC requirement of proportionality. By a majority (Hale and Neuberger dissenting) the House held that the adverse consequences of non-registration in a second job were not so disproportionate as to render the workers' registration scheme invalid. The national measures had to be judged in the context that access to the UK's labour market conferred the status of worker on A8 nationals and, as a consequence they became entitled to the same social advantages as UK nationals. Also, the terms on which A8 state nationals were granted access were critical to safeguarding the UK's social security system from exploitation. While different schemes could have been devised which would have ensured

that the government's legitimate aims were met (such as allowing retrospective registration or imposing criminal sanctions on employers) this did not justify the House insisting upon the selection of a better scheme. Their Lordships also rejected a submission that Ms Zalewska could rely on Art 7 of Regulations 1612/68 to claim benefits on the same basis as workers who were UK nationals because the derogation in the Accession Treaty did not specifically refer to it. As access to UK's labour market was defined in terms of eligibility, and the rules about eligibility for employment were set out in Arts 1–6, any mention of Art 7 was unnecessary.

- ¹ Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219.
- ² The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.
- ³ Social Security (Habitual Residence) (Amendment) Regulations 2004, SI 2004/1232, subsequently replaced by the Social Security (Persons from Abroad) Amendment Regulations 2006, SI 2006/1026.
- ⁴ Ministerial Statement Tuesday, 24 October 2006, Secretary of State for the Home Department, John Reid. The Home Secretary also stated that, 'very few 8A national brought dependants and the proportion attempting to claim out of work benefits has been less than 1%'.
- ⁵ Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219, reg 2(2)–(4), see chapter 7.
- ⁶ Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219, reg 5(5), as amended by SI 2006/1003, Sch 2.
- ⁷ Eg, housing and council tax benefit, tax credits and child benefit.
- ⁸ Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219, reg 5(2). An A8 national will lose the right to reside if employment is interrupted for more than 30 days during the first 12 months of his or her authorised employment (reg 2(4)). Save for the limited exemption for those who cease employment within the first month of starting work (reg 5(4)).
- ⁹ Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219, reg 4(2).
- ¹⁰ Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219, reg 2(4), reg 2(8).
- ¹¹ The derogation in the Accession Treaty is confined to access of employed workers under Article 39 of the EC Treaty and Directive 1612/68, Articles 1–6. The prohibition on any restriction on the self-employed in Article 43 of the EC Treaty remains in force. See European Union (Accessions) Act 2003, s 2; SI 2004/1219, reg 4(1).
- ¹² *Zalewska v Department for Department for Social Development* 2007 NICA 17 (9 May 2007), on appeal from Commissioner's decision C6/05–06(IS). Leave to appeal to the House of Lords was granted by the House of Lords on 15 November 2007.
- ¹³ *D v Secretary of State for Work and Pensions* [2004] EWCA Civ 1468.
- ¹⁴ [2008] UKHL 67, [2008] 1 WLR 2602.

Some Common Benefit Issues

(i) National Insurance Number Requirement

13.27 A claim for benefit cannot be processed unless the claimant and, where applicable, their partner, provides evidence that they have been allocated a national insurance number (NINO)¹. This requirement applies even when the other member of the couple would be ineligible to claim benefit in their own right². In 2006 a 'right to work' condition was introduced for allocating a NINO where the reason for the application was employment.³ Guidance issued to Jobcentre Plus staff⁴ states that a request for a NI Number will be treated as an 'employment inspired application' if the applicant has started work; is due to start work; is looking for work; is self-employed; or wants to

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pay NI contributions.⁵ Where the reason for the NINO application is solely in relation to a claim for benefit, then the applicant should not have to satisfy the 'right to work condition'.⁶ Note that the DWP has the power to make interim payments where 'it is impracticable to satisfy immediately the national insurance number requirements'.⁷ Where there has been a refusal to allocate a NINO to a claimant or their partner and this has resulted in a decision to terminate or refuse benefit, then both issues can be raised in an appeal to a Tribunal.⁸ The appeal Tribunal has jurisdiction to make the decision it considers the original decision maker ought to have made.⁹ The Tribunal can therefore decide for itself whether the information provided with the NINO application was sufficient to enable a NINO to be allocated.

The national insurance number (NINO) requirement has now been considered post-*Wilson* in *CH/4085/2007*. The claimant was joined by her husband who was subject to immigration control and did not have a NINO. The local authority sent a request to the Jobcentre for a NINO to allocate one to him, accompanied by some evidence as to his identity and immigration status. The Jobcentre refused to issue a NINO when the claimant's husband did not attend an allocation interview and the local authority decided that the claimant was not entitled to housing benefit. The claimant appealed, maintaining that her husband had failed to attend the interview as he needed to be home to care for their sick child. The Commissioner noted that the possession of a NINO was not a condition of entitlement to benefit; it was sufficient that an application had been made. If after supplying the initial information and evidence a person did not take the steps necessary to obtain a NINO, then the local authority would be entitled to infer that the application was not genuine and that the claimant did not therefore satisfy the conditions of entitlement. The present case however, could be distinguished from *Secretary of State for Work and Pensions v Wilson*¹⁰, as in that case the claimant's wife had no intention of applying for a NINO because she was concerned it might prejudice her application for leave to remain in the UK; whilst in the present case the evidence indicated that the claimant's husband's application for a NINO had been genuine. The Housing Benefit Regulations have been amended to remove the requirement for a partner who does not have leave to enter or remain in the UK to be allocated a NINO.¹¹

¹ Social Security Administration Act 1992, ss 1(1A) and 1(1B) and the Tax Credits (Claims and Notification) Regulations 2002 SI 2002/2014, reg 5(4).

² *Secretary of State for Work and Pensions v Wilson* [2006] EWCA Civ 882, (R(H) 7/06).

³ The Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001, SI 2001/769, reg 9(1A), as amended by the Social Security (National Insurance Numbers) Amendment Regulations 2006, SI 2006/2897, reg 2.

⁴ Secure National Insurance Number Application Process (SNAP) downloadable from: www.dwp.gov.uk.

⁵ SNAP01A, Initial Action, para 105, page 29. For potential legal challenges to this requirement see 'NINO Knowledge' by Stuart Wright, Welfare Rights Bulletin 198, June 2007, and the update in December 2007, both downloadable from Child Poverty Action Group's website: <http://www.cpag.org.uk>.

⁶ See SNAP01A – Initial Action, para 88, page 25 for when a request for a NINO should be treated as a 'benefit inspired application'.

⁷ Social Security Administration Act 1992, s 1(a), the reference to the NI Number requirement inserted by regulation 10(1), 3(a)(ii) of the Social Security, Child Support and Tax Credits (Miscellaneous Amendments) Regulations 2005, SI 2005/337 from 18 March 2005.

- ⁸ Commissioner's decision *CIS/0345/2003*, paras 18–23 and *CH/1231/2004*, para 12.
⁹ Tribunal of Commissioners' decision *R(IB) 2/04* paras 32 and 55(2).
¹⁰ [2006] EWCA Civ 882, [2007] 1 All ER 281 (reported as *R(H) 7/06*).
¹¹ Social Security (National Insurance Number Information: Exemption) Regulations 2009, SI 2009/471, in force from 6 April 2009; see also Circular HBCTB A4/2009.

(ii) *Loss of immigration documents*

13.28 The DWP and local authorities are required to establish the terms of a claimant's entry or stay in the UK when applying the Immigration Status Test. Most means-tested benefits are awarded for an 'indefinite period', subject to the claimant continuing to satisfy the conditions of entitlement.¹ If the DWP or the local authority conducts a periodic review of entitlement they are required to establish the terms of the claimant's entry or stay in the UK when applying the Immigration Status and the Habitual Residence Test. If the claimant has mislaid their immigration status document and the terms of the leave contained in the passport stamp or visa vignette are unclear then payment of benefit is likely to be suspended² pending confirmation of the claimant's status from the Home Office.³ The Secretary of State for Work and Pensions has a discretionary power to make interim payments during a suspension of benefit if it appears that the claimant is, or may be, entitled to benefit, but payments cannot be made immediately for some reason.⁴ If entitlement to benefit has been withdrawn from someone due to their immigration status but it would be very unlikely that the individual could be subject to a public funds condition, eg where someone has been granted refugee status, humanitarian protection or discretionary leave to enter or remain or is a dependent relative of an EEA national, then a request for interim payments may be appropriate. Note that the DWP should consider restoring benefit if a suspension of benefit will cause hardship to the claimant⁵. If after suspending benefit the DWP subsequently makes a decision to end entitlement, then the claimant will have a right of appeal to a Tribunal in the usual way.⁶

See also *CIS/185/2008* in which the claimant had been issued with a residence permit by the Home Office in May 2000 which had been valid until May 2005. The Commissioner held that the permit had been conclusive evidence of the claimant's right of residence unless and until that permit had been revoked.

- ¹ Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 17.
² Social Security and Child Support (Decisions and Appeals) Regulation 1999, SI 1999/991, reg 17, Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulation 2001, SI 2001/1002, reg 11.
³ See Housing Benefit Guidance Manual, Part C, Persons from abroad, paras 4.353–4.359 and Appendix C – Requests for a person's immigration status from the Home Office. The guidance states that the Home Office expects to respond to written requests in respect of non-asylum seekers within 10 days. See also IDI, Ch 22, s 5 – Endorsements and date stamps.
⁴ Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(1).
⁵ Suspension and Termination Guide (December 2005) available on: <http://www.dwp.gov.uk>.
⁶ Whether or not a person requires leave to enter or remain in the UK is a matter for the DWP, or, on appeal, the appeal Tribunal to determine, see *R(SB) 11/88* para 20 a case in which limited leave was granted in error to a claimant who fulfilled the statutory

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conditions for a right of abode. See also *R (on the application of Nahar) v Social Security Commissioners* [2001] EWHC Admin 1049, [2002] 2 FCR 442 which held that the Secretary of State for Work and Pensions was not bound by a decision made by an official acting on behalf of the Secretary of State for the Home Department.

Integration loans for refugees and others

13.30 It is at least arguable that backdating of welfare benefits is an obligation under the 1951 Refugee Convention, since an asylum seeker is a refugee once he or she fulfils the criterion set out in Article 1 of the Convention. A successful asylum application or appeal merely recognises the refugee's true status. It does not create it, and Article 24(b) of the 1951 Convention entitles refugees to receive the same treatment in respect of social security as UK nationals. However, this view is not shared by the current government and in June 2007, the backdating of welfare benefits to refugees was abolished,¹ save for those who were notified on or before 14 June 2007 and submitted a claim within the 28-day time limit.² It was replaced by the integration loans scheme for refugees and others, which came into force from 11 June 2007.³ Under the scheme, few asylum seekers who have previously been supported due to destitution would qualify for an integration loan, and in our view the scheme represents a shabby derogation from international humanitarian responsibilities.⁴ The scheme is jointly administered by the Home Office/United Kingdom Borders Agency (UKBA) and the Department of Work and Pensions (DWP). UKBA caseworkers decide who is eligible for a loan and the amount to be awarded. The DWP administers payment and recovery of the loan.

The following persons can apply for an integration loan, if they are aged 18 or over:

- those who have been granted refugee status;⁴
- those who have been granted humanitarian protection;
- those who have been granted leave to enter or remain because they are a dependant of either of the above.⁵

Only one loan payment is allowed per person but there is provision for couples to make a joint application.⁶ A person will be ineligible if they are found to be insolvent, either because they are incapable of making the repayments or are on benefits and are subject to the maximum number of deductions under the third party deductions scheme (see below)⁷. The factors that will be taken into account when deciding whether to award a loan include: the length of time since the applicant was granted leave to remain; the applicant's financial position; the applicant's likely ability to repay the loan; the information provided by the applicant as to his or her intended use of an integration loan; the available budget for integration loans. An award will be refused if the applicant has an income above £15,000 or savings of more than £1,000 unless the applicant can demonstrate that the loan will have 'a positive effect on their integration'.⁸ A loan can be refused if it is not made within 12 months of leave being granted.⁹ The loan is intended to cover items associated with the applicant's integration into society and should be used for housing, employment and education needs. It can include vocational training, a deposit

for accommodation, buying essential items for the home, or the purchase of tools of a trade, where financial assistance for these items is not available through Jobcentre Plus.¹⁰ No award will be made if it is for any of the items excluded by official Guidance.¹¹ Where an application for a loan has been refused or a smaller amount is offered than requested then the applicant can ask for the decision to be reconsidered. The request must be in writing and be received within 14 days of the date of the loan offer or refusal letter. The reconsideration will be undertaken by a different caseworker.¹² If the loan is accepted, recovery of the loan can take place by two different methods. Where the recipient is in receipt of means-tested benefit, the loan will be collected by the DWP through third party deductions.¹³ Where the recipient is not receiving benefits, the DWP will negotiate a repayment rate with the applicant based on the size of loan. Resort to civil action to recover the loan should only be taken where there is evidence that the applicant is deliberately avoiding repayment.¹⁴ The third party deduction scheme allows an amount to be deducted from a claimant's income support, income-based job seeker's allowance or state pension credit in order to pay off certain debts. The rate of deduction for 2007/08 is £3 a week and the DWP can take a maximum of three separate deductions a week. If there are more than three debts, the deductions will be made according to the order of priority.¹⁵ It should be noted that the level of deductions from a claimant's benefit can be higher than £9 if deductions are also being made to recover a social fund loan, recover an overpayment or to pay the claimant's current consumption of fuel. Applicants can argue that the integration loan should have a higher priority than repayment of a social fund loan or recovery of overpayments, particularly if a delay in excess of 12 months since leave was granted is one of the factors taken into account when deciding whether a loan can be made. The terms of repaying the loan can be revised or suspended if the applicant falls into hardship.¹⁶

¹ By s 12 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 brought into force by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Commencement No 7 and Transitional Provisions) Order 2007, SI 1602/2007.

² The Court of Appeal in *Tkachuk v Secretary of State for Work and Pensions* [2007] EWCA Civ 515, *R(IS) 3/07* confirmed previous case law to the effect that the 28-day time limit for claiming retrospective benefits would start on the date the claimant's immigration solicitor received the notification of being recorded as a refugee and not the date the claimant personally received the notification letter. See also Memo DMG 22/07, Income Support – Backdating for Refugees (June 2007). In *R(PC)1/08* the Commissioner rejected a submission that the failure to make regulations allowing backdating of an award of state pension credit to a successful asylum-seeker was in breach of Art 14 of ECHR when read with Art 1 of Protocol 1.

³ Integration Loans for Refugees and Others Regulations 2007 SI 1598/2007 issued under s 13 of the AI(TC)A 2004.

⁴ Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 13(1).

⁵ Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 13(2), as amended by the Immigration, Asylum and Nationality Act 2006, s 45.

⁶ SI 1598/2007, reg 4(4)(d). See also 'Integration Loans Policy Guidance' at Section 8, available on the UKBA website.

⁷ Note the amount that can be awarded for a joint application can be no higher than for a single person as the repayment rate for collecting the loan is set at the single rate regardless, whether the loan is a joint or a single one.

⁸ Guidance 6.1(a).

⁹ Guidance 7.1.

¹⁰ Guidance 9.1.

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- ¹¹ Guidance 9.3. The list of excluded items includes: non-essential items, general living expenses, medical services, domestic services and respite care and costs associated with cars, unless it is essential to their job, eg taxi driver.
- ¹² Guidance 12.
- ¹³ Social Security (Claims and Payments) Amendment (No 2) Regulations 2007, SI 1866/2007, see also official guidance, DMG Memo 28/07.
- ¹⁴ Guidance 18.1
- ¹⁵ The priority given to each type of debt in descending order is: rent arrears; fuel charges; water charges; council tax; court fines; child support; Integration loans and repayment of certain loans, e.g. from credit unions SI 1987/1968 Sch 9, para 9.
- ¹⁶ SI 1598/2007, reg 10; Guidance 16.

THE DEVELOPMENT OF THE ASYLUM SUPPORT SCHEME

Other changes

13.41 The system of asylum support, introduced from April 2000, must be seen in the context of changes in provision of community care and social security benefits with particular ramifications for asylum seekers. From 6 December 1999 those who fall within the statutory definition of being 'subject to immigration control' were *prima facie* excluded from access to many community care services and, from 3 April 2000, from social security benefits.¹ In a separate development, s 21 of the UK Borders Act 2007 requires the Secretary of State to issue a Code of Practice to ensure that the UK Border Agency, while exercising functions in the UK, shall take appropriate steps to ensure that children in the UK are safe from harm. On 6 January 2009, s 21 of the UK Borders Act 2007 came into force pursuant to the UK Borders Act 2007 (Commencement Order No 5) 2008, SI 2008/3136, Art 2(a). By the UK Borders Act 2007 (Code of Practice on Children) Order 2008, SI 2008/3158, Art 2, the Code of Practice for Keeping Children Safe from Harm² came into force on 6 January 2009. The Code of Practice provides some guidance to UKBA Staff, the effect of which could be to ensure that children receive adequate and appropriate support.

¹ IAA 1999, ss 115–117; see 13.1–13.32 (for social security) and 13.145–13.151 (for community care services).

² See www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/keepingchildrensafe/.

KEY ASPECTS OF THE SCHEME FOR SUPPORT

13.42 Although the detail of the scheme of support is provided for in separate secondary legislation,¹ important elements of the primary provision are made in the IAA 1999.² The general conditions of eligibility for support under the scheme are that the person is an 'asylum seeker' or the 'dependant of an asylum seeker' within the meaning of Part VI of the 1999 Act and is either destitute or likely to become destitute within a limited period.³ We deal now with these general conditions of eligibility.

¹ The Asylum Support Regulations 2000, SI 2000/704 as amended by SI 2002/472, SI 2002/3110, SI 2003/241, SI 2004/763, SI 2004/1313, SI 2005/11, SI 2005/738, SI 2006/733, SI 2007/863 and SI 2008/760 provide for the scheme of support. Appeals were regulated by the Asylum Support Appeals (Procedure) Rules 2000, SI 2000/541 as

amended by SI 2003/1735. However, from 3 November 2008 appeals are regulated by the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI 2008/2685.

² IAA 1999, ss 94, 95, Sch 9, paras 1, 3.

³ IAA 1999, ss 94(1), 95(1), Sch 9, paras 1–3; SI 1999/3056, regs 2(1), 3; SI 2000/704, reg 3.

THE ASYLUM SUPPORT SCHEME

13.54 The National Asylum Support Service (NASS) was a body established as part of the Home Office to be responsible for providing comprehensive support to destitute asylum seekers. It had been operational since 3 April 2000, when it took on responsibility for the support of certain new asylum applicants.¹ The intention was that, eventually, all destitute asylum seekers would have recourse to NASS rather than to the interim scheme. By the end of August 2000, all new asylum seekers were eligible to apply for NASS support, and on 4 April 2006, when the interim scheme ended,² NASS was responsible for all asylum seekers.³ NASS had regional offices in Manchester, Leeds, Newcastle, Birmingham, Leicester, Cambridge, Bristol, Cardiff, Glasgow, Dover, Croydon and Belfast as well as its headquarters in Croydon. These regional offices dealt with outreach work, investigations and housing contract management.⁴ In July 2006, it was announced that NASS had ceased to exist as a separate part of the Home Office. Under the New Asylum Model (NAM) 'end to end' case management of asylum claims was introduced. In the new arrangement one case owner deals with all aspects of the asylum application from the initial interview through to a final positive or negative outcome and the enforcement of that outcome. NAM case owners are expected to make decisions on asylum support for asylum seekers and failed asylum seekers. However, the part of the Home Office that used to be called NASS, based in Croydon, continues to make asylum support decisions. The use of ex-NASS facilities for asylum support decision making by the Home Office is likely to continue for cases decided under s 55 of the NIAA 2002 as well as for asylum support decisions made in relation to older or 'legacy' cases due to be decided by June 2011. In April 2007, the Immigration and Nationality Directorate (IND) of the Home Office was replaced by the Border and Immigration Agency (BIA) of the Home Office. In April 2008 the Border and Immigration Agency was absorbed into the newly created UK Border Agency. The latter also has additional responsibility for customs detection work at borders and ports and for UK Visa Services.

¹ The system of support provided by NASS is set out in the IAA 1999, Pt VI and Schs 8 and 10; the key provisions were brought into force from 3 April 2000 (Immigration and Asylum Act 1999 (Commencement No 3) Order 2000, SI 2000/464, Art 2 and Sch), on which date the regulations which set out the detailed machinery of the scheme also came into force: Asylum Support Regulations 2000, SI 2000/704, reg 1; Asylum Support Appeals (Procedure) Rules 2000, SI 2000/541, r 1.

² See Asylum Support (Interim Provisions) (Amendment) Regulations 2004, SI 2004/566.

³ Asylum Support (Interim Provisions) Regulations 1999, SI 1999/3056, as amended, regs 1(1) and 2(5). Local authorities retain community care responsibilities for those whose need for care and attention does not arise solely from destitution, however: *R (on the application of Westminster City Council) v Secretary of State for the Home Department* [2001] EWCA Civ 512, 33 HLR 938, [2001] All ER (D) 100 (Apr); see 13.145 below.

⁴ NASS in the Regions, formerly on the Home Office website.

13.61 Welfare Benefits, Asylum Support and Community Care

Persons entitled to asylum support

Avoiding a breach of a person's Convention rights

13.61 When unaccompanied minor asylum seekers become 18, they will be interviewed to see whether they claimed asylum as soon as reasonably practicable.¹ Similarly, as soon as an asylum seeker no longer has any minor dependants in his or her household, the Secretary of State will consider the timeliness of his or her application for asylum. This late consideration could lead to asylum support being terminated under s 55.² A person who makes an in-country application for asylum following a significant change in circumstances in his or her country of origin will be provided with asylum support as long as her or she makes his or her application at the earliest possible opportunity following that change of circumstances.³

¹ All asylum seekers who claim to be under 18 are referred to the Refugee Council's Panel of Advisers whether the Secretary of State believes their claimed age or not. If a person claims to be under 18, his or her age will be assessed during the screening process, and a physical appearance strongly suggestive of an over 18-year-old is likely to result in the claimant being treated as an adult unless there is credible evidence to substantiate that he or she is not: Policy Bulletin 33 Age Disputes 17 October 2000, para 8.1. It is now Home Office policy to accept the views of a qualified social worker in relation to a claimant's age: see *Best Practice: Unaccompanied Asylum and Non-asylum Children*, the UK Immigration Service, Version 01.01.04, para 1.3. See also *R (on the application of B) v London Borough Merton* [2003] EWHC 1689(Admin), [2003] 4 All ER 280; *R (on the application of T) v Enfield* [2004] EWHC 2297 (Admin); *R (on the application of C) v London Borough Merton* [2005] EWHC 1753 (Admin) and *R (on the application of A) v Liverpool City Council* [2007] EWHC 1477 (Admin) and chapter 12 above. See also *R (on the application of A) v London Borough of Croydon* [2008] EWHC 2921 (Admin), [2008] All ER (D) 19 (Dec) and *R (on the application of A) v London Borough of Croydon*; *R (on the application of M) v London Borough of Lambeth* [2008] EWCA Civ 1445, [2009] 1 FCR 317.

² Letter to Tim Crowley, 26 February 2004.

³ Policy Bulletin 75 Section 55 Guidance Version 7, 16 July 2007, para 6.22.

EXCLUSION FROM SUPPORT

Persons not excluded from obtaining social security benefits by their immigration status

13.74 An asylum seeker is excluded from support if, as a sole applicant, he or she is not excluded from obtaining income-based jobseeker's allowance, income support, income-related employment and support allowance payable under Pt 1 of the Welfare Reform Act 2007, housing benefit or council tax benefit through his or her immigration status.¹ Those affected by this exclusion are asylum seekers who, for the purpose of these social security benefits, are exempted from the 'subject to immigration control' test. They are set out at 13.8 above. The regulations do not exclude from access to asylum support all the possible categories of asylum seekers who might be able to obtain these benefits.² For example, they do not exclude persons who, although they have applied for asylum, still have leave to enter or remain in the UK which is not subject to a condition of not having recourse to public funds nor as the result of an undertaking, nor leave automatically granted by

the law while an appeal is pending.³ Thus, a person who claims asylum while in the UK as a student may be eligible for social security benefits and asylum support. Nor do the regulations exclude EEA nationals, although Sch 3 to the NIAA 2002 applies to exclude them. The Secretary of State may refuse support to persons who have access to social security benefits. Proof may also be required from the Benefits Agency that benefit has been refused before providing support to asylum seekers who were previously entitled.

- ¹ Asylum Support Regulations 2000, SI 2000/704, regs 4(2), (b), (6)(a) as amended from 27 October 2008 by the Employment and Support Allowance (Consequential Provisions) (No 3) Regulations 2008 SI 2008/1879. By reg 4(6)(b) as amended by the Employment and Support Allowance (Consequential Provisions) (No 2) Regulations (Northern Ireland) 2008, SR 2008/412, reg 9(a), this also includes income-based jobseeker's allowance, income support, income-related employment and support allowance, or housing benefit in Northern Ireland provided under the Jobseekers (Northern Ireland) Order 1995, SI 1995/2705, the Social Security Contributions and Benefits (Northern Ireland) Act 1992 and Pt 1 of the Welfare Reform Act (Northern Ireland) 2007.
- ² These are persons who may be seeking asylum in the UK but are not excluded from benefit generally by s 115(9) of the IAA 1999.
- ³ See the Immigration Act 1971, ss 3C and 3D (amended and inserted by s 11 of the IAN 2006 from 31 August 2006 (SI 2006/2226)); 13.7 above.

PROVISION OF SUPPORT

Support provided

Amounts provided

13.96 Regulation 2 of the Asylum Support (Amendment) Regulations 2008, SI 2008/760, amends reg 10(2) of the Asylum Support Regulations 2000, SI 2000/704, and sets out the current levels of support given to asylum seekers.¹ For the purposes of payment, to count as a married couple or civil partners, the couple who are married to or in a civil partnership with each other respectively, must be members of the same household.² To count as an unmarried couple or same-sex partners, the couple must be, although not married or in a civil partnership respectively, living together as though they are married or in a civil partnership.³ A 'lone parent' is a person who is not a part of a married or unmarried couple, a civil partnership or a same-sex couple, who is the parent of a child under 18 and support is being provided for the child;⁴ a 'single person' is a person who is neither a member of a married or unmarried couple, a civil partnership or a same-sex couple, nor the parent of a child under 18 for whom support is being provided.⁵ The amounts payable will be reduced where the Secretary of State provides accommodation as part of the support which includes some provision for essential living needs, such as bed and breakfast or full board.⁶

- ¹ SI 2008/760, in force 14 April 2008, under which the rates are as follows:
 –Married couple, unmarried couple, civil partners and same-sex couple at least one of whom is 18 or over but where neither is under 16: £66.13;
 –Lone parent aged 18 or over, or single person aged 25 or over: £42.16;
 –Single person aged 18–24: £33.39;
 –Person aged 16–17 (except a member of a married or unmarried couple as referred to above): £36.29;

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–Person aged under 16: £48.30. See 13.93 fn 4 above for additional payments for babies and pregnant mothers.

² SI 2000/704.

³ SI 2000/704, reg 2(1).

⁴ SI 2000/704, reg 2(1).

⁵ SI 2000/704, reg 10(4)(c).

⁶ SI 2000/704, reg 10(5).

Further applications for support

13.108 In most circumstances, there is nothing to prevent repeat claims for support and the Secretary of State must consider the application unless it is not made in the form currently in use,¹ or the person has previously had his or her support suspended or discontinued,² or the claim for asylum was not made as soon as reasonably practicable unless a failure to provide the claimant with asylum support would lead to a breach of the European Convention on Human Rights,³ or a further application for support is made after an appeal to the First-tier Tribunal's Social Entitlement Chamber sitting as the First-tier Tribunal (Asylum Support) is dismissed,⁴ and there has been no 'material change in circumstances'.⁵

¹ Asylum Support Regulations 2000, SI 2000/704, reg 3(3), (4).

² SI 2000/704, reg 21.

³ NIAA 2002, s 55; *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36.

⁴ IAA 1999, s 103(6).

⁵ SI 2000/704, reg 21; IAA 1999, s 103(6).

APPEALS UNDER THE ASYLUM SUPPORT SCHEME

Rights of appeal

13.119 There are rights of appeal against certain asylum support decisions to the First-tier Tribunal's Social Entitlement Chamber sitting as the First-tier Tribunal (Asylum Support).¹ Prior to that appeals were made to the Asylum Support Tribunal (AST) and before that to the Asylum Support Adjudicators. Legally qualified members of the First-tier Tribunal are Judges.² Previously, asylum support adjudicators were appointed by the Secretary of State.³ The circumstances in which an asylum seeker or dependant may appeal are extremely limited. A person may only appeal if the Secretary of State decides that the person is not entitled to any support at all,⁴ or terminates all support for reasons other than the person ceasing to be an asylum seeker.⁵ The First-tier Tribunal has jurisdiction to hear an appeal from an applicant relating to the factual circumstances and legal framework permitting the grant of support. This extends to considerations of whether or not the person is an asylum seeker.⁶ An asylum seeker with minor dependants may also appeal against a decision by the Secretary of State to terminate his or her support following certification by the Secretary of State that he or she has failed to co-operate with steps to remove him or her from the United Kingdom.⁷ The asylum support adjudicators, forerunners of the First-tier Tribunal (Social Entitlement Chamber), were at pains to stress that they had no jurisdiction to

hear complaints about location of accommodation,⁸ and the way this issue has come before them has been in appeals against termination of support for breach of conditions, where the breach is failing to attend or return to dispersed accommodation and appellants have argued that features of the location give rise to a reasonable excuse for the breach. In addition, the Court of Appeal has now held that as a matter of statutory construction, a right of appeal under s 103(2) of the 1999 Act only arises where the Secretary of State decides to stop providing support to an asylum seeker or his or her dependants, and not where a decision to provide support is conditional on the asylum claimant moving to a particular location, and the condition is not complied with.⁹ This decision will affect families with children in particular, as the Secretary of State holds offers of accommodation open where there are minor dependants even if the family refuses to relocate to a dispersal area.¹⁰ The Secretary of State has a power to introduce regulations permitting asylum seekers to appeal against a dispersal location,¹¹ but has not done so. There is no right of appeal against a decision that a person is not entitled to support by virtue of not having claimed asylum as soon as reasonably practicable.¹² The only means of challenging these decisions will be by way of judicial review.¹³ It was accepted that in relation to appeals before an asylum support adjudicator the minimum standards of fairness set out in Art 6 ECHR applied.¹⁴

¹ From 3 November 2008 the functions of asylum support adjudicators in the Asylum Support Tribunal were transferred to the First-tier Tribunal by the Transfer of Tribunal Functions Order 2008, SI 2008/2833. Asylum support appeals are now heard in the First-tier Tribunal's Social Entitlement Chamber.

² Tribunals, Courts and Enforcement Act 2007, s 4.

³ Immigration and Asylum Act 1999, s 102. Asylum support adjudicators constituted an independent Tribunal for the purposes of Art 6 ECHR: *R (on the application of Husain) v Asylum Support Adjudicator* [2001] EWHC Admin 852, [2001] All ER (D) 107 (Oct); see chapter 8 above. Asylum support adjudicators became housed within the AST when responsibility for their functions was transferred from the Home Secretary to the Lord Chancellor on 2 April 2007 by the Transfer of Functions (Asylum Support Adjudicators) Order 2007, SI 2007/275.

⁴ IAA 1999, s 103(1). There is also an appeal against refusal of 'hard cases' support under s 4 (as to which see 13.138ff below): s 103(2A), inserted by the AI(TC)A 2004, s 10(4) from 31 March 2005 (SI 2005/372). Once accommodation centres (for which see 13.133ff below) are in use for asylum seekers, the appeals provisions will apply to refusal of support in an accommodation centre (NIAA 2002, s 17): s 103(1), (2) as substituted by the NIAA 2002, s 53 and the AI(TC)A 2004, s 10(4) from a date to be appointed.

⁵ IAA 1999, s 103(2), which becomes s 103(3) when the NIAA 2002, s 53 comes into force; where a decision is made to stop providing support the appeal may be made before support actually ends. These are referred to as qualification appeals and stoppage appeals respectively: see *Dogan* below.

⁶ *R (on the application of Secretary of State for the Home Department) v Chief Asylum Support Adjudicator (Defendant) and Flutura Malaj (Interested Party)* [2006] EWHC 3059, (Admin).

⁷ NIAA 2002, Sch 3, para 7A, inserted by Asylum and Immigration (Treatment of Claimants etc) Act 2004, s 9. None of the other persons categorised in NIAA 2002, Sch 3 as being ineligible for support may appeal if the decision refusing support was made on or after 1 December 2004: AI(TC)A 2004 s 9(3), SI 2004/2999, Art 4 (transitional provisions).

⁸ ASA 00/09/0046; 00/09/0066; 00/10/0087; although adjudicators have directed NASS not to return asylum seekers to particular locations: ASA 00/07/0024, para 11.

⁹ *R (Secretary of State for the Home Department) v Chief Asylum Support Adjudicator and Dogan (Ahmet)* [2003] EWCA Civ 1673.

¹⁰ Policy Bulletin 17 Failure to Travel, version 3.1, 19 June 2007, para 2.4.

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- ¹¹ Under the IAA 1999, s 103(7) (which becomes new s 103A, and applies to location of support provided under s 4 ('hard cases support', when the NIAA 2002, s 53 comes into force).
- ¹² NIAA 2002, s 55(10).
- ¹³ The ECHR does not require that a merits appeal on the facts against all administrative decisions in respect of a person's civil rights: *Kaplan v United Kingdom* (1980) 4 EHRR 64 at para 61; *Bryan v United Kingdom* (1995) 21 EHRR 342; *W v United Kingdom* (1987) 10 EHRR 29. Concerns at the lack of appeal rights in s 55 cases were dismissed by the Court of Appeal in *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA 364, [2004] QB 36, but the court indicated that the procedures for determining the claims were not Art 6 compliant. Since the judgment, procedures have been significantly revised.
- ¹⁴ *R (on the application of Husain) v Asylum Support Adjudicator* [2001] EWHC Admin 852, [2001] All ER (D) 107 (Nov); see also ASA 00/09/0063, ASA 00/10/0087 and ASA 00/10/0089. Concerns under Art 6 relate to the lack of legal aid for representation: *Airey v Ireland* (1979) 2 EHRR 305, ECtHR, particularly if appeals where an appellant's personal conduct are at issue are determined in the appellant's absence: *Muyldermans v Belgium* (1991) 15 EHRR 204, ECtHR at para 64.

Appeal procedures

13.120 The procedural rules for the First-tier Tribunal (Social Entitlement Chamber) are the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.¹ The main emphasis in the rules on asylum support appeals is speed. The overriding objective is specified as being to enable the Tribunal to deal with cases fairly and justly including, dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues. Parties to the appeal are enjoined to help the Tribunal to further the overriding objective and co-operate with the Tribunal generally.² The appeal procedures set out in the Rules contain some detail but the Tribunal has a general power to give case management directions on matters connected with the appeal and to make directions on the initiative of the Tribunal or an application by a party.³ In addition, a failure to comply with the Rules does not automatically mean that the appeal or the decision on the appeal has no effect although there are powers to deal with non-compliance.⁴ The Tribunal may give a direction substituting a party if the wrong person has been named as a party.⁵ Appellants may be represented throughout the appeal procedure by any person whom they choose to represent them, whether legally qualified or not,⁶ in which case, provided they are notified, relevant documents sent by the Tribunal or the Secretary of State to the appellant must be sent to the representative.⁷ Where two or more cases involve common or related issues of fact or law, one or more cases may be designated as a lead case and the other cases stayed.⁸ This is unlikely to occur much in practice given the speed with which asylum support cases are listed.

¹ SI 2008/2685.

² SI 2008/2685, r 2.

- ³ SI 2008/2685, rr 5 and 6. Under the former asylum support adjudicator appeal regime, it was held that an asylum support adjudicator could use the power to give directions on matters connected with the appeal under the Asylum Support Appeals (Procedure) Rules 2000, SI 2000/541, r 14, to direct the Secretary of State to expedite consideration of a second application for asylum support: ASA 00/06/0017.
- ⁴ SI 2008/2685, r 7. When an asylum seeker arrived too late for a hearing, having taken the specific train directed, the adjudicator, under the former asylum support adjudicator appeal regime used r 19 of SI 2000/541, the interpretative provisions of s 3 of the Human Rights Act 1998 and fair hearing standards of ECHR, Art 6 to set aside the decision and re-list the appeal: ASA 00/11/0106.
- ⁵ SI 2008/2685, r 9(1).
- ⁶ SI 2008/2685, r 11(1). The Housing and Immigration Group set up a 'duty solicitor' scheme, staffed by experienced volunteer solicitors and barristers, to assist claimants at hearings. This scheme has been taken over by the Asylum Support Appeals Project so that this scheme forms an additional part of the duty scheme supplied by its staff.
- ⁷ SI 2008/2685, r 11(6).
- ⁸ SI 2008/2685, r 18.

Notice of appeal

13.121 Any decision against which an appeal lies must be communicated by the Secretary of State by letter.¹ Notice of appeal must be sent so that it is received by the Tribunal no later than three days after the day on which the notice of the decision was received.² It is given by filling out the standard form which is issued by the Secretary of State or a self-made form that contains all the required information and documents.³ The Notice of Appeal form is *Form E09 (2008)*.⁴ The form must be signed by the appellant.⁵ In particular, the form requires an appellant to provide details of the grounds of appeal, whether the appellant requires an oral hearing and if so, whether an interpreter would be required. The form must be completed in full in English or Welsh.⁶ Any information or evidence, which has not already been submitted, may be sent in with the form.⁷

¹ The former Asylum Support Regulations 2000, SI 2000/704, contained no express requirement that these decisions must be communicated by letter but the new Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI 2008/2685, r 22(2), assume that they will be. See also Policy Bulletin 23 Asylum Support Appeals Process, August 2005.

² SI 2008/2685, r 22(2).

³ SI 2008/2685, r 22(3)–(5).

⁴ www.asylum-support-tribunal.gov.uk/formsguidance.htm.

⁵ SI 2008/2685, r 22(3).

⁶ SI 2008/2685, r 22(3).

⁷ See Form.

13.122 The Tribunal may be asked to extend the time limit for appealing, either before or after its expiry.¹ The strength of the case is relevant to the question of whether it is in the interests of justice to extend time.² If time is not extended the Notice of Appeal is not admitted and there is no appeal. If the Tribunal refuses to extend time, the remedies will be either a new application for support or a judicial review of the refusal. It may or may not be possible in these circumstances to obtain judicial review of the Secretary of State's decision.³

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- ¹ The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI 2008/2685, rr 5(3)(a) and 22(6). Under the previous asylum support adjudicator regime time could only be extended if: (i) it was in the interests of justice; and (ii) the asylum seeker or the representative could not comply with the time limit due to circumstances beyond their control, see the Asylum Support Appeals (Procedure) Rules 2000, SI 2000/541, r 3(4). The asylum support adjudicators applied a liberal approach to the extension of time, where an appellant appeared not to have had access to an interpreter (ASA 00/04/0003); where a notice of appeal was submitted with a page missing (ASA 00/06/0017); where NASS was unable to confirm that the decision had been sent by first class post (ASA 00/07/0021); where no reference to the right of appeal was contained in the decision letter, although the explanatory notes to the application forms said this would be the case (ASA 00/07/0030); and where there had been postal delays (ASA 00/08/0037).
- ² See *R v Immigration Appeal Tribunal, ex p Mehta* [1976] Imm AR 38, CA, and chapter 18 below. In ASA 00/00/0056 no reasons for extending time were given, but the merits appear to have been relevant.
- ³ In judicial review proceedings, the court may refuse to interfere with the decision where an applicant has failed to exercise a statutory right of appeal. See chapter 18 below.

The service of documents, information and reasons

13.123 On the same day that the Tribunal receives the notice of appeal, or, if that is not reasonably practicable, as soon as practicable on the next day, the Tribunal must send a copy of the notice of appeal and any supporting documents to the Secretary of State.¹ On receipt of the notice of appeal, or a copy of it, the Secretary of State must send or deliver a response to the Tribunal so that it is received within three days after the date on which the Tribunal received the notice of appeal. The response must state the name and address of the decision maker (the Secretary of State); the name and address of the Secretary of State's representative if any; an address where documents may be sent or delivered; whether the Secretary of State opposes the appellant's case and, if so, any grounds for such opposition which are not set out in any documents which are before the Tribunal; and any further information or documents required by a practice direction or direction. It may include a submission as to whether it would be appropriate for the case to be disposed of without a hearing. In addition, the Secretary of State must provide a copy of any written record of the decision under challenge, and any statement of reasons for that decision, if they were not sent with the notice of appeal and copies of all documents relevant to the case in the decision maker's possession unless a practice direction or direction states otherwise. The Secretary of State must provide a copy of the response and any accompanying documents to the appellant at the same time as it provides the response to the Tribunal. The appellant and any other respondent may make a written submission and supply further documents in reply to the Secretary of State's response.²

¹ The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI 2008/2685, r 22(7).

² SI 2008/2685, r 24.

Decision of the Tribunal whether to hold a hearing of the appeal

13.124 The Tribunal must hold an oral hearing before making a decision which disposes of the appeal unless each party has consented to, or has not objected to, the matter being decided without a hearing and the Tribunal

considers that it is able to decide the matter without a hearing.¹ The Tribunal may dispose of proceedings without a hearing under r 8, by striking out a party's case. This must happen if the appellant has failed to comply with a direction that stated that failure by the appellant to comply with the direction would lead to the striking out of the proceedings or that part of them. It may happen where the appellant has failed to comply with a direction that stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or that part of them.² The Tribunal must give each party reasonable notice of the time and place of the hearing. The period of notice must be at least one day's and not more than five days' notice. The Tribunal may give shorter notice with the parties' consent or in urgent or exceptional circumstances.³

¹ The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 SI 2008/2685, rr 27(1) and 32.

² SI 2008/2685, rr 8(1) and 27(3).

³ SI 2008/2685, r 29.

Further evidence before determination of the appeal

13.125 If there is further evidence in support of the appeal, which was not submitted with the notice of appeal, it may be submitted subsequently for consideration by the Tribunal, within the extremely tight time limits above. The appellant may make written submissions and supply further documents in reply to the Secretary of State's response to the notice of appeal.¹ Under the former asylum support adjudicator regime, if no oral hearing was to be held, the adjudicator would determine the appeal, at most, five days after the notice of appeal was received. The Tribunal has broad powers to admit further evidence from either party before and at the appeal hearing. Evidence may also be excluded where the evidence was not provided within the time allowed by a direction or a practice direction, the evidence was provided in a manner that did not comply with a direction or a practice direction, or it would be unfair to admit the evidence.²

¹ The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI 2008/2685, r 24(6).

² SI 2008/2685, rr 5(1), (2) and 15(2).

Oral hearings

13.126 Oral hearings before the Tribunal must be heard in public,¹ unless it gives a direction that a hearing, or part of it, is to be held in private. Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it. The Tribunal may give a direction excluding from any hearing, or part of it any person whose conduct the Tribunal considers is disrupting or is likely to disrupt the hearing; any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely; any person who the Tribunal considers should be excluded in order to give effect to a direction under r 14(2) (withholding information likely to cause harm) or any person where the purpose of the hearing would be defeated by the attendance of that

person. The Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence.² The appellant's interests or desire for the appeal to be heard in private is not decisive. There are no rules setting out the procedure to be adopted at the oral hearing and the Tribunal has a broad discretion. However, fairness requires that appellants are allowed to give oral evidence, call witnesses in support,³ question any witnesses relied on by the Secretary of State, and address the Tribunal on the law and the facts (by themselves or through their representatives). If witnesses are called, the Tribunal may consent to a witness giving, or require any witness to give, evidence on oath, and may administer an oath for that purpose.⁴ The Secretary of State should meet an appellant's reasonable travelling expenses to attend the oral hearing.⁵ Subject to r 30(5) (exclusion of a person from a hearing), each party to proceedings is entitled to attend a hearing.⁶ If a party fails to attend a hearing, the Tribunal may proceed with the hearing if it is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing and considers that it is in the interests of justice to proceed with the hearing.⁷ The hearing may also proceed where the appellant indicated in the notice of appeal that he or she did not wish to attend or be represented at the hearing and it may proceed in the absence of a Home Office representative. Appellants may obtain a refund of their travel costs for attending an asylum support appeal.⁸

¹ The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI 2008/2685, 30(1).

² SI 2008/2685, r 30(5) and (6).

³ SI 2008/2685, r 16, provides for the summoning or citation (Scotland) of witnesses and orders to answer questions or produce documents.

⁴ SI 2008/2685, r 15(5).

⁵ Immigration and Asylum Act 1999, s 103(9).

⁶ SI 2008/2685, r 28.

⁷ SI 2008/2685, r 31.

⁸ ASA 00/07/0027, para 3. NIAA 2002, s 103B inserted by the NIAA 2002, s 53 in force from a date to be appointed, provides a statutory foundation for the Secretary of State's obligation to pay reasonable travelling expenses to enable an appellant to attend an asylum support appeal.

Decision and reasons

13.127 The Tribunal may give a decision orally at a hearing. Subject to r 14(2) (withholding information likely to cause harm), it must provide a decision notice stating its decision to each party as soon as reasonably practicable after making a decision which finally disposes of all issues in the proceedings. The decision notice must be provided at the hearing or sent on the day that the decision is made.¹ The Tribunal must send a written statement of reasons for a decision which disposes of proceedings to each party, if the case is decided at a hearing, within three days after the hearing, or if the case is decided without a hearing, on the day that the decision is made.² In respect of appeals to the former asylum support adjudicator appeals regime, it was held that asylum support adjudicators were not bound by their own decisions.³

¹ The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI 2008/2685, r 33.

² SI 2008/2685, r 34(1).

³ ASA 00/08/0034, para 14.

Evidence and burden of proof

13.128 In deciding the appeal, the Tribunal may take into account and admit evidence not available to the Secretary of State and evidence that would not be admissible in a civil trial in the United Kingdom.¹ There are no rules on who bears the burden of proof in asylum support appeals but, applying ordinary legal principles, the person who makes a particular assertion must prove it. The burden may, therefore, rest with the person claiming support to establish matters such as destitution, but if the Secretary of State has sought to exclude someone from support despite prima facie entitlement, she should establish the ground of exclusion.² The asylum support adjudicators, the predecessors of the newly formed Tribunal, generally applied the balance of probabilities as the appropriate standard of proof,³ although arguably a higher civil standard applies where the Secretary of State alleges particularly egregious conduct in breach of conditions, or an offence under Pt VI of the Immigration and Asylum Act 1999, in order to exclude a person from support.⁴

¹ The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI 2008/2685, r 15(2).

² ASA/02/10/4566.

³ See eg ASA 00/04/0003.

⁴ Asylum Support Regulations 2000, SI 2000/704, regs 19, 20.

The Tribunal's powers

13.129 On deciding the appeal, the Tribunal may require the Secretary of State to reconsider the question of whether the appellant should be provided with support, replace the Secretary of State's decision with its own decision or dismiss the appeal so that the decision of the Secretary of State stands.¹ The extent of the Tribunal's powers is not specified in the 1999 Act, in contrast to ordinary immigration judges, but it is clear that they must apply the provisions of the 1999 Act and the asylum support regulations. The asylum support adjudicators, the predecessors of the newly formed Tribunal, had also shown themselves willing to consider whether decisions are in accordance with the Secretary of State's policy, as set out, inter alia, in the *Policy Bulletins*.² Asylum support adjudicators endeavoured to ensure that their decisions did not constitute or adopt a breach of an appellant's human rights, by, for example, considering whether the termination of support following breach of conditions would leave an appellant exposed to levels of suffering which would engage ECHR, Art 3, or breach rights to respect for the home and private life/physical integrity under ECHR, Art 8.³ In one case an adjudicator allowed an appeal with reference to ECHR, Art 3 (in the context of reasonable excuse for breach of conditions) where an appellant with heart trouble had to go without food if he missed the hostel meals which were provided at rigidly enforced times.⁴

¹ Immigration and Asylum Act 1999, s 103(3).

² ASA 00/09/0044; 00/09/0049; 00/11/0095.

13.129 *Welfare Benefits, Asylum Support and Community Care*

³ See eg ASA 00/10/0089.

⁴ ASA 00/11/0106.

13.130 The Tribunal's decision is effective from the day on which it is made. Therefore, where the parties are notified at the hearing that the appeal has been successful, the Secretary of State must, as far as possible, take immediate steps to implement the decision rather than wait for the written reasons. It is not apparent from the legislation whether the Tribunal should focus on the date of the Secretary of State's decision or the date of hearing. The power to require the Secretary of State to reconsider the decision suggests the latter.² There are no express rules as to the backdating of support or for compensating an asylum seeker who has been without support as a result of an erroneous earlier decision.³ The interim period will be very short but where no temporary support has been provided during that period, the Secretary of State should presumably take into account the effect of being without support for that period in meeting the asylum seeker's current needs.

¹ See the Immigration and Asylum Act 1999, s 103(3)(a). But see ASA 00/10/0071, where an adjudicator dismissed an appeal on destitution although by the time of the decision the appellant's capital would have diminished sufficiently to qualify. See also ASA 00/11/0105, paras 9 and 15.

² Although an asylum support adjudicator has held that an asylum seeker is legally entitled to amounts due from the date of the asylum application subject to deduction for backdated social security benefit: ASA 01/02/0202, paras 4 and 14; but see also *R v Hammersmith London Borough Council, ex p Isik* (19 September 2000, unreported), CA.

Procedures following an appeal

13.131 There is no further appeal against the decision of the Tribunal.¹ There are powers to correct clerical mistakes and accidental slips or omissions and to set aside a decision which disposes of proceedings.² A party, dissatisfied with a decision of the Tribunal, must proceed by way of judicial review.³ If the judicial review then reaches the Court of Appeal, it may well be covered by the Court of Appeal practice direction in relation to asylum seekers.⁴ This provides that asylum seekers should remain anonymous in proceedings before the Court. Although this practice direction is intended for immigration and asylum cases, it appears to be applied to all cases before the Court concerning asylum seekers. An asylum seeker in such a case would fall to be known by his or her initials followed by country of origin. If the asylum support appeal is dismissed, the Secretary of State may not consider any further application for support from the appellant unless it thinks that there has been a 'material' change of circumstances.⁵ Relevant changes would include, but are not limited to, those about which a supported asylum seeker must notify the Secretary of State.⁶

¹ Immigration and Asylum Act 1999, s 103(5).

² The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI 2008/2685, rr 36 and 37.

³ There have been a number of challenges on behalf of the Secretary of State to decisions by asylum support adjudicators: see eg *R (on the application of the Secretary of State for the Home Department) v Chief Asylum Support Adjudicator* [2003] EWHC 269 (Admin), [2003] All ER (D) 116 (Feb); *R (on the application of the Secretary of State for the Home Department) (National Asylum Support Service) v Asylum Support Adjudicators* [2001]

EWHC Admin 881, [2001] All ER (D) 13 (Nov); *R (Secretary of State for the Home Department) v Chief Asylum Support Adjudicator and Dogan (Ahmet)* [2003] EWCA Civ 1673.

⁴ *Practice Note (anonymisation in asylum and immigration cases in the Court of Appeal)* [2006] EWCA Civ 1359.

⁵ IAA 1999, s 103(6), to become s 103(7) when the Nationality, Immigration and Asylum Act 2002, s 53 is in force, as amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 10(4)(c) when in force to include support in accommodation centres.

⁶ See the Asylum Support Regulations 2000, SI 2000/704, reg 15. Other relevant changes might include disentitlement to social security benefits by refusal of an asylum claim.

Ending the appeal by withdrawal

13.132 A party may give notice of the withdrawal of its case, or any part of it (i) at any time before a hearing to consider the disposal of the proceedings or, if the Tribunal disposes of the proceedings without a hearing, before that disposal, by sending or delivering to the Tribunal a written notice of withdrawal; or (ii) orally at a hearing. Where notice is given orally at a hearing, a notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal. The Tribunal must notify each party in writing of a withdrawal. A party who has withdrawn their case may apply in writing to the Tribunal for the case to be reinstated. An application must be received by the Tribunal within one month after the date on which the Tribunal received the notice prior to a hearing or disposal, or the date of the hearing at which the case was withdrawn orally.¹ On the face it, if the Secretary of State withdraws her decision, she is required to make a fresh decision on the application for support, which may be the subject of a further appeal. But in one case² the adjudicator treated the further decision as an amendment of the earlier one, so avoiding the delay created by the need to lodge a further appeal.³

¹ The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI 2008/2685, r 17.

² ASA 00/11/0116.

³ Such delay could deprive the appellant of the right to a hearing within a reasonable time required by ECHR, Art 6, read with in conjunction with the Human Rights Act 1998, s 3.

HARD CASES

13.138 Another controversial area of the asylum support system is the complete termination of all support under ss 95 or 98 of the IAA 1999 to those without dependent children under 18, once all appeals have been exhausted,¹ and to failed asylum seekers with dependent children whose appeals have been exhausted and who fail without reasonable cause to take reasonable steps to leave the UK voluntarily or to place themselves in a position in which they are able to do so.² The Secretary of State has a reserve power under s 4(1) of the IAA 1999 to provide, or arrange for the provision of facilities for the accommodation of anyone who is temporarily admitted to the UK, released from detention by the immigration authorities or released on bail from immigration detention. Section 49 of the NIAA 2002 amended s 4 of the IAA 1999³ to make explicit reference to a power to provide accommodation

facilities for failed asylum seekers and their dependants, see s 4(2). The IAN 2006⁴ has amended⁵ s 4 of the IAA 1999 so that the Secretary of State may make regulations to enable a supported person to be provided with specified services or facilities, including vouchers, but not money. In practice, s 4 support is provided by the Secretary of State under the so-called hard cases fund. In order to qualify for support under this fund, failed asylum seekers must show that they are destitute and that one of a number of statutory conditions are met.⁶ These are:

- (a) they are taking all reasonable steps to leave the UK or place themselves in a position in which they are able to leave the UK, which may include complying with attempts to obtain a travel document to facilitate their departure;⁷
- (b) they are unable to leave the UK by reason of a physical impediment to travel or for some other medical reason.⁸ This criterion requires that the person is unable to leave the UK, (although it need not be literally impossible to leave); it is not sufficient that the person may have a medical condition making it undesirable in the interests of his or her treatment or prognosis to leave the UK;⁹
- (c) they are unable to leave the UK because in the opinion of the Secretary of State there is no viable route of return available;¹⁰
- (d) they have obtained permission for judicial review of a decision in relation to their asylum claim;¹¹
- (e) provision of accommodation is necessary to avoid a breach of their Convention rights.¹²

¹ Since they cease to be asylum seekers within the statutory definition: see 13.43 above.

² AI(TC)A 2004, s 9, inserting a new para 7A into the NIAA 2002, Sch 3.

³ The amended s 4 came into force on 7 November 2002.

⁴ IAN 2006, s 43(7).

⁵ In force 16 June 2006 – Immigration, Asylum and Nationality Act 2006 (Commencement No 1) Order 2006, SI 2006/1497.

⁶ Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005, SI 2005/930, reg 3, in force 31 March 2005. The criteria for eligibility are set out on in the Section 4 Support Instruction and the Section 4 Support Review. See also the Section 4 guidance and Section 4 Transition Project (all on the Borders and Immigration Agency website).

⁷ In *R (on the application of Ahmed) v Asylum Support Adjudicator* [2008] EWHC 2282 (Admin), [2008] All ER (D) 12 (Oct), Silber J held that on the facts (no advantage taken of the voluntary assisted returns programme) both defendants were entitled to hold that it could not be said the claimant was taking all reasonable steps to leave the UK. The wording of the provision only applied to matters which arose in the UK and concerned leaving the UK. Even if it did not, there was no evidence to suggest that the route of return was not viable or was dangerous. A claim that a person was at risk on return contrary to Art 3 ECHR had already been considered in the unsuccessful immigration appeal and the asylum support adjudicator was entitled so to hold. Were Art 3 ECHR to be engaged, there was insufficient evidence to make good the proposition.

⁸ Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, SI 2005/930.

⁹ *R (on the application of the Secretary of State for the Home Department) v Asylum Support Adjudicator* [2006] EWHC 1248 (Admin), (2006) Times, 11 July.

¹⁰ In *R (on the application of Abdullah) v Secretary of State for the Home Department* (CO/3709/04), Charles J granted permission to apply for judicial review of decisions to refuse hard cases support to failed Iraqi asylum seekers other than on the basis that they return voluntarily to Iraq, as there was arguably no safe route of return. In *R (on the application of Rasul) v Asylum Support Adjudicator and ors* [2006] EWHC 435 (Admin), SI 2005/930, reg 3(2)(c) was held to be satisfied where the Secretary of State has expressed

an opinion that there was a viable route of return to a country for an asylum seeker. Such an opinion was in the nature of a policy decision and on appeal to the Asylum Support Adjudicators, there is no jurisdiction in that forum to enquire into the correctness of that opinion. Wilkie J observed that reg 3(2)(a) could be engaged on the basis that the Claimant was taking all reasonable steps to leave the UK or place himself in a position in which he is able to leave the UK, which may include complying with attempts to obtain a travel document to facilitate his departure. In *ASA 06/03/12859* the Chief Asylum Support Adjudicator considered *R (Rasul)* and declined to follow Wilkie J's observations in respect of reg 3(2)(a). She held that she could consider the reasonableness of steps taken but not whether it was reasonable to take a proposed step. Such proposed steps precluded from consideration included steps that would involve taking an alleged unsafe route of return. She did not consider that an asylum support adjudicator had jurisdiction to consider extra-territorial issues such as the risk incurred by taking a particular route. If the applicant had approached the International Organisation of Migration (IOM) to seek a voluntary return, the position might have been different.

- ¹¹ SI 2005/930, reg 3(1), 3(2)(d), which also provides for the equivalents in Scotland and Northern Ireland. The 'permission for judicial review' test needs modification in the light of the changes to the asylum appeals system wrought by the NIAA 2002, s 101 and the AI(TC)A 2004, s 26. Whilst a judicial review may still be used to challenge the decision to remove a person in an appropriate case, challenges to an adverse decision of the Asylum and Immigration Tribunal are brought by way of an application for reconsideration in the Administrative Court of the High Court under s 103A of the NIAA 2002, see CPR 54 Part III. In *R v Immigration Appeal Tribunal, ex p Mohamed* [1999] Imm AR 48, Dyson J held that it was not unreasonable to use s 4 support for asylum seekers awaiting a test case on third country removals, whose asylum claims were not being decided substantively.
- ¹² SI 2005/930, reg 3(1), (2)(a)–(e). In *HS (Iraq) v Secretary of State for the Home Department* AIT AA/1410/2006 an Iraqi asylum seeker had his claims for leave to remain under the Refugee Convention and Article 3 of the ECHR rejected. He maintained that he was entitled to leave to remain under Article 15(c) of Council Directive 2004/83/EC and para 339C of the Immigration Rules HC 395, that is subsidiary or humanitarian protection, as he was at real risk of suffering serious harm on account of the internal armed conflict in Iraq. The appeal was allowed at first instance. The Asylum and Immigration Tribunal is currently to hear appeals on this issue with a view to issuing a Country Guidance case. A former asylum seeker who brings a fresh claim under Article 15(c) and paragraph 339C may make an application for support under s 4 of the IAA 1999 on the basis that it would be contrary to Article 3 ECHR for him to return. Applications for support on this basis will be treated on a case-by-case basis. In *ASA/05/12/11497* the Chief Asylum Support Adjudicator considered an application for support where a fresh asylum application had been made. The asylum support decision maker had to look at the matter on an individual basis. However, support should be granted unless the fresh claim for asylum simply rehearses previously considered material or contained no detail whatsoever. See also, *KH (Article 15(c) Qualification Directive) Iraq* CG [2008] UKAIT 00023. In *R (on the application of Mohammed Kareem Ahmed) v Asylum Support Adjudicator (2) Secretary of State* [2008] EWHC 2282 (Admin), Silber J held that a claim that a person was at risk on return contrary to Art 3 ECHR had already been considered in the unsuccessful immigration appeal and the asylum support adjudicator was entitled so to hold. Were Art 3 ECHR to be engaged, there was insufficient evidence to make good the proposition.

13.139 The 'inability to leave the country' criterion was applied strictly in *Guveya*¹, where Moses J held that the fact that the Secretary of State had adopted a 'generous' policy of non-removal of failed asylum seekers to Zimbabwe did not mean that it was reasonable for the claimant to refuse to return voluntarily or that he was bound to be provided with accommodation. However, in *Nigatu*,² Collins J held that persons who had made representations which were not clearly unfounded in support of a fresh claim for asylum or under Article 3 of the ECHR were eligible, and in *Womba*,³ an asylum support adjudicator held that only IND caseworkers, and not NASS workers (the distinction may now be elided under the New Asylum Model (NAM)) for

case owners, although the training provided to them and designation of their formal competencies will still be material), were able to decide that representations were clearly unfounded. It has been held in the Administrative Court that *Womba* was incorrectly decided.⁴ Where a failed asylum seeker makes representations purporting to be a fresh asylum or human rights claim and before the Secretary of State decides whether to accept the representations as such, a caseworker or local authority is entitled to form a view of the merits of the putative claim in order to decide whether the person must be supported in order to avoid a breach of his or her Convention rights. However, 'it is only in the clearest cases that it will be appropriate for the public body concerned to refuse relief on the basis of the manifest inadequacy of the purported fresh grounds'.⁵ The Section 4 Support Instruction accepts that the submission of further representations seeking a fresh claim, or submission of a late appeal which is under consideration by the appellate authorities, are situations where the provision of hard cases support may be necessary to avoid a breach of Convention rights.⁶ An asylum seeker who is refused support under s 55 of the NIAA 2002 is not entitled to hard cases support.⁷ Neither is an adult asylum seeker who has failed to comply with removal directions, or the adults in a family certified as having failed to take reasonable steps to leave voluntarily following final determination of their claim, save where support is necessary to avoid a breach of their Convention rights or their rights under the Community Treaties.⁸ The regulations under s 4(5)⁹ of the IAA 1999 allow conditions to be imposed on the continued provision of s 4 support, including a condition that the person in question performs or participates in specified community activities.¹⁰ The AI(TC)A 2004 provided a new right of appeal to the asylum support adjudicators, now the First-tier Tribunal (Social Entitlement Chamber) in its capacity as the First-tier Tribunal (Asylum Support), in relation to the refusal or termination of support under Section 4.¹¹ It is Border and Immigration Agency policy, in cases of priority, to decide an application for support under s 4 within 48 hours, see *R (Matembera) v Secretary of State for the Home Department*.¹² Support provided under s 4 of the 1999 Act may be provided by a local authority in accordance with arrangements made by the Secretary of State under s 99(1) of the 1999 Act, following an amendment by s 43 of the IAN 2006.¹³ In connection with this, an authority may incur reasonable expenditure in connection with preparing to enter into arrangements under s 4 of the 1999 Act, see s 99(4) of the 1999 Act as amended.¹⁴ Accommodation under s 4 of the 1999 Act is excluded from the protective provisions of the Protection from Eviction Act 1977.¹⁵

¹ *R (on the application of Guveya) v National Asylum Support Service* [2004] EWHC 2371 (Admin), [2004] All ER (D) 594 (Jul), a case with serious implications for asylum seeking families deprived of support under the NIAA 2002, Sch 3, para 7A (inserted by the AI(TC)A 2004, s 9 from 1 December 2004) if they fail to leave the country voluntarily or put themselves in a position where they are able to do so.

² *R (on the application of Nigatu) v Secretary of State for the Home Department* [2004] EWHC 1806 (Admin).

³ ASA/05/04/9198.

⁴ *R (on the application of AW) v Croydon London Borough Council*; *R (on the application of A, D and Y) v Hackney London Borough Council* [2005] EWHC 2950 (Admin), [2005] All ER (D) 251 (Dec).

⁵ Lloyd Jones J in *R (on the application of AW) v Croydon London Borough Council*.

⁶ Section 4 Support Instruction, p 21, see also *R (on the application of Erdogan) v Secretary of State* [2004] EWCA Civ 1087, para 21.

- ⁷ At least, not while he or she remains an asylum seeker (as opposed to a failed asylum seeker who cannot leave, when hard cases support might be available under SI 2005/930, reg 3.
- ⁸ SI 2005/930 reg 3(1), (2) above, unless they qualify under one of the other sub-paragraphs such as a medical condition precluding removal.
- ⁹ SI 2005/930, in force 31 March 2005. Subsections (5)–(9) were inserted into the IAA 1999, s 4 by the Asylum and Immigration (Treatment of Claimants etc) Act 2004, s 10(1), in force 1 December 2004 (SI 2004/2999). Section 10(1), (2), (6) and (7) were brought into force on 1 December 2004 by the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Commencement No 2) Order 2004, SI 2004/2999 and s 10(3), (4) and (5) were brought into force on 31 March 2005 by the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Commencement No 4) Order 2005, SI 2005/372. The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, SI 2005/930 also came into force on 31 March 2005.
- ¹⁰ SI 2005/930, regs 4–6. The Joint Committee on Human Rights expressed concern that the performance of community service as a condition of subsistence support could violate Article 4 of the ECHR: 14th report Session 2003–2004: Asylum and Immigration (Treatment of Claimants) Bill, additional clauses, 5.7.04 (HL 130/HC 828. Other conditions which may be imposed include compliance with standards of behaviour, reporting and residence restrictions and with specified steps to facilitate removal: reg 6.
- ¹¹ AI(TC)A 2004, s 10(3), inserting s 103(2A) into the NIAA 2002, in force 31 March 2005: SI 2005/372. The transfer to the First-tier Tribunal (Social Entitlement Chamber) was effected by the Transfer or Tribunal Function Order 2008, SI 2008/2833 and the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684.
- ¹² In *R (Matemba) v Secretary of State for the Home Department* [2007] EWHC 2334 (Admin) interim relief was obtained by a destitute failed asylum seeker in circumstances where this policy was not followed. At an oral hearing permission to apply for judicial review was refused as s 4 accommodation was no longer required. Hodge J held there was no duty to provide support pending a decision whether to provide s 4 support, however long delay in assessing a claim might lead to a breach of rights under the ECHR. He further held that such a breach had been prevented by the intervention of the Court and that it was incumbent on the Secretary of State to put in place a system that avoided delay.
- ¹³ In force 16 June 2006 – Immigration, Asylum and Nationality Act 2006 (Commencement No 1) Order 2006, SI 2006/1497.
- ¹⁴ In force 16 June 2006 – Immigration, Asylum and Nationality Act 2006 (Commencement No 1) Order 2006, SI 2006/1497.
- ¹⁵ See s 3A(7A) of the Protection from Eviction Act 1977, as amended by s 43(4) of the IAN 2006 – in force 16 June 2006 – Immigration, Asylum and Nationality Act 2006 (Commencement No 1) Order 2006, SI 2006/1497.

SUPPORT FOR THOSE WITH SPECIAL IMMIGRATION STATUS

13.142 Under Part 10 of the Criminal Justice and Immigration Act 2008, not yet in force, the Secretary of State may designate a person who is (a) a ‘foreign criminal’ (as defined in the Act) who is liable to deportation but cannot be removed on account of obligations arising under the Human Rights Act 1998 and the ECHR, or (b) is a family member of someone who falls within (a). Persons with the right of abode, including British citizens, may not be designated. A designated person does not have leave to enter or remain in the United Kingdom, is subject to immigration control, is not to be treated as an asylum seeker or a former asylum seeker, and is not in the UK in breach of immigration laws. Such a designated person may not be granted temporary admission. Conditions may be imposed on a designated person, relating to residence, employment or occupation, and reporting to the police, Secretary of State or an immigration officer. Travel expenses in connection with compliance with reporting conditions, may be obtained under s 69 of the Nationality,

13.143 *Welfare Benefits, Asylum Support and Community Care*

Immigration and Asylum Act 2002. A designated person will not have access to welfare benefits as he will be excluded by s 115 of the Immigration and Asylum Act 1999. Conditions imposed may also prevent employment or other economic activity.

13.143 Part 10 of the Criminal Justice and Immigration Act 2008 applies the asylum support regime under Pt VI of the Immigration and Asylum Act 1999, with modifications, to designated persons and their dependants. Support may be by way of providing accommodation appearing to the Secretary of State to be adequate for a person's needs, meeting what appear to be essential living needs, and by other ways which the Secretary of State thinks necessary to reflect the exceptional circumstances of a particular case. Support may not be provided wholly or mainly by way of cash unless the Secretary of State thinks it necessary to reflect the particular circumstances of a particular case (this restriction may be repealed, modified or disappplied by an order made by the Secretary of State). A notice to quit accommodation provided may be served where a person has ceased to be a designated person. Support under s 4 of the 1999 Act is not available to designated persons. The Secretary of State is relieved of the obligation under s 97 of the 1999 Act to have regard to the desirability of providing accommodation in a well-supplied area. Local authorities, registered social landlords, registered housing associations in Scotland and Northern Ireland and the Northern Ireland Housing Executive are relieved of the obligation to assist the Secretary of State in the provision of accommodation under s 100 of the 1999 Act in respect of designated persons. Part VI of the 1999 Act is further modified in that obligations arising under ss 101 (reception zones), 108 (failure of the sponsor to maintain), 111 (grants to voluntary organisations), and 113 (recovery of expenditure from sponsor) do not to apply in respect of designated persons. References in Part VI of the 1999 Act which require or permit the Secretary of State to have regard to the temporary nature of asylum support are to be read as requiring the Secretary of State to have regard to the nature and circumstances of support provided to the designated person.

13.144 However, by s 134(6) of the CJIA 2008, a designated person is not to be treated as a person from abroad who is not eligible for housing assistance as homeless under s 185(4) of the Housing Act 1996 or as a person subject to immigration control for the purposes of s 119(1)(b) of the Immigration and Asylum Act 1999 (homelessness: Scotland and Northern Ireland)¹. Thus, for homelessness purposes a designated person is not to be disregarded in determining whether another person (a) is homeless or threatened with homelessness, or (b) has a priority need for accommodation. In addition, as with support provided under Pt VI of the 1999 Act to asylum seekers, there is a right of appeal to the First-tier Tribunal (Social Entitlement Chamber). The Act makes provision for the application of rules to facilitate such appeals. After a designation lapses support may not be provided for a time thereafter unless (a) the person is granted leave to enter or remain in the United Kingdom or is notified by the Secretary of State or an immigration officer of a right of residence in the United Kingdom under the Community Treaties;² or (b) the person is made the subject of a deportation order under s 5 of the Immigration Act 1971.³

- ¹ Any future order made under s 10 of the Human Right Act 1998 to amend one of the homelessness provisions, s 185(4) of the Housing Act 1996 or s 119(1)(b) of the Immigration and Asylum Act 1999 (homelessness: Scotland and Northern Ireland), may also repeal or amend s 134(6) of the Act. However events have moved on. The Housing and Regeneration Act 2008, Sch 15 makes amendments to the Housing Act 1996, the Housing (Scotland) Act 1987, the Housing (Northern Ireland) Order 1988 and the Immigration and Asylum Act 1999. The amendments have the intention of addressing the declaration of incompatibility made in *R (on the application of Morris) v Westminster City Council* [2005] EWCA Civ 1184, [2006] 1 WLR 505 so that the eligibility provisions of the housing legislation in question are not discriminatory contrary to Art 14 ECHR. The amendments have not yet come into force but when they do they will repeal the provisions of the Criminal Justice and Immigration Act 2008 exempting designated person from this discrimination, on the basis that such discrimination no longer exists. Whether the amendments do actually remove all traces of discrimination is another matter.
- ² Support may be provided in respect of a period which begins when the designation lapses, and ends on a date determined in accordance with an order of the Secretary of State.
- ³ Support may be provided in respect of (a) any period during which an appeal against the deportation order may be brought (ignoring any possibility of an appeal out of time with permission), (b) any period during which an appeal against the deportation order is pending, and (c) after an appeal ceases to be pending, such period as the Secretary of State may specify by order.

COMMUNITY CARE PROVISION FOR THOSE SUBJECT TO IMMIGRATION CONTROL

13.147 Persons who are subject to immigration control and who are not asylum seekers may also be entitled to support under the NAA 1948 if their need arose for those same reasons and not merely because of an inability to access benefits or to obtain permission to work, or otherwise support themselves. For instance, where an overstayer was chronically ill as a result of being HIV positive, his needs arose from a combination of illness and destitution and he was held to be a person who was entitled to care and attention from his local authority under the Act.¹ However, the House of Lords has made it clear that the care and attention required must be care and attention from the local authority and must relate to matters other than a mere need for accommodation. Care and attention embraces a need for help with personal care, household tasks or supervision, where a person cannot or cannot reasonably be expected to manage these tasks himself.² A victim of domestic violence may also be entitled to care and attention under the Act.³ Those who are unfit to return to their country of origin,⁴ or who are prevented from returning home by factors outside their own control,⁵ may also have a need for care and attention. In addition, failed asylum seekers may also have a need for care and attention.⁶ However, any entitlement is subject to the provisions of Sch 3 to the NIAA 2002 and the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002.⁷ Schedule 3 prevents a local authority from providing support to various categories of people defined by their nationality, their immigration status and whether they have failed to comply with removal directions or failed to take steps to leave the country,⁸ save where the support is necessary to avoid a breach of either ECHR or EC rights.⁹ In such cases support may be provided to the extent necessary to avoid a breach of those rights.¹⁰ If a person has made a human rights application to stay in the UK or is otherwise not free to go, it may be necessary for a local authority to take a

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view as to its merits of that application in order to determine whether provision of support is necessary, whilst the Home Office considers whether the application for leave to remain should be allowed to avoid a breach of human rights that would be occasioned by return. However, it would only be if the local authority could properly characterise the human rights application as manifestly unfounded that it could withhold support on the basis that it was not necessary to avoid a breach of ECHR rights.¹¹ Whilst Sch 3 makes a person ineligible for the provision of ‘support or assistance’ it does not affect a person’s eligibility for the provision of a personal adviser and a pathway plan under s 23C of the Children Act 1989 because these things are not ‘support or assistance’.¹²

¹ *R (on the application of M) v Slough Borough Council* [2004] EWHC 1109 (Admin), [2004] LGR 657, [2004] All ER (D) 283, Collins J. The Court of Appeal approved Collins J’s judgment in *Slough Borough Council v R (on the application of M)* [2006] EWCA Civ 655, (2006) Times, 13 June 2006. However, see the judgment of the House of Lords, cited in fn 2 below, that care and attention required must be care and attention from the local authority and must relate to matters other than a mere need for accommodation.

² *R (on the application of M) v Slough London Borough Council* [2008] UKHL 52, [2008] 4 All ER 831.

³ *R (on the application of Khan) v Oxfordshire County Council* [2004] EWCA Civ 309, [2004] HLR 706. On the facts of the case she was not found to be entitled to care and attention under s 21.

⁴ *R v Brent London Borough Council, ex p D* [1998] 1 CCL Rep 234.

⁵ *R v Lambeth London Borough Council, ex p Sarhangi* [1999] 2 CCL Rep 145.

⁶ See for example *R (on the application of N) v Coventry City Council* [2008] EWHC 2786 (Admin).

⁷ SI 2002/3078.

⁸ NIAA 2002, Sch 3, paras 4–7A (para 7A inserted by the AI(TC)A 2004), s 9, in force from 1 December 2004 by the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Commencement No 2) Order 2004, SI 2004/2999. Section 44 of the IAN 2006 provides that the Secretary of State may make an order that para 7A of Sch 3 to the 2004 Act shall cease to have effect. Section 44 of the 2006 Act is not yet in force. At the time of writing the Home Office have indicated that para 7A will remain in force. The provisions disqualify affected persons from support or assistance under the National Assistance Act, ss 21 and 28 (accommodation and welfare), the Health Services and Public Health Act 1968, s 45 (welfare of elderly), s 254 of, and Sch 20 to, the National Health Service Act 2006, or s 192 of, and Sch 15 to, the National Health Service (Wales) Act 2006 (social services), Children Act 1989, ss 17, 23C, 24A and 24B (welfare powers which can be exercised in relation to adults), and their Scottish and Northern Irish equivalents: Sch 3, para 1(1).

⁹ NIAA 2002, Sch 3, para 3.

¹⁰ NIAA 2002, Sch 3, para 3.

¹¹ *R (on the application of B) v Southwark London Borough* [2006] EWHC 2254 (Admin), [2007] 3 FCR 457, applying *R (on the application of Kimani) v Lambeth London Borough Council* [2003] EWCA Civ 1150, [2004] 1 WLR 272, [2003] 3 FCR 222, *R (on the application of PB) v Haringey London Borough Council* [2006] EWHC 2255 (Admin) and *R (on the application of AW) v Croydon London Borough Council*; *R (on the application of A, D and Y) v Hackney London Borough Council* [2005] EWHC 2950 (Admin), [2005] All ER (D) 251 (Dec).

¹² *R (on the application of B) v London Borough of Southwark* (see fn 11 above).

CHILDREN ACT 1989

13.152 Before the Children Act 1989 came into force, the National Assistance Act 1948 contained a power to assist both adults and children in need of care and attention but the Children Act 1989 amended the 1948 Act to restrict

its powers to those aged 18 or over.¹ The Children Act 1989 includes a general target duty for all local authorities to safeguard and promote the welfare of children within their area who are in need, to meet these needs by providing a range of appropriate services, and to promote the upbringing of such children by their families wherever that is consistent with promoting their welfare.² This duty may include the provision of accommodation and financial support to both the children and their families. Local authorities may owe a duty under s 17 to non-asylum seeking families who are subject to immigration control. However, s 17 does not place an absolute duty on a local authority to provide accommodation in accordance with a family's assessed need; neither does it impose a specific duty to meet the needs of each individual child. It only places a general duty on a local authority to maintain a level and range of services sufficient to enable it to discharge its functions under the Act. Its more specific duties are contained in other sections of the Act.³ In cases covered by Sch 3 to the NIAA 2002, the authority may provide accommodation and support only to the children, except in cases where this would lead to a breach of rights protected by the ECHR or the EC Treaties.⁴ Local authorities are not permitted to exercise their powers to provide accommodation and essential living needs to asylum seekers and their minor dependants whilst the Secretary of State is either providing them with support or has the power to do so if they were to apply for support.⁵ Responsibility for supporting the children of asylum seekers lies exclusively with the Secretary of State. So where an able-bodied asylum seeker had two disabled minor dependants, no duty arose under s 17 and the Secretary of State was held to be responsible for providing adequate accommodation to meet the children's needs. It was held that in such circumstances, the Home Office should use its powers to request local authorities and social landlords to assist it to find adequate accommodation for the family.⁶ Responsibility to provide accommodation for an Unaccompanied Asylum Seeking Child (UASC) will fall to a local authority under s 20 of the Children Act 1989 where the child is within its area and appears to the local authority to require accommodation as a result of there being no person with parental responsibility, the child having been lost or abandoned, or where the person who has been caring for the child prevented (whether or not permanently, and for whatever reason) from providing him or her with suitable accommodation or care.⁷ Such a child will be 'looked after' by the local authority. The Secretary of State does not provide asylum support to unaccompanied asylum seeking children for so long as they are minors. When a child becomes 18 years old, responsibility for accommodation and support may transfer to the Secretary of State.⁸ Where a local authority considers that a person may be an adult, it may conduct an age assessment to establish the person's age. The correct approach to age assessment had proved highly contentious in terms of the procedural safeguards required to ensure fairness.⁹ The 'right' to accommodation under s 20 of the Children Act 1989 has been held not to be a civil right for Art 6(1) ECHR purposes and that even if it were, the availability of judicial review was sufficient to ensure compliance.¹⁰

¹ Children Act 1989, Sch 13, para 11.

² Children Act 1989, s 17.

³ *R (on the application of G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208, [2003] 3 WLR 1194, [2004] 1 All ER 97; *R (on the application of Blackburn-Smith) v London Borough of Lambeth* [2007] EWHC 767, (Admin).

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- ⁴ See eg *R (on the application of Grant) v Lambeth London Borough Council* [2004] EWHC 1524 (Admin), [2004] 3 FCR 494; *R (on the application of Conde) v Lambeth London Borough Council* [2005] HLR 452. See also *R (on the application of C) v Birmingham City Council* [2008] EWHC 3036 (Admin), [2008] All ER (D) 171 (Nov) on the need for local authorities to have regard to a material policy of the Secretary of State in deciding whether or not to withdraw support and offer to pay for travel to the country of origin in order to meet any human rights obligations arising under Sch 3 to the Nationality, Immigration and Asylum Act 2002.
- ⁵ IAA 1999, s 122 (to be substituted by the NIAA 2002, s 47 from a date to be appointed).
- ⁶ *R (on the application of A) v National Asylum Support Service* [2003] EWCA Civ 1473, [2004] 1 All ER 15.
- ⁷ See *R (on the application of Liverpool City Council) v Hillingdon London Borough Council* [2008] EWHC 1702 (Admin), [2009] 1 FCR 252.
- ⁸ Policy Bulletin 29 Transition at Age 18.
- ⁹ See *R (on the application of B) v Merton London Borough Council* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280; *R (on the application of I) v Secretary of State for the Home Department* [2005] EWHC 1025 (Admin), (2005) Times, 10 June; *R (on the application of C) v Merton London Borough Council* [2005] EWHC 1753 (Admin), [2005] 3 FCR 42 and *R (on the application of A) v Croydon* [2008] EWHC 2921 (Admin), [2008] All ER (D) 19 (Dec).
- ¹⁰ *R (on the application of A) v London Borough of Croydon*; *R (on the application of M) v London Borough of Lambeth* [2008] EWCA Civ 1445, [2009] 1 FCR 317.

ACCESS TO HOUSING

13.154 A person who is subject to immigration control¹ has the right to own property in the UK and to enter into a private tenancy agreement. As a private sector tenant, he or she has the same rights to security of tenure, access to civil remedies in cases of disrepair or excessive rent rises as any other private tenant and may rely on the Protection from Eviction Act 1977.² He or she is also protected from discrimination on the basis of race, when seeking accommodation.³ However, there is limited entitlement to housing benefit, see 13.9–13.12. Persons subject to immigration control will not generally be eligible for public sector housing under Part II of the Housing Act 1985.⁴ Section 160A of the Housing Act 1996, inserted by the Homelessness Act 2002, prevents local housing authorities from *allocating* public sector housing to persons from abroad, including those subject to immigration control under the 1996 Act,⁵ those excluded from housing benefit by s 115 of the IAA 1999⁶ and other classes as prescribed. Regulations under s 160A prescribe categories of persons who are subject to immigration control or are other persons from abroad who may be allocated housing under Part VI of that Act. The regulations in force since 1 June 2006 are the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006.⁷ There are four classes of persons subject to immigration control who are eligible for housing: recognised refugees, persons with exceptional leave to remain such as discretionary leave, persons with indefinite leave to remain who are habitually resident in the common travel area, and those with humanitarian protection within the Immigration Rules.⁸ A fifth category of persons originally identified as eligible for accommodation (nationals of a state which has ratified the European Convention on Social and Medical Assistance or the Council of Europe Social Charter and who are lawfully present and habitually resident) are no longer eligible under the regulations.⁹ In addition, a sixth category, persons over 18, who left Montserrat after 1 November 1995 because of the effect on that territory of a volcanic

eruption, are no longer eligible for assistance if they apply on or after 9 October 2006.¹⁰ Thus the persons subject to immigration control who are eligible for assistance are:

- Class A – a person who is recorded by the Secretary of State as a refugee within the definition in Article 1 of the Refugee Convention and who has leave to enter or remain in the UK (since they are not excluded from having recourse to public funds);
- Class B – a person: (i) who has exceptional leave to enter or remain in the UK granted outside the provisions of the Immigration Rules (such as discretionary leave); and (ii) who is not subject to a condition requiring him to maintain and accommodate himself, and any person who is dependent on him, without recourse to public funds;
- Class C – persons who have indefinite leave to remain and are habitually resident in the common travel area (except for sponsored immigrants who have been here for less than five years and whose sponsor is still alive);
- Class D – persons granted humanitarian protection within the Immigration Rules.

¹ IAA 1999, s 118(6).

² *Akinbolu v Hackney London Borough Council* (1996) 29 HLR 259.

³ Race Relations Act 1976, ss 20–21.

⁴ IAA 1999, s 118. See also the Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000, SI 2000/706, Persons Subject to Immigration Control (Housing Authority Accommodation) (Wales) Order 2000, SI 2000/1036, and the Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) (Amendment) Order 2006, SI 2006/2521. See also the Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) (Amendment) Order 2008, SI 2008/1768.

⁵ Housing Act 1996, s 160A(1), (3) (inserted by the Homelessness Act 2002, s 4 from 5 December 2002).

⁶ Housing Act 1996, s 160A(4), as inserted.

⁷ SI 2006/1294. In *Ehiabor v Royal Borough of Kensington and Chelsea* [2008] EWCA Civ 1074, [2008] All ER (D) 104 (May), it was held that a child born in the UK, who was not a British citizen, required leave to remain, and was thus subject to immigration control.

⁸ The Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, SI 2006/1294, reg 3.

⁹ For non-EEA states which have ratified these agreements, see 13.11 above. See also the Allocation of Housing (England) Regulations 2002, SI 2002/3264, reg 4. For 'lawfully present', see *Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64, [2006] 1 AC 564, [2006] 1 All ER 1. Prior to 3 April 2000, nationals of states which had signed the Convention and Charter and who were habitually resident here were also entitled to join the housing register. The category was removed by the Allocation of Housing and Homelessness (Amendment) (England) Regulations 2006, SI 2006/1093 save for applicants who before 20 April 2006 had made applications for an allocation of housing accommodation under Part 6 of the Housing Act 1996 and had not been notified by the local housing authority that they were ineligible for an allocation.

¹⁰ Allocation of Housing and Homelessness (Miscellaneous Provisions) (England) Regulations 2006, SI 2006/2527, the Allocation of Housing (Wales) (Amendment) Regulations 2006, SI 2006/2645.

13.155 Nationals of EEA states and their family members, as other persons from abroad, are ineligible for an allocation of housing unless they have the right to reside pursuant to the Immigration (European Economic Area) Regulations 2006,¹ Council Directive 2004/38/EC² or another enforceable European Community right. Persons not subject to immigration control, as

other persons from abroad, (including nationals of EEA States and their family members) are ineligible for allocation of housing unless they are habitually resident in the common travel area and have a right to reside (ie as British citizens, persons with the right of abode, persons exempt from immigration control, and EEA nationals and family members with a right to reside). However, if their only right to reside is an EEA right to reside as a jobseeker, a family member of a jobseeker or a person with an initial three month right to reside, they will be ineligible.³ On a separate point, the following persons with a right to reside do not have to be further habitually resident in order to be eligible for accommodation: (a) an EEA national who is a worker; or (b) an EEA national who is self-employed; (c) an Accession state worker who is treated as a qualified person under the EEA Regulations (national of a state in eastern Europe that joined the European Union on 1 May 2004 or 1 January 2007, lawfully working in UK); (d) a family member of a person listed at (a)–(c); (e) a person with an EEA right to reside permanently (acquired other than by having completed five years of EEA rights to reside under the Immigration (European Economic Area) Regulations 2006);⁴ (f) a person not subject to immigration control who left Montserrat after 1 November 1995 because of the effect of the volcanic eruption; (g) a person in the UK owing to deportation or removal from another country; and (h) during the relevant period beginning at 4pm on 25 July 2006 and ending on 31 January 2007, a person who left Lebanon on or after 12 July 2006 because of the armed conflict there.⁵ Those entitled to housing accommodation may apply to a local housing authority for an allocation of housing, and their entitlement will be considered in line with the usual procedures contained in Part VI the Housing Act 1996. Those refused housing allocation on grounds of ineligibility have a right to written reasons for the refusal and to a review of the decision.⁶

¹ SI 2006/1003.

² In *Sheich (Habiba) v Bristol County Council* 5 BS 03394, HHJ Purcell held that an EEA national who was not employed and who was not a work seeker or otherwise a qualified person within the meaning of reg 5 of the Immigration (European Economic Area) Regulations 2000, SI 2000/2326 was eligible for housing assistance under Part VII of the Housing Act 1996, because she was in receipt of income support and fell within Class 1 of reg 3 of the Homelessness (England) Regulations 2000, SI 2000/701. That was the position confirmed by the Court of Appeal in *Barnet London Borough Council v Ismail* [2006] EWCA Civ 383, [2006] 1 WLR 2771, (2006) Times, 25 April. Thereafter, the government amended the Allocation of Housing (England) Regulations 2002, SI 2002/3264, to revoke reg 4(d) and the Homelessness (England) Regulations 2000, to revoke reg 3(1)(i) which, respectively, had made those subject to immigration control but receiving income support or jobseeker's allowance eligible for an allocation of housing and housing assistance. See SI 2006/1093, reg 2(1). In *Ibrahim v Harrow London Borough Council* [2008] EWCA Civ 386, [2008] 2 CMLR 841 the Court of Appeal referred to the European Court of Justice the question of whether a non-EEA national enjoyed a right to reside in circumstances where, she was the mother/primary carer of children in education, the children were children of a former EEA worker, the non EEA national was married to the former EEA worker, and the former EEA national has left the UK and then returned to the UK and was no longer a worker. In *Teixeira v London Borough of Lambeth* [2008] EWCA Civ 1088, [2008] All ER (D) 91 (Oct) the Court of Appeal referred to the ECJ the question of whether an EU citizen who was both the primary carer of children in education and also a former worker, could enjoy a right to reside. The cases turn on the continuing efficacy and extent of Art 12 of Regulation (EEC) 1612/68 and the applicability of the reasoning in *Baumbast v Secretary of State* C-413/99 [2002] ECR I-7091 ECJ following the introduction of Directive 2004/38/EC, as well as the question of whether or not there is any requirement for primary carers to be self-sufficient. In *Barry v London Borough of*

Southwark [2008] EWCA Civ 1440, [2009] NLJR 118 it was held that two weeks' work at a tennis tournament was sufficient for a person to qualify as a worker and for the applicable machinery under reg 6(2) of the Immigration (European Economic Area) Regulations 2006 to enable him to retain worker status.

³ SI 2006/1294, reg 4(1). The three months right of residence referred to is that conferred by SI 2006/1003, reg 13.

⁴ SI 2006/1294, reg 4(2).

⁵ SI 2006/1294, reg 4(2).

⁶ Housing Act 1996, s 160A(9), (10) as inserted and s 167(4A)(d).

13.156 In respect of applications for homelessness assistance under Part VII of the Housing Act 1996, those subject to immigration control are those listed at Classes A–D above plus a Class E consisting of a person who is an asylum-seeker whose claim for asylum is recorded by the Secretary of State as having been made before 3 April 2000 in one of three circumstances: (i) on arrival (other than on his re-entry) in the UK from a country outside the UK, the Channel Islands, the Isle of Man or the Republic of Ireland; (ii) within three months from the day on which the Secretary of State made a relevant declaration, and the applicant was in Great Britain on the day on which the declaration was made; or (iii) on or before 4 February 1996 by an applicant who was on 4 February 1996 entitled to benefit under reg 7A of the Housing Benefit (General) Regulations 1987 (persons from abroad).¹ In respect of other persons from abroad, not subject to immigration control, who are eligible for assistance as homeless under Part VII of the Housing Act 1996, the list is the same as for those eligible for an allocation of housing under Part VI of the 1996 Act. By s 185(4) in Part VII of the 1996 Act a person from abroad who is not eligible for homelessness assistance shall be disregarded in determining whether another person: (a) is homeless or threatened with homelessness, or (b) has a priority need for accommodation. This provision has the effect of excluding members, including family, of an applicant's household, from being taken into consideration when decisions are being made to determine whether the applicant is homeless or in priority need. In a classic example, where the children of a British Citizen applicant arrive from abroad, and do not themselves satisfy the eligibility criteria, they cannot confer priority need on the applicant. This means that the applicant will not be able to obtain the main duty to secure accommodation under s 193 of the 1996 Act. This has an impact on family life as it makes it more difficult for the family to live together. The Court of Appeal has declared s 185(4) of the 1996 Act to be incompatible with the ECHR, Articles 8 (right to respect for family life) and Article 14, as it creates a difference in treatment that is unjustified discrimination on grounds of national origin or a combination of nationality, immigration control, settled residence and social welfare.² The Housing and Regeneration Act 2008, Sch 15, amends the Housing Act 1996, the Housing (Scotland) Act 1987, the Housing (Northern Ireland) Order 1988 and the Immigration and Asylum Act 1999 in an attempt to remove the incompatibility. The provisions are not yet in force. They create a statutory regime that makes it easier for a local housing authority to perform a duty to persons forming a household, to whom a duty is owed because their number includes a person who lacks leave to remain or has such leave subject to a no recourse to public funds condition. Whether this new scheme is itself discriminatory

remains to be seen. The 'Homelessness Code of Guidance for Local Authorities' was published by the Department for Communities and Local Government in July 2006. It came into force on 4 September 2006. Eligibility for assistance is considered at Chapter 9: Eligibility for Assistance, paras 9.1–9.25 and Annex 8 to Annex 13. For homelessness applicants, interim accommodation pending review under s 188(3) of the 1996 Act and pending appeal under s 204(4) of the 1996 Act is subject to Sch 3 to the NIAA 2002. Accommodation may only be provided to those falling within its provisions, if it is, and to the extent, necessary to avoid a breach of the ECHR or the EC Treaties.³

- ¹ SI 2006/1294, reg 5. For the purpose of Class E (iii), a person does not cease to be an asylum-seeker while he is eligible for housing benefit by virtue of: (a) regulation 10(6) of the Housing Benefit Regulations 2006, SI 2006/213; or (b) reg 10(6) of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006, SI 2006/214, as modified in both cases by para 6 of Sch 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006, SI 2006/217.
- ² *R (on the application of Morris) v Westminster City Council*; *R (on the application of Badhu) v Lambeth London Borough Council* [2005] EWCA Civ 1184, [2006] 1 WLR 505, [2006] HLR 122, Sedley and Auld LLJ, Jonathan Parker LJ dissenting.
- ³ *R (on the application of Maryam Mohamed) v Harrow London Borough Council* [2006] HLR 18 and *Putans v Tower Hamlets London Borough Council* [2006] EWHC 1634 (Ch), [2007] HLR 126.

13.157 Section 118 of the IAA 1999, which re-enacts s 9(1) of the Asylum and Immigration Act 1996 (AIA 1996), requires housing authorities to ensure that, so far as is practicable, tenancies and licences are not granted under Part II of the Housing Act 1985 (provision of housing accommodation) to persons subject to immigration control, except for certain classes specified in regulations.¹ The regulations consolidate previous provisions made under s 9 of the AIA 1996. However, from 3 April 2000, regulations also permit housing authorities to use hard to let accommodation held under Part II of the Housing Act 1985 for overseas students, as long as they are not granted secure tenancies.² Section 118 does not apply to secure tenancies allocated under Part VI of the Housing Act 1996. Eligibility for an allocation of housing is governed by s 160A of the Housing Act 1996.³

- ¹ Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000, SI 2000/706, Art 3, and Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) (Amendment) Order 2006, SI 2006/2521.
- ² SI 2000/706, reg 4(e). See also the Persons Subject to Immigration Control (Housing Authority Accommodation) (Wales) Order 2000, SI 2000/1036 (W67).
- ³ See 13.154.

ACCESS TO EDUCATIONAL PROVISION

Higher education

13.167 Publicly-funded educational institutions are permitted to charge higher fees for students of further¹ and higher² education, who do not qualify as 'home students'.³ For higher education courses, individual higher education institutions are responsible for classifying students for fees purposes.⁴ A

student is likely to qualify as a 'home student' for the purposes of higher education courses if he or she falls within one of twelve categories:

- (1) British citizens, those with the right of abode in the UK or with indefinite leave to remain here, who are ordinarily resident in the UK, who have been ordinarily resident⁵ in the UK and Islands throughout the three-year period preceding the first day of the first academic year of the course,⁶ and that ordinary residence must not have been wholly or mainly for the purpose of receiving full-time education⁷;
- (2) persons who have acquired the EC/EEA permanent right of residence under Directive 2004/38/EC, and are settled in the UK thereby, who are ordinarily resident in the UK, who have been ordinarily resident in the UK and Islands throughout the three-year period preceding the first day of the first academic year of the course; and where the three year prior residence in the UK and Islands was wholly or mainly for the purpose of receiving full-time education, were ordinarily resident in the EEA, Switzerland or the Overseas territories⁸, immediately before that period of residence;
- (3) persons who are refugees; the spouses or civil partners of refugees on the date the refugees applied for asylum; and children of the refugees, spouses or civil partners who were so related on the date the refugees applied for asylum and who were under 18 on that date; who are ordinarily resident in the UK and Islands, have not ceased to be so resident since they were recognised as refugees or granted leave, and are ordinarily resident in UK on the first day of the first academic year of the course. The UKCISA Guidance states that if a person is granted refugee status part way through a course, he or she will be liable to pay 'home fees' on the next occasion that fees are due. However, as the grant of refugee status merely recognises the fact that the person is a refugee and does not create this status, it is arguable that a refugee is entitled to a repayment of any additional fees paid as an 'overseas' student' before his or her status was formally recognised;
- (4) persons granted humanitarian protection, discretionary leave or exceptional leave to remain when asylum is refused; their spouses or civil partners on the date the person applied for asylum; and children of the persons, spouses or civil partners who were so related on the date the person applied for asylum and who were under eighteen on that date;
- (5) persons who are: (a) EEA or Swiss migrant workers; (b) EEA or Swiss self-employed persons; (c) family members of such persons mentioned (a)–(b); (d) EEA frontier workers or EEA frontier self-employed persons; (e) Swiss frontier employed persons or Swiss frontier self-employed persons; and (f) family members of persons mentioned in (d)–(e); who are ordinarily resident in the UK on the first day of the first academic year of the course and ordinarily resident in the EEA, Switzerland and the overseas territories throughout the three-year period preceding the first day of the first academic year of the course. However, there is no requirement to be ordinarily resident in the UK on the first day of the first academic year of the course where persons are EEA frontier workers or EEA frontier self-employed persons, Swiss frontier employed persons or Swiss frontier self-employed persons or family members of such persons;⁹

- (6) persons who are ordinarily resident in the UK on the first day of the first academic year of the course; have been ordinarily resident in EEA, Switzerland or the Overseas territories throughout the three-year period preceding the first day of the first academic year of the course; and are entitled to support by virtue of Article 12 of Council Regulation (EEC) No 1612/68 as extended by the EEA Agreement;
- (7) persons who are settled in the UK; left the UK and exercised a right of residence after having been settled in the UK; are ordinarily resident in the UK on the day on which the first term of the first academic year actually begins; have been ordinarily resident in the EEA, Switzerland or the overseas territories throughout the three-year period preceding the first day of the first academic year of the course; and where the prior ordinary residence was wholly or mainly for the purposes of receiving full-time education, were ordinarily resident in the EEA and Switzerland immediately beforehand.¹⁰
- (8) persons who are either (a) EC nationals on the first day of an academic year of the course or (b) family members of a such a person, who are undertaking the course in the UK. All such persons must have been ordinarily resident in the EEA, Switzerland or the overseas territories throughout the three-year period preceding the first day of the first academic year of the course. The prior period of ordinary residence in the relevant territory must not during any part of the period referred to have been wholly or mainly for the purpose of receiving full-time education;
- (9) persons who are EC nationals other than UK nationals on the first day of the first academic year of the course, who are ordinarily resident in the UK on the first day of the first academic year of the course, who have been ordinarily resident in the UK and Islands throughout the three-year period immediately preceding the first day of the first academic year of the course, and where prior periods of ordinary residence were wholly or mainly for the purpose of receiving full-time education, were ordinarily resident in the territory comprising the EEA, Switzerland or the overseas territories, immediately prior to that period of ordinary residence in the UK. Where a state acceded to the EC after the first day of the first academic year of the course and a person is a national of that state, the requirement to be an EC national other than a UK national on the first day of the first academic year of the course is treated as being satisfied¹¹;
- (10) the children of Swiss nationals who are entitled to support in the UK by virtue of the Swiss Agreement, who are ordinarily resident in the UK on the first day of the first academic year of the course, and who have been ordinarily resident in the EEA and Switzerland throughout the three-year period preceding the first day of the first academic year of the course. In a case where such prior ordinary residence referred to was wholly or mainly for the purpose of receiving full-time education, were ordinarily resident in the territory comprising the EEA, Switzerland and the overseas territories, immediately before that period of ordinary residence;
- (11) the children of Turkish workers, who are ordinarily resident in the UK on the first day of the first academic year of the course, and who have

been ordinarily resident in the EEA, Switzerland, Turkey and the overseas territories, throughout the three-year period preceding the first day of the first academic year of the course;

- (12) students studying under a formal exchange programme where fees have to be paid. (It is usual under such programmes for the fees to be waived.)

- ¹ GCSE, 'A' level and their equivalent, NVQ, GNVQ, BTEC and access courses.
- ² Undergraduate, post-graduate, HND and HNC courses.
- ³ Education (Fees and Awards) Act 1983, s 1; Education (Fees and Awards) (England) Regulations 2007, SI 2007/779; and Education (Fees and Awards) (Wales) Regulations 2007, SI 2007/2310, Education (Student Fees, Awards and Support) (Amendment) (No 2) Regulations 2007, SI 2007/2263. See also the Education (Fees and Awards) (Wales) Regulations 2008, SI 2008/1259 (W126). For the position in respect of student support from 1 April 2008 see the Education (Student Support) Regulations 2008, SI 2008/529.
- ⁴ In line with the Education (Fees and Awards) (England) Regulations 2007, SI 2007/779 (as amended by SI 2007/2263).
- ⁵ Ordinary residence was defined by the House of Lords in *Shah v Barnet London Borough Council* [1983] 2 AC 309 as 'abode in a particular place or country which [the person] has adopted voluntarily and for a settled purpose as part of the regular order of his life for the time being, whether of short or long duration'. Reasons for the residence can include business or profession, employment, health, family or merely love of the place. If a person is not legally present in the UK he or she cannot be ordinarily resident. For the purposes of the Fees Regulations a person who is ordinarily resident in the UK as a result of having moved from the Islands (Channel Islands, Isle of Man) for the purpose of undertaking a course is to be considered to be ordinarily resident in the Islands; see SI 2007/779, reg 2(8) as inserted by SI 2007/2263.
- ⁶ This will be calculated as the date closest to 1 January, 1 April or 1 September.
- ⁷ A person is treated as ordinarily resident in England; England and Wales; Great Britain; the UK; the UK and Islands; the EEA and Switzerland; the EEA, Switzerland and the overseas territories; or the EEA, Switzerland and Turkey if he would have been so resident but for the fact that he, his spouse or civil partner, his parent or in the case of dependent direct relative in the ascending line, his child or child's spouse or civil partner, is or was temporarily employed outside the area in question. Temporary employment includes Crown Service in the armed forces, serving outside the UK, service in the armed forces of an EEA State or Switzerland for any period which they serve outside the territory EEA and Switzerland, service in the armed forces of Turkey, during any period which they serve outside the EEA, Switzerland and Turkey; see SI 2007/779, reg 2(4)–(5).
- ⁸ Overseas territories means Anguilla; Aruba; Bermuda; British Antarctic Territory; British Indian Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Islands; Faroe Islands; French Polynesia; French Southern and Antarctic Territories; Mayotte; Greenland; Montserrat; Netherlands Antilles (Bonaire, Curaçao, Saba, Sint Eustatius and Sint Maarten); Pitcairn, Henderson, Ducie & Oeno Islands; South Georgia and the South Sandwich Islands; St Helena and Dependencies (Ascension Island and Tristan de Cunha); St Pierre et Miquelon; the Territory of New Caledonia and Dependencies; Turks and Caicos Islands and Wallis and Futuna; see SI 2007/779, reg 2(1).
- ⁹ For categories (5)–(8) persons are treated as ordinarily resident in England, England and Wales, Great Britain, the UK, the UK and Islands, the EEA and Switzerland, the EEA, Switzerland and the overseas territories, or in the EEA, Switzerland and Turkey if they would have been so resident but for the fact that they, their spouses or civil partners, their parents or in the case of a dependent direct relatives in the ascending line, their children or their children's spouses or civil partners were temporarily receiving full-time education outside the area in question; see SI 2007/779, reg 2(6). For all categories, an area which was previously not part of the European Community or the EEA but at any time has become part of one or the other or both of these areas, is to be considered to have always been a part of the European Economic Area; see SI 2007/779, reg 2(7).
- ¹⁰ Persons have exercised a right of residence if they are UK nationals, family members of UK nationals for the purposes of Article 7 of Directive 2004/38 (or equivalent EEA Agreement and Swiss Agreement provisions) or persons who have rights of permanent residence who in each case have exercised rights under Article 7 of Directive 2004/38 (or equivalent EEA Agreement and Swiss Agreement provisions) in a state other than the UK or, in the case of

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persons who are settled in the UK and have rights of permanent residence, if they go to the state within the EEA and Switzerland of which they are nationals or of which the persons in relation to whom they are family members are nationals: SI 2007/779, Sch 1, para 8(2).

- ¹¹ Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia.

13.169 Local authorities may lawfully impose eligibility criteria for awards. Financial assistance, called Student Support, is available in the form of student loans for tuition fees; maintenance grants or special support grants; student loans for maintenance; bursaries; extra help for those with a disability, children or adult dependants; and a college fee loan for graduate entrants to specified undergraduate courses at Oxford or Cambridge. Support is available for first-degree courses (either full time or sandwich), a Higher National Diploma, a Diploma in Higher Education or a Postgraduate Certificate in Education and some part-time courses. Mandatory award criteria are set out in the Education (Mandatory Award) Regulations 2003.¹ The criteria for eligibility for other student support is contained in the Education (Student Support) Regulations 2008.² Information as to who to contact with support enquires is found in 'A Guide to Financial Support for Higher Education Students in 2008–2009'. In general, the following categories of persons are eligible for student support in England³:

- (1) persons settled in the UK and Islands: on the first day of the first academic year of the course must be ordinarily resident in England, ordinarily resident in the UK and Islands for the three-year period before the first day of the first academic year of the course, where the main purpose of residence in the UK and Islands must not have been full-time education during the three-year period. Separate provisions apply to those from the Isle of Man or Channel Islands;
- (2) refugees and family members: must be: (a) a refugee; (b) spouse or civil partner on the date the refugee applied for asylum; or (c) child of a refugee, spouse or civil partner who was under 18 on the date the refugee applied for asylum; on the first day of the first academic year of the course must be ordinarily resident in England; and must have remained ordinarily resident in the UK and Islands;
- (3) persons granted other leave when asylum claim refused: (a) persons granted humanitarian protection or discretionary leave or exceptional leave to remain when asylum is refused, (b) their spouses or civil partners on the date the person applied for asylum, and (c) children of the persons, spouses or civil partners who were so related on the date the person applied for asylum and who were under eighteen on that date; on the first day of the first academic year of the course must be ordinarily resident in England; and must have been ordinarily resident in the UK and Islands for three years before the first day of the first academic year of the course;
- (4) EU citizens living in UK and Islands (not UK Nationals): on the first day of the first academic year of the course must be ordinarily resident in England, ordinarily resident in the UK and Islands for the three-year period before the first day of the first academic year of the course, and if the prior period of residence was for the purpose of full-time

education, must have been ordinarily resident in the EEA or Switzerland prior to the three year-period of ordinary residence in the UK and Islands;

- (5) EU citizens and their family members with the permanent right of residence: on the first day of the first academic year of the course must be ordinarily resident in England, ordinarily resident in the UK and Islands for the three-year period before the first day of the first academic year of the course, and if the prior period of residence was for the purpose of full-time education, must have been ordinarily resident in the EEA or Switzerland prior to the three-year period of ordinary residence in the UK and Islands;
- (6) EEA and Swiss workers and their family members (not UK nationals): on the first day of the first academic year of the course must be ordinarily resident in England (this is not required from EEA or Swiss frontier workers or family members of frontier workers), and must have been ordinarily resident in the EEA or Switzerland for three years prior to the first day of the first academic year of the course;
- (7) EU citizens and their family members, living in the EEA and Switzerland (only eligible for tuition fee loans in this capacity): must be in the UK as self-sufficient persons, students or family members of such persons, ordinarily resident in the EEA or Switzerland for three years before the first day of the first academic year of the course, where the main purpose of residence in the EEA or Switzerland must not have been to receive full-time education during the three-year period;
- (8) persons settled in the UK as UK nationals, family members of UK nationals, or persons with the permanent right of residence: on the first day of the first academic year of the course must be ordinarily resident in England, the person or family member must have left the UK and exercised an EEA right of residence in the EEA or Switzerland after having been settled in the UK, must have been ordinarily resident in the EEA or Switzerland for the three-year period before the first day of the first academic year of the course, and if the prior period of residence was for the purpose of full-time education, must have been ordinarily resident in the EEA or Switzerland prior to the three-year period of ordinary residence;
- (9) children of Swiss Nationals living in the EEA or Switzerland: on the first day of the first academic year of the course must be ordinarily resident in England, must have been ordinarily resident in the EEA or Switzerland for three years before the first day of the first academic year of the course, and if the prior period of residence was for the purpose of full-time education, must have been ordinarily resident in the EEA or Switzerland prior to the three-year period of ordinary residence;
- (10) children of Turkish workers living in the EEA, Switzerland or Turkey: must be the children of Turkish citizens ordinarily resident in the UK who are or have been lawfully employed in the UK, on the first day of the first academic year of the course must be ordinarily resident in England, and must have been ordinarily resident in the EEA, Switzerland or Turkey for three years before the first day of the first academic year of the course.

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Student Support is administered by local authorities in England and Wales, the Student Awards Agency for Scotland and the appropriate Education and Library Board in Northern Ireland. However, citizens and their children should apply directly to the Department for Innovation, Universities and Skills, and Student Finance Direct.

¹ SI 2003/1994, as amended.

² SI 2008/529.

³ The current criteria for England, Wales, Scotland and Northern Ireland can be found on the UKCISA website.

ACCESS TO THE NATIONAL HEALTH SERVICE

13.170 The founding principle of the National Health Service was the provision of treatment which was free at the point of delivery, comprehensive and provided on the basis of need.¹ But inroads were made into the principle of free treatment in the late 1980s, when the Secretary of State was empowered to make regulations imposing charges for non-emergency treatment on people who are not ordinarily resident in the UK.² The term ‘overseas visitors’ has been and is used in the relevant regulations to describe those who are not ordinarily resident.³ Subsequent regulations permitted charges to be made.⁴ These charges can be calculated at an appropriate commercial basis and the power to set these rates has been devolved to the Strategic Health Authorities, Primary Care Trusts, Foundation Trusts and NHS Trusts in England.⁵

¹ The current duty for England is expressed at s 1 of the National Health Service Act 2006 and for Wales in the National Health Service (Wales) Act 2006.

² See former National Health Service Act 1977, s 121 (as amended by ss 7(12) and (14) of the Health and Medicines Act 1988) and s 175 of the National Health Service Act 2006). For ordinary residence, see chapter 5 above.

³ National Health Service (Charges to Overseas Visitors) Regulations 1989, SI 1989/306, reg 1. A challenge to the definition of the term ‘overseas visitor’ and its application to a failed asylum seeker in order to justify the refusal of non-emergency treatment, was brought on the basis that he was not unlawfully in the UK as he had claimed asylum at port. The NHS Hospital Trust in question agreed to treat the person. However, in a collateral challenge to the related Department of Health Guidance *Implementing the overseas visitors hospital charging regulations: Guidance for NHS trust hospitals in England* continues, see *R (on the application of YA (Palestine)) v Secretary of State for Health* CO/8095/2006. In *R (on the application of A) v West Middlesex University Hospital Trust* [2008] EWHC 855 (Admin), (2008) Times, 13 May it was held that guidance advising NHS Trusts to charge failed asylum seekers, otherwise ordinarily resident, was unlawful.

⁴ National Health Service (Charges to Overseas Visitors) Regulations 1989, SI 1989/306, as amended by the National Health Service (Charges to Overseas Visitors) Amendment Regulations 1991, SI 1991/438, National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 1994, SI 1994/1535, National Health Service (Charges to Overseas Visitors) Amendment Regulations 2000, SI 2000/602, National Health Service (Charges to Overseas Visitors) Amendment (No 2) Regulations 2000, SI 2000/909, National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2004, SI 2004/614 and National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2006, SI 2006/3306. See also the National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2008, SI 2008/2251.

⁵ National Health Service (Charges to Overseas Visitors) Regulations 1989, SI 1989/306, reg 7, as amended by SI 2000/602, reg 2(d) and SI 2004/614, Sch 2.

NHS hospital treatment

13.172 NHS hospital treatment is no longer free for all at the point of delivery. Free treatment is limited by reference to an individual's immigration status and/or nationality unless the treatment falls within one of the categories listed in 13.174 below. Since 1 April 2004, amendments to the regulations¹ mean that only individuals who come within certain specified categories will enjoy the same entitlement to free non-emergency NHS hospital treatment as British citizens and those who have indefinite leave to remain in the UK. The categories include:

- (1) those who have resided in the UK lawfully for more than one year immediately preceding the time when the treatment is provided, unless this period of residence resulted from being granted leave to enter for purpose of undergoing private medical treatment or was the result of a decision by the Secretary of State to grant leave and exempt the visitor from any charges for his or her treatment in the light of exceptional humanitarian reasons;²
- (2) those engaged in employment with an employer which has its principal place of business in the UK or which is registered in the UK as a branch of an overseas company;³
- (3) self-employed persons whose principal place of business is the UK;⁴
- (4) those pursuing a full time course of study which is substantially funded by the UK government or is of at least six months duration;⁵
- (5) persons working on a ship registered in the UK;⁶
- (6) persons in receipt of a UK war pension;⁷
- (7) diplomats working in a foreign embassy;⁸
- (8) members of HM armed forces;⁹
- (9) persons recruited in the UK to work abroad for the UK civil service, the British Council or the Commonwealth War Graves Commission or working abroad in a post financed in part by the UK government;¹⁰
- (10) persons working abroad who previously lived in the UK lawfully for a continuous period of ten years and have been away for less than five years;¹¹
- (11) persons working in another EEA state or in Switzerland but who pay National Insurance contributions in the UK;¹²
- (12) persons in receipt of a UK state pension living not less than six months a year in the UK who are not registered as a resident in another EEA country;¹³
- (13) members of NATO armed forces where treatment cannot readily be obtained in their own country or from the UK armed forces medical service;¹⁴
- (14) volunteers with a voluntary organisation that is providing a service similar to a relevant service as defined in ss 64 and 65 of the Health Services and Public Health Act 1968 or the service to which Article 71 of the Health and Personal Social Services (Northern Ireland) Order 1972 refers;¹⁵
- (15) persons who are taking up permanent residence in the UK;¹⁶
- (16) persons accepted as refugees or who have made a formal application for leave to remain as a refugee which has not yet been determined;¹⁷

- (17) those granted Humanitarian Protection or exceptional or discretionary leave;¹⁸
- (18) persons detained in prison or immigration detention centres;¹⁹
- (19) missionaries working outside the UK for an organisation established in the UK, regardless of whether they derive a salary or wage from the organisation, or receives any type of funding or assistance from the organisation for the purposes of working overseas; or²⁰
- (20) those who the competent authorities of the United Kingdom for the purposes of the Council of Europe Convention on Action Against Trafficking in Human Beings (i) consider that there are reasonable grounds to believe is a victim within the meaning of Article 4 of the Convention, and the recovery and reflection period in relation to him under Article 13 of the Convention has not yet expired; or (ii) have identified as a victim within the meaning of Article 4 of the Convention.²¹

Dependants of those falling within these categories are also entitled to free NHS hospital treatment. An individual who is no longer eligible for free treatment on or after 1 April 2004 on the basis that he or she cannot establish lawful residence in the UK for a period of not less than 12 months, but who prior to that date was receiving free NHS hospital treatment, will be entitled to complete his or her course of treatment without being obliged to pay.²² Nationals of EEA Member States and those who have been accepted as refugees or stateless persons in those states may also be entitled to free NHS hospital treatment as a result of European law. For example, nationals of EEA Member States who are temporarily working or studying in the UK and who are in possession of a European Health Insurance Card are entitled to free NHS treatment of all types, as are their families.²³

¹ See reg 4 of the National Health Services (Treatment of Overseas Visitors) (Amendment) Regulations 2004, SI 2004/614.

² National Health Service (Charges to Overseas Visitors) Regulations 1989, SI 1989/306, as amended by SI 2004/614, reg 4(1)(b).

³ SI 1989/306, as amended by SI 2004/614, reg 4(1)(a)(zi).

⁴ SI 1989/306, as amended by SI 2004/614, reg 4(1)(a)(i).

⁵ SI 1989/306, as amended by SI 2004/614, reg 4(1)(a)(iii).

⁶ SI 1989/306, as amended by SI 2004/614, reg 4(1)(d).

⁷ SI 1989/306, as amended by SI 2004/614, reg 4(1)(e).

⁸ SI 1989/306, as amended by SI 2004/614, reg 4(1)(f).

⁹ SI 1989/306, as amended by SI 2004/614, reg 4(1)(g).

¹⁰ SI 1989/306, as amended by SI 2004/614, reg 4(1)(h), (i).

¹¹ SI 1989/306, as amended by SI 2004/614, reg 4(1)(k).

¹² SI 1989/306, as amended by SI 2004/614, reg 4(1)(l).

¹³ SI 1989/306, as amended by SI 2004/614, reg 4A(1).

¹⁴ SI 1989/306, as amended by SI 2004/614, reg 6.

¹⁵ SI 1972/1265 (NI 14), as amended; SI 1989/306, as amended by SI 2004/614, reg 4(1)(a)(ii).

¹⁶ SI 1989/306, as amended by SI 2004/614, reg 4(1)(a)(iv).

¹⁷ SI 1989/306, as amended by SI 2004/614, reg 4(1)(c).

¹⁸ Department of Health *Entitlement to NHS Treatment* (correct at 1 April 2004).

¹⁹ SI 1989/306, as amended by SI 2004/614, reg 4(1)(n).

²⁰ SI 1989/306, as amended by the National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2006 SI 2006/3306, reg 4(1)(m).

²¹ SI 1989/306, as amended by the National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2008, SI 2008/2251, reg 2.

²² SI 1989/306, as amended by SI 2004/614, reg 4(2).

- ²³ SI 1989/306, as amended by SI 2004/614, reg 4(1)(m); Council Regulation 1408/71, OJ L149/2, 5.7.71; Council Regulation 1390/81, OJ L143, 12.5.81.

ACCESS TO EMPLOYMENT

13.180 The concession which permitted asylum seekers to obtain permission to work if their application for asylum had not been determined within six months was withdrawn on 23 July 2002. Those who were already benefiting from the concession were permitted to continue to work until their application was finally determined. However, Council Directive 2003/9/EC on the minimum standards for the reception of asylum seekers requires Member States to grant access to the labour market to asylum seekers who have waited for more than 12 months for their claim to be determined,¹ and the Immigration Rules have been amended to enable such persons to apply for permission to take employment (although not to become self-employed or engage in a business or professional activity.² Other exceptional circumstances may also justify the grant of permission to work.³ Asylum seekers who do not have permission to work may undertake voluntary activities.⁴ Supported asylum seekers wishing to take up vocational training will need the conditions attached to their temporary admission amended to allow unpaid employment, and any training allowance may impact on their eligibility for asylum support support.⁵ Failed asylum seekers may be required to perform unpaid work as a condition of continued entitlement to support under s 4 of the IAA 1999.⁶ By s 59 of the IAN 2006, a person detained in a removal centre does not qualify for the national minimum wage in respect of work done in pursuance of removal centre rules.⁷ In *R (on the application of Tekle) v Secretary of State for the Home Department*⁸ it was held that the blanket policy denying permission to work to those who had made fresh asylum applications was unlawfully overbroad and unjustifiably detrimental to claimants who had had to wait for as long as four years.

¹ Directive 2003/9/EC, Art 11.2. In *R (on the application of Omar) v Secretary of State for the Home Department* [2008] EWHC 1604 (Admin), [2008] All ER (D) 351 (Jun) it was held that as a further application for asylum by a failed asylum seeker was not an initial application for asylum that had not finally been determined, the applicant had no entitlement to work under Council Directive 2003/9, Art 11.

² HC 395 para 360, inserted by HC 194 from 4 February 2005.

³ Letter from Beverley Hughes to Andrew Mackinlay MP, 22 July 2003.

⁴ Policy Bulletin 72 Employment and Voluntary Activity.

⁵ Policy Bulletin 72 Employment and Voluntary Activity.

⁶ Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, SI 2005/930, reg 4.

⁷ In force 13 August 2006, see the Immigration, Asylum and Nationality Act 2006 (Commencement Order No 2) 2006, SI 2006/2226.

⁸ [2008] EWHC 3064 (Admin), [2008] All ER (D) 120 (Dec).

PENAL AND CARRIER SANCTIONS

INTRODUCTION

14.1 Enforcement of immigration control has become the major policy issue preoccupying UK ministers and their EU counterparts. Immigration officers now have an array of powers which have transformed them into an immigration police force independent of the police.¹ The Home Secretary Jacqui Smith announced the launch of the country's new UK Border Agency (UKBA) on the 3 April 2008. The new Agency, established as a shadow agency of the Home Office, is intended to protect UK borders, control migration, prevent border tax fraud, smuggling and immigration crime and implement quick and fair decisions. On 19 June 2008 the UKBA announced that around 7,500 UKBA officers and staff up and down the UK are to be reorganised into 70–80 Local Immigration Teams to 'focus on local immigration crime'.² In addition to the 3,000 police permanently based at UK borders, 39 new Special Branch posts will be funded in 2008/09 to increase specialist police coverage, with funding for border policing increasing to around £75m in the new financial year. In the Borders, Citizenship and Immigration Bill provision will be made for amalgamating immigration and customs functions. In addition to these changes a welter of offences have been created, including offences designed to criminalise immigrants and asylum seekers in their attempts to enter the country and in their resistance to leaving it. There are a number of overlapping enforcement mechanisms. For example, in a case where leave to enter has been obtained by deception, an immigrant might be summarily removed as an illegal entrant by the immigration service,³ deported on conducive to the public good grounds by the Secretary of State⁴ or prosecuted in the courts by the police,⁵ with a possibility of a recommendation for deportation as part of the sentence.⁶ We deal with deportation in chapter 15 and removal in chapter 16. In this chapter we deal with arrests by police and immigration officers, the criminal sanctions aimed at immigrants and asylum seekers and those who assist them, and the burgeoning sanctions against employers and carriers.

¹ The transformation of immigration officers into an immigration police force is to be given recognition in the Police and Justice Act 2006, s 41 of which makes provision for regulations being made to enable the Independent Police Complaints Commission (IPCC) to deal with complaints against immigration officers and other officials of the Secretary of State. Regulations have not yet been made. See 14.33, below.

² The Home Secretary Jacqui Smith said that 'Each local team will enforce the full range of immigration laws, concentrating on intelligence gathering, the disruption of illegal activity, tracking down and detaining immigration offenders and failed asylum seekers, and tackling illegal working'. Companies employing those without the right to work now face fines of up to £10,000 per illegal worker, and from 19 June are to be named on the UKBA website. She also announced that names and addresses of foreign nationals – who have been removed from the UK and who have been convicted of immigration offences – will be shared with over 270 financial service, telecoms and utility companies through the database of a new fraud prevention body CIFAS, to assist them in tackling fraud.

³ Immigration Act 1971 (IA 1971), Sch 2, para 9; see 16.2 below.

⁴ IA 1971, s 3(5)(a); *Immigration Appeal Tribunal v Patel* [1988] Imm AR 434, HL.

⁵ IA 1971, ss 24A (as amended by the Immigration and Asylum Act 1999, ss 2(8), 26(1)(c)).

⁶ IA 1971, s 3(6).

RECOVERY FORFEITURE AND DISPOSAL OF PROPERTY

Disposal of property

14.19 The new power to dispose of property under s 26 of the UK Borders Act 2007 by returning it to its rightful owner, selling it or keeping it applies to any property that has come into the possession of an immigration officer or the Secretary of State in relation to their immigration functions. This will include vehicles, ships or aircraft which have been used in clandestine entry to the UK or human trafficking. A magistrates' or Sheriff Court may make disposal orders on application being made by the Secretary of State.¹ Such an order shall not affect the right of any person to take legal proceedings for the recovery of the property, provided that the proceedings are started within six months of the date of the order.² Where the property in question has been forfeited under s 25, or under s 25C of the IA 1971, the applicant (if not the Secretary of State) has six months from the date of the order to apply to the court and must satisfy it (i) that the applicant did not consent to the offender's possession of the property, or (ii) that the applicant did not know and had no reason to suspect that the property was likely to be used, or was intended to be used, in connection with an offence.³ The Immigration (Disposal of Property) Regulations 2008, SI 2008/786, came into force on 17 April 2008. The Regulations allow the Secretary of State to dispose, sell or retain property confiscated pursuant to powers under ss 25 and 26 of the UK Borders Act 2007.

¹ UK Borders Act 2007, s 26(2).

² UK Borders Act 2007, s 26(3).

³ UK Borders Act 2007, s 26(5).

BIOMETRIC IDENTITY CARDS FOR FOREIGN NATIONALS

Biometric immigration document (BID)

14.27 Sections 5 and 6 of the UK Borders Act 2007 confer a power on the Secretary of State to make regulations requiring non-EEA foreign nationals¹ to apply for the issue of a 'biometric immigration document' (BID), containing that person's facial photo, fingerprints, and features of the iris or any other part of the eye.² For all this compulsory vetting the person will be required to pay a fee under s 51 of the IAN 2006. The holder of the document will also be required to produce it, where a question arises about that person's status in relation to nationality, immigration or asylum.³ New regulations have now been made making it compulsory for specified applicants seeking leave to remain to apply for a biometric immigration document,⁴ and a Code of Practice has been brought into operation to deal with the use of immigration and civil penalties for those who refuse or fail to meet these new requirements.⁵ These are described in more detail at 4.12A–12C above. The planned roll-out period for the extension of these powers is described at 2.68–68A.

¹ UK Borders Act 2007, ss 5(1)(a) and 15(1)(a). In December 2006 the government declared that it would screen and store biometric ID for everyone from the 169 nationalities outside the EEA applying to work, study or stay in the UK for more than six months; acquire biometric ID for people from 108 nationalities applying to visit the UK; and roll out

14.27 *Penal and Carrier Sanctions*

biometric ID progressively for non EEA foreign nationals already living in the UK who apply to extend their stay and only issue a National Insurance card when a biometric identity has been established: See UK Borders Bill, Research Paper 07/11, 31 January 2007, Home Affairs Section, House of Commons Library, p 22, available at: www.parliament.uk/commons/lib/research/rp2007/rp07-011.pdf.

² UK Borders Act 2007, s 15(1)(b) and (c).

³ UK Borders Act 2007, s 15(1)(a). Immigration includes asylum: UK Borders Act 2007, s 15(1)(f).

⁴ The Immigration (Biometric Registration) Regulations 2008, SI 2008/3048.

⁵ The Immigration (Biometric Registration) (Civil Penalty Code of Practice) Order 2008, SI 2008/3049, made under s 9(1) of the UK Borders Act 2007.

Other information-gathering powers

14.30 The IAA 1999 created a wide information exchange network between the Secretary of State on the one hand and, on the other, a range of agencies including the police, the National Criminal Intelligence Service (NCIS), the National Crime Squad (NCS) and Customs and Excise.¹ Information held by a chief officer of one of these agencies, a contractor or sub-contractor of the Home Office or 'any other specified person', may be supplied to the Secretary of State for immigration purposes, including the administration of control, the prevention, detection, investigation and prosecution of offences under the Immigration Acts, civil penalties (carrier sanctions), asylum support and other specified purposes.² Similarly, the Secretary of State is empowered to supply information held by him or her in connection with the exercise of immigration functions to chief officers of the same agencies.³ The Secretary of State may also provide information (including fingerprints) to the authorities of a country to which he or she seeks to remove an undocumented person.⁴ The 2002 Act added powers for the Commissioners of the Inland Revenue to supply address details to enable the Secretary of State to locate someone reasonably suspected not to have leave to enter or permission to work.⁵ Information may also be provided to determine whether a person is of good character (in connection with a naturalisation application)⁶ or for the purposes of the maintenance and accommodation requirements of the Immigration Rules.⁷ Further, s 17 of the AI(TC)A 2004 enables the Secretary of State or an immigration officer to retain any document coming into their possession in the course of the exercise of an immigration function, while they suspect that a person to whom the document relates may be liable to removal from the UK and that retention of the document may facilitate the removal.⁸ The Immigration, Asylum and Nationality Act 2006 (Commencement No 7) (Amendment) Order 2007, SI 2007/3580 brought into force certain provisions in the Immigration, Asylum and Nationality Act 2006, on a delayed date, on 31 March 2008.⁹ Those provisions address information and its disclosure to law enforcement agencies, the power of Her Majesty's Revenue and Customs (HMRC) to obtain information, the provision of information to immigration officers, police powers regarding passenger and crew information, the duty to share information and the code of practice regarding that, and the disclosure of information for security purposes; and offences regarding the same. Part I of the Borders, Citizenship and Immigration Bill is intended to provide the legislative framework for immigration officers and officials of the Secretary of State to exercise revenue and customs functions which have up to now been

exercised by HMRC. As part of this exercise officials of the UK Border Agency (UKBA) will be given much wider policing and border security powers than ever before – taking part in the prevention of drugs smuggling as well as, for example, the collection of duties and taxes from passengers and on postal packets and the prevention of smuggling of goods where such duties and taxes have not been paid. In this connection clauses 14 to 21 of the Bill, as first published, explain how customs information may and may not be used and disclosed and amend the duty to share information set out in the Immigration, Asylum and Nationality Act 2006 (IAN 2006).

- ¹ Since the amalgamation of Customs and Excise with the Inland Revenue, provision is now made to include the Revenue in this extensive information exchange, with confidentiality safeguards and a new criminal offence of wrongful disclosure: UK Borders Act 2007, ss 40–42. The main aim of the inclusion of the Inland Revenue in this wider gateway, according to the Home Affairs Committee, is to make tackling tax and National Insurance evasion as a central feature of the drive against the employment of illegal labour, in which the tax authorities must make much greater efforts to tackle these in the informal economy. See 241 HC 775 2005–06, paras 453, 455. See also Home Office, UK Borders Bill: Regulatory Impact Assessment, January 2007, pp 5–6. The government have repeatedly made it clear that they want as full access as possible to Her Majesty's Revenue & Customs (HMRC) data to track down illegal immigrants.
- ² IAA 1999, s 20. The Immigration (Supply of Information to the Secretary of State for Immigration Purposes) Order 2008, SI 2008/ 2077 provides that information held by certain persons may be supplied to the Secretary of State for use for 'immigration purposes'. These persons are the Secretary of State for Transport, the Secretary of State for Work and Pensions (for the purposes of functions relating to social security), and the Chief Constable of the British Transport Police Force (for the purposes of the prevention, detection, investigation or prosecution of criminal offences and safeguarding national security).
- ³ IAA 1999, s 21.
- ⁴ IAA 1999, s 13. The transfer of information is deemed 'necessary for reasons of substantial public interest' for the purposes of the Data Protection Act 1998: IAA 1999, s 13(4).
- ⁵ Nationality, Immigration and Asylum Act 2002, s 130. This gateway has been widened by the changes in the UK Borders Act 2007, noted at fn 1, above.
- ⁶ Nationality, Immigration and Asylum Act 2002, s 131. The scope of police powers in relation to nationality inquiries has been widened to include information whether an applicant for registration listed in s 58(2) of the IAN 2006 is of good character; and in relation to decisions whether to deprive someone of their nationality under s 40 of the British Nationality Act 1981: UK Borders Act 2007, s 43, amending s 131, above.
- ⁷ Nationality, Immigration and Asylum Act 2002, s 130.
- ⁸ AI(TC)A 2004, s 17. This power is so broad as to invite abuse.
- ⁹ The original commencement date was 31 December 2007: the Immigration, Asylum and Nationality Act 2006 (Commencement No 7) Order 2007, SI 2007/3138.

Passenger information

14.32 The powers under the IA 1971 for immigration officers to demand passenger and crew lists from captains of ships and aircraft¹ arriving in the UK were modified by regulations made under the 1999 Act² to enable immigration officers to require much more detailed information, including passengers' gender, date of birth, travel document number, visa expiry date, ticket number and date and place of issue, the identity of the person booking the ticket, the method of payment, the passenger's travel itinerary and the names of all other passengers on the reservation.³ Immigration officers may demand the information in relation to ships and aircraft expected to arrive and those which have left or are expected to leave the UK.⁴ A senior officer

may also require information about the expected arrival of any craft expected to carry non-EEA nationals.⁵ There is provision in the Asylum and Immigration (Treatment of Claimants etc) Act 2004 to allow immigration officers to demand copies of particular passengers' travel documents as well, a power which would be targeted as individuals, rather than applied in a blanket manner, because of the huge delays which copying all passengers' documents would entail.⁶ When the authority to carry scheme in s 124 of the Nationality, Immigration and Asylum Act 2002 is brought into force, the passenger information may be required in advance of boarding, to enable a check to be made against Home Office databases so that, if a passenger is identified as a security or immigration risk, authority to carry him or her may be refused.⁷ A request to a carrier continues in force until withdrawn, and can last up to six months, or longer if renewed. The data required is not restricted to foreign nationals but can cover all passengers, including British and European citizens. However, up to now the power has been used for specific flights or flights from specific destinations. Additional powers exist under the Terrorism Act 2000 to require passenger information.⁸ The effect of the Immigration and Police (Passenger, Crew and Service Information) Order 2008 is to enable immigration and police officers to (a) request specific passenger, crew and service information from air, sea and rail carriers in respect of movements into or out of the UK and (b) to specify the form and manner in which some of this data should be supplied.⁹

¹ IA 1971, Sch 2, para 27. The power to demand passenger and crew lists under para 27 of Sch 2 has been extended by s 31 of the IAN 2006. This information can now be obtained in advance of the arrival of the ship or aircraft in the UK and not just on arrival. Secondly, the duty to provide the lists applies to owners and agents of the ship or aircraft as well as the captain: Sch 2, para 27, as amended by the IAN 2006, s 31. Sections 32 and 33 of the same Act give the police new and additional powers to obtain from the owners, agents or captains of ships and aircraft details of passengers, crew, flight or voyage and freight. Provision is also made for information sharing between each of the different policing agencies, including immigration officers, in ss 36 to 41 of the IAN 2006.

² IA 1971, Sch 2, para 27B, inserted by the IAA 1999, s 18.

³ Immigration (Passenger Information) Regulations 2000, SI 2000/912.

⁴ IA 1971, Sch 2, para 27B(1)(a) and (b). The power is exercisable in respect of a particular passenger or craft, or all passengers and/or all craft of the carrier.

⁵ IA 1971, Sch 2, para 27C, inserted by the IAA 1999, s 19.

⁶ Asylum and Immigration (Treatment of Claimants) Act 2004, s 16, amending the IA 1971, Sch 2, para 27B as from a date to be appointed.

⁷ See 14.100 below.

⁸ Terrorism Act 2000, Sch 7, para 17.

⁹ For more details see the Explanatory Statement to the Immigration and Police (Passenger, Crew and Service Information) Order 2008, SI 2008/5.

Codes of Practice

14.33 The Codes of Practice issued under the Police and Criminal Evidence Act 1984 have always applied to persons who are not police officers who are investigating offences,¹ and have been held to apply to immigration officers exercising administrative powers in relation to illegal entrants and overstayers, at least if a criminal offence was potentially involved.² Now, in the exercise of powers of arrest, questioning, search, fingerprinting, entry and seizure – whether investigating criminal offences or in the course of their IA 1971, Sch 2 functions – immigration officers are statutorily obliged to have regard to

certain specified (but not all) provisions of the Codes of Practice.³ Thus, when arresting a suspect without a warrant, whether for an immigration offence or for a related offence, immigration officers must have regard to all the provisions of Codes C, D and E.⁴ When conducting interviews, they should not refuse access to solicitors, and questioning should be under caution and contemporaneously recorded.⁵ But when arresting without warrant under the administrative provisions of the Schedule, none of the provisions of Code C relating to the conduct of interviews apply, according to the Codes of Practice Direction.⁶ Where there is a Code breach, this does not necessarily mean that the immigration officer or Secretary of State cannot subsequently rely on what is said at an interview.⁷ If it is not voluntary, has been obtained by force, inducement or oppression, or a statement has been made at a time of stress, it may be ruled out.⁸ But if there is simply a failure to inform the applicant that his or her solicitor is available, all the court or Secretary of State need do is to be very careful to test the reliability of the answers.⁹ Clause 22 of the Borders, Citizenship and Immigration Bill provides that the Secretary of State may by order provide for the application of provisions of the Police and Criminal Evidence Act 1984 (PACE) and the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE (NI)) to persons detained, and investigations conducted, by designated customs officials and immigration officers. As the provisions of PACE do not apply in Scotland clause 23 amends the Criminal Law (Consolidation) (Scotland) Act 1995 to ensure that in Scotland the current provisions will apply as they apply to HMRC.

¹ Police and Criminal Evidence Act 1984, s 67(9).

² *R v Secretary of State for the Home Department, ex p Ibrahim* [1993] Imm AR 124, QBD.

³ IAA 1999, s 145, Immigration (PACE Codes of Practice) Direction 2000, Immigration (PACE Codes of Practice No 2 and Amendment) Direction 2000 (on taking, retention and destruction of fingerprints).

⁴ The Detention, Treatment and Questioning of Persons by Police Officers; The Identification of Persons by Police Officers; Tape Recording of Interviews with Suspects.

⁵ See PACE Code C as applied by the Immigration (PACE Codes of Practice) Direction 2000, paras 6, 10, 11, and 12. Illegal entry interviews where no caution was administered were held inadmissible in the Scottish cases of *Oghonoghov v Secretary of State for the Home Department* 1995 SLT 733, OHCS and *Kim (Sofia) v Secretary of State for the Home Department* 2000 SLT 249, OHCS.

⁶ Immigration (PACE Codes of Practice) Direction 2000, Sch 1. In practice, immigration officers are likely to adhere to the relevant Code, as (broadly speaking) they have done in the past.

⁷ But see *Oghonoghov v Secretary of State for the Home Department*, *Kim v Secretary of State for the Home Department*, fn 5 above.

⁸ Evidence of a police interview was excluded by an adjudicator in a deportation appeal (breach of conditions) in *Oyefuwa* (18035).

⁹ *Ibrahim*, above at 129. In addition it should be recalled that Police and Criminal Evidence Act 1984, ss 76 and 78 (exclusion of evidence obtained unfairly or by oppression) do not apply to civil proceedings.

CRIMINAL OFFENCES

Non-production of passport

Defences based on Article 31 of the Refugee Convention

14.45 After the judgment in *Adimi* a statutory defence was enacted to charges of deception under s 24A of the IA 1971 or falsification of documents under

s 26(1)(d) of the Act, and to charges under the Forgery and Counterfeiting Act 1981 (forgery, use and possession of false instruments) by the IAA 1999, s 31.¹ The statutory defence is significantly narrower in its scope than the protection afforded by Article 31(1) of the Refugee Convention according to *Adimi*. It applies to those who have claimed refugee status, but their case have not yet been dealt with, if the prosecution cannot disprove beyond a reasonable doubt that they are not refugees.² It requires refugees to have made a claim for asylum as soon as was reasonably practicable after arrival in the UK (in addition to presenting themselves to the authorities without delay);³ and excludes the defence where refugees have stopped en route to the UK in another country, unless they could not reasonably have expected to be given protection in that country.⁴ It provides that those wrongly convicted before the commencement of the section may apply to the Criminal Cases Review Commission for their cases to be referred to the Court of Appeal.⁵ In *Hussain*⁶ it was held that s 31 represented Parliament's interpretation of the UK's obligations under Article 31. A two-judge Divisional Court went further in *Pepushi*,⁷ holding that s 31 was to be followed even if it put the UK in breach of the Refugee Convention. In *R v Makuwa*⁸ the Court of Appeal held that in a prosecution to which s 31 of the IAA 1999 applied, the defendant's refugee status was a matter to be determined by proof; but the burden on the defendant was a merely evidential burden and provided he or she adduced sufficient evidence to raise the issue, the burden is then upon the prosecution to prove to the usual standard that the defendant is not a refugee. With regard to the other elements of the defence, the burden remains on the defendant.⁹

¹ Section 31(3) of the 1999 Act has been amended to insert a new para (aa), which adds the false documents offences in s 25(1) and (5) of the Identity Cards Act 2006 to s 31(3) of the IAA 1999 giving a specific defence for refugees with false documents referred to in s 25(1) or (5) of the Identity Cards Act 2006, not yet in force. Section 25 of the same Act will create new criminal offences relating to the possession of false identity documents. Subsections (1) and (2) set out the circumstances in which persons are guilty of an offence if they are in possession of a document which they know or believe to be false or a genuine document that has been improperly obtained or relates to someone else. To be guilty of the offence the person must have the intention that the document be used for identity fraud. Subsection (5) makes it an offence for persons to have in their possession, without reasonable excuse, a false identity document or a genuine document that has been improperly obtained or relates to someone else, or equipment used for making false identity documents. Unless there is a reasonable excuse, these offences apply irrespective of any intent to use the documents or equipment. Subsection (7) prescribes a maximum penalty of two years' imprisonment, a fine or both.

² IAA 1999, s 31(1), (6); *R v Makuwa* [2006] EWCA Crim 175, [2006] 1 WLR 2755. A refused asylum seeker can seek to avail him or herself of the defence, and arguably the ruling in *Makuwa* also applies to the post decision situation.

³ IAA 1999, s 31(1)(a) and (c).

⁴ IAA 1999, s 31(2).

⁵ IAA 1999, s 31(8). In fact most convictions were in the magistrates' court, and could be reopened under Magistrates' Courts Act 1980, s 142(2), to enable the Crown to offer no evidence. Asylum seekers who were wrongly convicted and imprisoned have received compensation of up to £40,000: see *Abdi v Secretary of State for the Home Department* (2002) Legal Action, November. Home Office evidence to the Home Affairs Committee was that fewer than 20 people had successfully claimed compensation for wrongful conviction: Home Affairs Committee First Report of Session 2003–04, Asylum and Immigration (Treatment of Claimants) Bill, HC 109.

⁶ *R (on the application of Hussain) v Secretary of State for the Home Department* [2001] EWHC Admin 555.

⁷ *R (on the application of Pepushi) v CPS* [2004] EWHC 798 (Admin), [2004] All ER (D) 129 (May).

⁸ *R v Makuwa* [2006] EWCA Crim 175, [2006] 1 WLR 2755.

⁹ The Court followed the reasoning used in *R v Navabi*; *R v Embaye* [2005] EWCA Crim 2865, (2005) Times, 5 December where a reverse burden argument concerning the defences under s 2 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 was rejected.

14.45A In *R v Asfaw*¹ the House of Lords held that since s 31 of the 1999 Act was intended to give effect to Art 31 of the Refugee Convention, the defence provided by it should not be read as limited to offences attributable to a refugee's illegal entry into or presence in this country, but rather as providing immunity (if the conditions contained therein are fulfilled) from the imposition of criminal penalties for offences attributable to the attempt of a refugee to leave this country in the continuing course of a flight from persecution, even after a short stopover in transit. They also dealt with the position where a defendant who has attempted to leave this country for another place of refuge using false documents is charged both with an offence to which the s 31 defence applies and with an offence of dishonesty to which it does not. The House held that to charge a defendant in this way was not an abuse of process, since the defence under s 31 applies only to a limited number of offences and since the prosecution are entitled to question whether the defendant is a refugee. If the defendant is not a refugee, then the defence will not avail him or her in respect of either count; however, if the two counts relate to identical conduct and the second count is included in the indictment in order to prevent the defendant from relying on the defence, there will be strong grounds for contending that prosecuting that count is an abuse of process, since it would be unfair and contrary to the intention of the Act to convict the defendant on that count if he or she has successfully raised the defence in respect of the first count. The appropriate course of action in such circumstances is for the court to stay the prosecution of the second count pending the determination of the first count by the jury, and to maintain the stay if the defendant is acquitted. It should be noted that the House was not concerned with s 31(2), which is drafted in narrower terms than Art 31, in that refugees who have stopped over in another country are protected only if they are able to show that they could not reasonably have been expected to be given protection under the Convention in that country, whereas under Art 31 a short-term stopover en route would not deprive the refugee of protection from prosecution. So although *Pepushi*² is still good law, it is likely that in the light of the thorough review of the history of Art 31 in the speeches in *Askew*, the courts will adopt a generous approach to what refugees could 'reasonably have expected' by way of protection in third countries. In *R v Hasan*³ the court held that it was reasonably arguable that H had a reasonable prospect of demonstrating that he came directly from a country where his life or freedom was threatened within the meaning of the Convention Relating to the Status of Refugees 1951 (United Nations), Art 31 and did not stop in another country. H would have had a reasonable prospect of relying on s 31 and defending the charge. H was not given advice specifically on the meaning of coming directly from a country where his life or freedom was threatened or on the ambit of s 31(2). The instant case was a case where the safety of conviction could be considered, notwithstanding the fact that H pleaded guilty. The conviction was quashed. As H had already served his sentence, it was not in the interests of justice to order a retrial.

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¹ *R v Asfaw* [2008] UKHL 31, [2008] 2 WLR 1178.

² *R (on the application of Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), [2004] All ER (D) 129 (May).

³ [2008] EWCA Crim 3117, [2008] All ER (D) 116 (Nov).

14.46 The Asylum Policy Instructions (API) on s 31 and Article 31, as updated to October 2006 and rebranded in January 2009, state that the *primary* focus for the CPS following the enactment of s 31 has to be upon the law to be found in the section and not the law on Art 31 to be found in the *Adimi* judgment.¹ The cases of *Hussain* and *Pepushi* are relied on but no mention is made of *Makuwa* or *Asfaw*, *notwithstanding the January 2009 rebranding*. The API state that where someone has not received a decision on their claim or has been refused and is appealing, it would normally be appropriate to await the outcome of the claim or appeal before proceeding to prosecution (if it was considered to be in the public interest to do so), but that persons granted humanitarian or discretionary leave on human rights grounds cannot claim the benefit of the defence, not being refugees.² The API provide guidance on the issues of ‘good cause for illegal entry’,³ presenting oneself to the authorities ‘without delay’, claiming asylum ‘as soon as reasonably practicable’⁴ and the effect of stopping in another country outside.⁵ Rebranding must mean rehashing, when what is needed is a simple updating.

¹ API ‘Section 31 and Article 31’, para 5. A joint Memorandum of Good Practice, drafted by representatives of the police, the Home Office, the Crown Prosecution Service and the Law Society in the wake of the *Adimi* judgment, indicated that immigration officers, police and prosecutors should apply both Art 31(1) of the Refugee Convention and the statutory defence in deciding whether to investigate, initiate or continue a prosecution, and stated that only in the clearest of cases (for example, where the suspect is a British citizen or says nothing to suggest any fear of persecution) should police proceed to charge. It was never formally published. For details see the previous edition of this work, at 14.26.

² API ‘Section 31 and Article 31’, para 9.

³ The API (paras 7 and 8) acknowledge that a refugee will *ipso facto* have good case, although not a refugee *sur place* since the illegal entry was not necessitated by flight.

⁴ The API say ‘Caseworkers have to conduct a balancing exercise when deciding what constitutes “without delay” and what is “as soon as reasonably practical”. What constitutes “without delay” and “as soon as reasonably practical” is very much a question of fact and degree. It will be different in every case depending upon the particular circumstances of the case.’ (para 9). This is a much less rigid approach than exhibited in the previous guidance. See sixth edition of this publication at 14.39.

⁵ The API recognise that an asylum-seeker may have been in transit through the third country and might not have come into contact with immigration officials and might not therefore have had the opportunity to make an asylum claim. Under these circumstances, and taking into account all the information available, it may be that the claimant is entitled to the protection afforded by s 31 as previously interpreted by the British courts: API ‘Section 31 and Article 31’, para 10.

Trafficking offences

14.54 The Nationality, Immigration and Asylum Act 2002 created a new offence of trafficking in prostitution, making it an offence punishable by up to 14 years’ imprisonment to arrange or facilitate a passenger’s arrival in, travel within, or departure from the UK, (a) intending to exercise control over prostitution by the passenger in the UK or elsewhere, or (b) believing that another person would do so.¹ The Sexual Offences Act 2003 repeals these

provisions and replaces them with an offence of trafficking for sexual exploitation, an offence much broader in its reach.² The offence is committed by intentionally arranging or facilitating the arrival in, travel within, or departure from the UK of a passenger, (a) intending to do anything to the passenger in any part of the world which involves the commission of a relevant offence, or (b) believing that another person is likely to do so.³ A huge range of sexual offences is incorporated within the definition of 'relevant offence'.⁴ As with the offences of facilitating arrival at or entry into the UK, the courts have jurisdiction in trafficking cases over acts done in the UK or those done in the UK or abroad, if committed by British nationals of all categories, British Protected Persons or UK-incorporated companies.⁵ The placing of the new trafficking offence in an immigration statute and then removing it to a sexual offences one raises the question of why it was in the immigration statute in the first place. Although facilitating is an essential element of the offence, it is quite different from the raft of offences dealing with facilitating unlawful immigration, in that there is a clearly identified victim in trafficking. Exercise of control over the victim by the initial trafficker or by others is a key characteristic of the offence. While the victim is nearly always going to have an unlawful immigration status (reason enough for placing it in an immigration statute), it is surprising that domestic immigration law and practice is entirely silent on the measures which need and ought to be taken to protect the victim. Indeed initial experience of the operation of the new laws is that they give authority and justification for rounding up women engaged in prostitution and speedily deporting them, while doing very little against their exploiters. It seems the government has turned its back on the vibrant discussion at UN and EC level on the central question of the protection of victims, which is to give them renewable short term and, in some cases, permanent stay in the country to which they have been taken.⁶ Passing the criminal laws is easy; tackling the exploitation and protecting the victims cannot properly be ignored.⁷

¹ Nationality, Immigration and Asylum Act 2002, s 145.

² Sexual Offences Act 2003 (SOA 2003), ss 139, 140, 141(1), Sch 6, 7, in force 1 May 2004: SI 2004/874.

³ SOA 2003, ss 57–59.

⁴ SOA 2003, s 60. The definition includes offences under part I of the Act and under s 1(1)(a) Protection of Children Act 1978, equivalent offences in Northern Ireland, or anything done elsewhere which would be an offence in England, Wales or Northern Ireland.

⁵ NIAA 2002, s 146(1), (2); SOA 2003, s 60(2) and (3). These provisions echo the jurisdictional reach of the courts for facilitators (see 14.47 above).

⁶ Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities COM (2002) 71 final. This Proposal corresponds to recommendations issued by different international organisations on the fight against trafficking in human beings, eg. the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, GA res 55/25, Annex II U.N. GAOR Supp (n° 49) at 60, UN Doc A/45/49 (Vol I) (2001). See further 'Integration of the human rights of women and the gender perspective violence against women', report of the Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights Resolution 1997/44, Economic and Social Council, E/CN.4/2000/68. See also Council of Europe, Parliamentary Assembly Recommendation 1545 (2002), 21.01.2002.

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- ⁷ In the *CPS Code for Crown Prosecutors* prosecutors are told that where a defendant or potential defendant is a victim of trafficking they should take cognisance of the CPS Guidance before initiating a prosecution.

Offences in connection with the administration of the Immigration Acts

14.72 The NIAA 2002 created new offences relating to registration cards and immigration stamps. It is an offence to make a false registration card, or to alter a registration card with intent to deceive, or to use or attempt to use a false or altered card with intent to deceive, or to make something designed to be used in making or altering a card, or to possess a false or altered card or a forgery tool without reasonable excuse.¹ The offences, unlike those in s 26(1)(d), are triable either way, and making, altering or using carry a sentence of up to ten years' imprisonment on indictment, while offences of possession carry up to two years on indictment.² The registration card is defined as a document which carries information about a person (whether or not electronic) and is used by the Secretary of State in connection with an asylum claim (whether or not by that person).³ The Immigration (Registration Card) Order 2008, SI 2008/1693 will extend the definition of 'registration card' to include documents issued by the Secretary of State to a person wholly or partly in connection with a claim for support under s 4 of the Immigration and Asylum Act 1999 (whether or not made by that person). Support under s 4(1) is available to a number of classes of people subject to immigration control, including those with temporary admission, those released from detention and persons on bail under immigration provisions. The majority of people supported are destitute former asylum seekers whose claim for asylum was rejected and who are temporarily unable to leave the United Kingdom for reasons beyond their control. The offences of possession of an immigration stamp or a replica stamp without reasonable excuse⁴ carry sentences up to two years on indictment.⁵ Both offences carry powers of arrest without warrant⁶ and the other ancillary powers of search of premises.⁷

¹ IA 1971, s 26A, inserted by the Nationality, Immigration and Asylum Act 2002, s 148.

² IA 1971, s 26A (5), (6). On summary trial they carry six months' imprisonment and/or a fine up to the statutory maximum.

³ The asylum registration card carries a wealth of information, including biometric information: see 14.26 above. Applicants and their dependants each have a card, which serves as evidence of their status in the UK. The anomaly between the penalties for offences under s 26 (including deception) and s 26A is likely to result in prosecution under s 26A rather than s 26.

⁴ IA 1971, s 26B, inserted by the Nationality, Immigration and Asylum Act 2002, s 148.

⁵ IA 1971, s 26B(4). On summary trial the penalties are as for the s 26A offences: see fn 2 above.

⁶ IA 1971, s 28A(9) inserted by the NIAA 2002, s 150.

⁷ IA 1971, s 28B(5) and s 28D(4), as amended by the NIAA 2002, s 150.

Offences in relation to passports and acquisition of nationality

14.77 A passport is an 'instrument' for the purposes of 'relevant offences' under the Forgery and Counterfeiting Act 1981.¹ Relevant offences are forgery (making a false instrument),² using a false instrument,³ possession of a false instrument with intent,⁴ and possession of a false instrument without lawful

authority or excuse.⁵ All the offences are triable either way, punishable on summary conviction by a fine up to the statutory maximum or six months' imprisonment, and on indictment by a maximum of 10 years' imprisonment, save for possession without lawful authority when the maximum sentence on indictment is two years.⁶ Persons presenting false passports at immigration control are frequently charged with the possession offences. The statutory defence under the IAA 1999, s 31, and Refugee Convention, Article 31 argument, apply to these offences.⁷ The Asylum and Immigration (Treatment of Claimants etc) Act 2004 adds other 'immigration documents' to the definition of 'instrument' under the 1981 Act, including cards and adhesive labels carrying information about the person (which might be electronic), and about the leave granted, or given to confirm a right of residence under the Community Treaties.⁸ For offences of possession of a false identity document or the means of creating one, see s 25 of the Identity Cards Act 2006.⁹

¹ Forgery and Counterfeiting Act 1981, ss 8(1)(a), 5(5)(f).

² FCA 1981, s 1.

³ FCA 1981, s 3.

⁴ FCA 1981, s 5(1).

⁵ FCA 1981, s 5(2).

⁶ FCA 1981, s 6; the statutory maximum is £5,000: Magistrates' Courts Act 1980, s 32(9). See *R v Kolawole* (2004) Times, 16 November: 12–18 months is an appropriate sentence for use of a false passport for a person of good character on a guilty plea. See also cases cited at 14.37 fn 9 above.

⁷ IAA 1999, s 31(3) and (4); see 14.44–14.46 above.

⁸ Asylum and Immigration (Treatment of Claimants etc) Act 2004, s 3, inserting FCA 1981, s 5(5)(fa), 5(9)–(11) as from a date to be appointed.

⁹ In *R v (1) Buriticia-Castrillon and (2) Omtade* [2008] EWCA Crim 1972, the Court of Appeal Criminal Division held that a sentence of 15 months' imprisonment for possession of a false identity document contrary to the Identity Cards Act 2006, s 25(1) was inappropriate and would be replaced by a sentence of 10 months' imprisonment where an appellant had used a false passport as a means of identification to obtain something to which they were entitled, namely to cash a cheque. See also *R v Hasan* [2008] EWCA Crim 3117, [2008] All ER (D) 116 (Nov), discussed at 14.45A, above.

DEPORTATION AND REPATRIATION

DEPORTATION – LIABILITY AND EXEMPTION

Non-British citizens

Automatic deportation of foreign criminals

15.14A The UK Borders Act 2007 (Commencement No 3 and Transitional Provisions) Order 2008, SI 2008/1818 brought into force as from 1 August 2008 the automatic deportation provisions of the UK Borders Act 2007, meaning that foreign criminals who have been sentenced to a period of imprisonment of at least 12 months ('condition 1', above) now face expulsion subject only to the Refugee and Human Rights Conventions, European Community law, or where the Secretary of State thinks the foreign criminal was under the age of 18 on the date of conviction (see below). There are transitional provisions for those in custody at the time of commencement or whose sentences are suspended. This is provided such a person has not been served with a notice of a decision to make a deportation order under s 5 of the Immigration Act 1971 before commencement. 'Condition 2' prisoners are not yet included. HC 951 amends the Immigration Rules in order to bring them in line with the new statutory powers. Paragraph 1 provides that para 364 of HC 395 does not apply to automatic deportations. Paragraph 2 provides that the prohibition on making a deportation order while an appeal is pending does not apply. The Immigration (Notices)(Amendment) Order 2008, SI 2008/684 and the Immigration (Notices)(Amendment)(No 2) Regulations 2008, SI 2008/1819 add a decision that a person is a foreign criminal to the list of immigration decisions which require a notice of appeal rights to be served on the individual concerned.

15.14B One view is that whilst the current provisions relating to a recommendation for deportation by a court are neither amended nor repealed, the scope for making a recommendation will be severely curtailed in view of the breadth of the provisions for automatic deportation and to the established criteria for making a recommendation for deportation.¹

¹ See Archbold 2009, 5.199.

15.15A The law and underlying policy with regard to deportation is in a mess. When a convicted criminal is sentenced the main focus is on the following – the nature of the crime, the impact on the victims, the extent and nature of the defendant's criminality, his or her background and the risk he or she poses to the public. The deterrent element of the sentence, if applied, focuses on the nature of the crime rather than the individual in the dock. Sentencing is a sophisticated, complex and well worked exercise.

15.15B In deportation the considerations are different. Except for the purposes of a criminal appeal, it is not a sentence and is not, therefore to be seen as punishment, although for many it is just that, especially in cases where a marriage and family ties are broken. The main policy imperatives behind it are deterrence, society's revulsion and protection of the public. There is often an overlap between protection and deterrence. The theory is that if it is an effective deterrent there will be less crime and therefore the public will be safer. If there is a high risk of the deportee reoffending then it does not much matter which of these two policy imperatives apply. The problem lies in those cases where the offender is rehabilitated or presents a very low risk to the public. In *N (Kenya) v Secretary of State for the Home Department*¹ and in *OP (Jamaica) v Secretary of State for the Home Department*² the Court of Appeal has identified the Secretary of State's policy as one of deterrence and has in effect said that he or she knows best and it will be an error of law if the lower Tribunal does not give appropriate weight to that policy (see 15.35 below). Appropriate weight will not have been given, if the Tribunal places too much emphasis on the rehabilitation of the offender. Despite a strong dissenting judgment by Sedley LJ objecting to the appropriation of the adjudicator's discretion in *N (Kenya)*, this has been the applicable law since 2004.

¹ [2004] EWCA Civ 1094, [2004] INLR 612.

² [2008] EWCA Civ 440, [2008] All ER (D) 06 (May).

15.15C By the rewriting of para 364 of HC 395 in July 2006 and the introduction of automatic deportation of foreign prisoners in 2008, different Home Secretaries have gone much further. There is no longer any question in domestic law of 'giving appropriate weight' to the deterrent policy. It trumps in every case, where deportation is automatic and, so far as domestic law is concerned there is no realistic balancing exercise to be performed any more. But in both *N* and *OP* the court stated that there was no difference between the balancing exercise under para 364 of the Immigration Rules (before amendment) and the provisions of Art 8 ECHR. 'In substance, the Art 8 proportionality question and the para 364 balance are the same'. So in those cases where there is family or private life the new automatic provisions may not have changed anything very much. It is clear that under Art 8(2) one of the balancing factors may be the deterrent effect of deportation though it is very doubtful how much, if any, weight society's revulsion should have in striking the balance..

¹ *N*, para 54; *OP* para 16.

15.15D Of course the picture is quite different under EC law, where the focus is on the individual being deported and general deterrence has no part to play.¹ And what about the criminal court's power to recommend deportation? As we discuss at 15.30ff the *Nazari*, *Carmona* and *Caird* guidelines still apply. But what is the point of it all, if the end result is a foregone conclusion and the input of the trial judge is of no consequence since the new focus is entirely on the Secretary of State's pre-determined view of the offence? Is the individual criminality and dangerousness of the offender of no consequence? Are mitigating or aggravating circumstances unimportant? Is the assessment of the

15.15D Deportation and Repatriation

risk posed by the offender by the time of his or her release of little or no relevance? The problem does not lie in dealing with those who have no ties to the UK or pose a serious risk to the public. It is the others. The automatic deportation powers in UK domestic law are so out of kilter with human rights and community law for those who do have ties to this country. What is clear is that beyond the new direction of the law on deportation there is another consideration. If the reason for deportation at the end of the sentence is the protection of the public, this can only mean the British public. The international drug dealer, the terrorist and the psychopath will each be released to another country where he is she will be free to engage in crime. This will be particularly true of sex offenders being removed to countries where there are none of the safeguards of a sex offenders' register.² Deportation then risks becoming the means of exporting and circulating crime – 'not in my back yard – you can have them'. Some serious rethinking needs to be done.

¹ Citizens' Directive (Directive 2004/38/EC), Art 28 and Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 21(b) and (d); Case 30/77 *Bouchereau* [1977] ECR 1999 at para 28. See chapter 7. For a recent application see *LG (Italy) v Secretary of State* [2008] EWCA Civ 190, [2008] All ER (D) 262 (Mar) on the meaning of 'imperative grounds of public security'; *Bulale v Secretary of State* [2008] EWCA Civ 806, [2008] 3 CMLR 738. In determining whether a propensity to commit robberies constituted, in terms of the Directive, a 'sufficiently serious' threat to society to justify the applicant's expulsion, the court stated that the thrust of the thinking that led to the Directive seems fairly clearly to have been that it should be, at the least, difficult to expel an EU citizen on the basis of crimes of dishonesty, but that violence might be a different matter.

² It is also quite possible that no-one in the country of return will have any information of the offences for which the person is being deported. See the very interesting document reproduced in *HH (Iraq)* AIT, 1 February 2008, which sets out the restricted circumstances in which criminal convictions can be disclosed to foreign governments, consistently with the Data Protection Act 1998 and the Human Rights Act 1998.

DEPORTATION RECOMMENDED BY COURT

15.27 The third head of deportation arises where a non-citizen over 17 years of age¹ is convicted² of an offence punishable with imprisonment³ and is recommended for deportation by the court.⁴ The recommendation may be made by any court having power to sentence him or her for the offence, unless the court commits the person to be sentenced or further dealt with for that offence by another court.⁵ Thus, the recommendation may be made by the magistrates' court, a Crown Court, or the Court of Appeal.⁶ There is no statutory restriction on the combination of a recommendation with other any other sentence;⁷ it may be made in respect of an offender who is sentenced to imprisonment for life⁸ or one who is sentenced to a fine, although it is unlikely a non-custodial sentence would reach the entry-point criteria for demonstrating 'potential detriment'. A recommendation may also be made in respect of youth custody, although such a sentence, intended to rehabilitate and train, may mean that it is not a proper case for a recommendation.⁹

In *R v. Abdi (Liban)*¹⁰, it was held that by virtue of the provisions of s 6(3) of the Immigration Act 1971, the final paragraph of which is a reference to the Powers of Criminal Courts (Sentencing) Act 2000, s 14(1), a recommendation for deportation may be made in conjunction with a conditional discharge.

- ¹ A person is deemed to have attained the age of 17 if, on consideration of any available evidence, he or she appears to the court to have done so: Immigration Act 1971, s 6(3)(a).
- ² A person is convicted of an offence for deportation purposes if he or she is found to have committed it, notwithstanding any enactment to the contrary and notwithstanding that the court does not proceed to conviction: Immigration Act 1971, s 6(3).
- ³ Whether an offence is punishable with imprisonment is to be determined without regard to any enactment restricting imprisonment of young offenders, or first offenders: Immigration Act 1971, s 6(3)(b).
- ⁴ Immigration Act 1971, s 3(6). For Scotland, see the Criminal Justice (Scotland) Act 1980, Sch 8.
- ⁵ Immigration Act 1971, s 6(1), in which special provision is made for Scotland.
- ⁶ In Scotland a recommendation may be made by a Sheriff or the High Court of Justiciary (subject to provisos): see Immigration Act 1971, s 6(1). The Court of Appeal's jurisdiction is conferred by Criminal Appeal Act 1968, ss 11(3), 50.
- Notwithstanding any rule of practice restricting the matters which ought to be taken into account in dealing with an offender sentenced to imprisonment: Immigration Act 1971, s 6(4) and see *R v Assa Singh* [1965] 2 QB 312, [1965] 1 All ER 938, CCA.
- ⁸ *R v Akan* [1973] QB 491.
- ⁹ See *R v Flynn* [1963] Crim LR 647.
- ¹⁰ [2008] 1 Cr App Rep (S) 87, CA.

15.29 No court may recommend a person for deportation unless he or she has been given seven days' notice in writing.¹ If the notice has not been served in time, the hearing may be adjourned, even after conviction, to enable the notice to be served.² The court needs a 'full inquiry into all the circumstances' and counsel should be invited to address the court specifically on the issue of a recommendation.³ Where a court decides to make a recommendation, full reasons for the decision should be given, in fairness to the offender and in order to assist the Secretary of State with the ultimate decision as to whether to proceed with deportation.⁴ A failure by the sentencing court to provide any, or any adequate, reasoning does not automatically lead to a recommendation being quashed, however, since the Court of Appeal has the power to give its own reasons where it considers deportation appropriate.⁵ Similarly, a failure by the prosecution to give the requisite 7 days' notice under s 6(2) does not necessarily invalidate the recommendation.⁶

- ¹ Immigration Act 1971, s 6(2). The proper course is to attach the acknowledgment of service of the notice to the case file, to avoid later disputes: *R v Edgehill* [1963] 1 QB 593, [1963] 1 All ER 181, but this is not essential, and service may be inferred from strong circumstantial evidence: *R v Rodney* [1996] 2 Cr App Rep (S) 230; *R v Adomako* [1998] EWCA Crim 3019.
- ² Immigration Act 1971, s 6(2).
- ³ *R v Nazari* (1980) 71 Cr App Rep 87; *R v Escauriaza* (1987) 9 Cr App Rep (S) 542; *R v Omojudi* (1992) 13 Cr App Rep (S) 346; *R v Frank* (1991) 13 Cr App Rep (S) 500.
- ⁴ *R v Nazari* above; *R v Rodney* [1998] INLR 118, [1996] 2 Cr App Rep (S) 230; *R v Bozat* [1997] 1 Cr App Rep (S) 270; *R v Dosso* [1998] EWCA Crim 3180; *R v Ntua* [1999] EWCA Crim 1520.
- ⁵ *R v Abdi (Liban)* [2008] 1 Cr App Rep (S) 87, CA.
- ⁶ *R v Rodney* above; *R v Bozat* above; *R v Green (Steven)* [1997] EWCA Crim 2661; *R v Dudgey* [1998] 2 Cr App Rep (S) 430.

Guidelines for criminal courts

15.30 The power to make a recommendation must be exercised judicially and is concerned with criminal behaviour rather than the enforcement of an immigration policy.¹ The court is not under an obligation to recommend

deportation in serious cases concerning evasion of immigration controls (such as forging passports or organising illegal entry)² and the question whether to recommend deportation should be decided quite independently of the immigration status of the offender.³ The basic statement of principle to guide the criminal courts was set out in the decision in *R v Caird*.⁴ In quashing a recommendation for deportation against one of the defendants, the court stated that it wished to emphasise:

‘that the courts when considering a recommendation for deportation are normally concerned simply with crime committed and the individual’s past record and the question as to what is their effect on the question of potential detriment to this country of the appellant remaining here. It does not embark, and indeed is in no position to embark, upon the issue as to what is likely to be his life if he goes back to his country of origin. That is a matter for the Home Secretary.’

Caird was cited with approval and amplified in the leading case of *R v Nazari*,⁵ where the widely differing cases of four appellants were dealt with together and the Court of Appeal set out a series of guidelines for courts. These cases have now been supplemented by *R v Carmona*.⁶ The criminal courts are concerned with potential detriment to the UK, and assessing potential detriment is a question of fact in each case, involving consideration of matters other than the gravity of the offence. Detriment refers to the potential harm caused by the defendant’s criminal behaviour, and not such matters as receipt of welfare benefits⁷ or immigration status.⁸ A comparatively minor offence will not make continued presence a detriment;⁹ the important issue is the defendant’s likely future conduct.¹⁰ The likelihood of re-offending is usually relevant; indeed the EC criteria have to all intents and purposes been assimilated into domestic criminal law.¹¹ In *R v Abdi (Liban)*,¹² it was held that there was no inconsistency between the judge’s conclusion that the criteria for significant risk under s 229 of the Criminal Justice Act 2003 had not been satisfied and his decision to make a recommendation for deportation on the basis that there was a degree of risk of re-offending (although not sufficient to amount to dangerousness under s 229) and that serious harm would undoubtedly result from any re-offending.

¹ See Arthur Rogerson ‘Deportation’ [1963] PL 305 at 309; Graham Zellick ‘The Power of The Courts To Recommend Deportation’ [1973] Crim LR 612; the Wilson Committee on Immigration Appeals (1967) Cmnd 2739, para 94.

² *R v Akan* (1972) 56 Cr App Rep 716, CA; *R v Anno-Firempong* [1997] EWCA Crim 1054 (possession of a false passport boarding an aircraft for Canada); *R v Dosso* [1998] EWCA Crim 3180 (assisting illegal entry).

³ The relevant considerations were the offender’s history, particularly criminal history, and the gravity of the offence: *R v Khandari*, 24 April 1979, Bridge LJ. A similar view was expressed in *Miller v Lenton* (1981) 3 Cr App Rep (S) 171; *R v Nunu* (1991) 12 Cr App Rep (S) 752, CA. See also *R v Stefanski*, *R v Kwiek* [2002] EWCA Crim 1810. However, in *R v Benabbas (Ahmed)* [2006] 1 Cr App Rep (S) 550, [2005] EWCA Crim 2113, it was said that there was a distinction to be drawn between the person who had entered the UK by fraudulent means and the person who was in this country unlawfully and who was convicted of an offence unconnected with his status and the circumstances in which he had entered the country. The public interest in preventing the fraudulent use of passports to gain entry or support residence was of considerable importance and deserved protection; where the essential gravamen of the offence for which the offender was being sentenced was itself an abuse of the immigration laws, the issue of detriment, when applying *R. v. Nazari* [1980] 1 WLR 1366) was intimately bound up with the protection of public order afforded by confidence in a system of passports; therefore, the approach identified in *R v*

Khandari was inappropriate to the offence of entering without a passport, although it might be appropriate where the defendant had immediately claimed asylum upon entry (because the asylum claim would be assessed by the Secretary of State, who was best left to consider it without any possible complication arising from a recommendation for deportation).

- ⁴ (1970) 54 Cr App Rep 499, CA.
- ⁵ [1980] 3 All ER 880 at 885–886, 71 Cr App Rep 87.
- ⁶ [2006] EWCA Crim 508, [2006] 2 Cr App Rep (S) 662.
- ⁷ *R v Serry* (1980) 2 Cr App Rep (S) 336, [1980] LS Gaz R 1181, CA.
- ⁸ But see fn 3 above.
- ⁹ *R v Kraus* (1982) 4 Cr App Rep (S) 113, CA; *R v Compassi* (1987) 9 Cr App Rep (S) 270, CA; *R v Okelola* (1992) 13 Cr App Rep (S) 560, CA. In *R v Williams (Vivian)* [1996] EWCA Crim 354, the Court of Appeal treated sexual abuse on and impregnation of a 12-year-old stepdaughter as a relatively minor offence not meriting deportation, although such offences are deemed to merit at least ten years' absence from the UK by the Home Office: see IDI Dec 00, Ch 13, Annex A, 'Period normally appropriate for revocation', and such a decision is, one hopes, inconceivable today. However, a conspiracy to defraud (cashing giro's) was deemed sufficiently serious in *R v Lembo*, *R v Mobonda*, *R v Mukwete* [2003] EWCA Crim 3246. In *R v Tangestani-Najad* [1998] EWCA Crim 1970, assault occasioning actual bodily harm on a tenant by a landlord with previous convictions was deemed not serious enough to merit deportation.
- ¹⁰ *R v David* (1980) 2 Cr App Rep (S) 362, CA; *R v Tshuma* (1981) 3 Cr App Rep (S) 97; *R v Altauwel* (1981) 3 Cr App Rep (S) 281 and other cases cited in Thomas *Current Sentencing Practice* Part K.
- ¹¹ *R v Escauriaza* (1987) 87 Cr App Rep 344, CA; *R v Spura* (1988) 10 Cr App Rep (S) 376, CA. Note the different approach under the Immigration Act 1971, s 3(5)(a), for which see *R (on the application of Samaroo) v Secretary of State for the Home Department* (CO 4973/1999) (20 December 2000, unreported) (affd [2001] EWCA Civ 1139, [2001] UKHRR 1150, [2002] INLR 55).
- ¹² [2008] 1 Cr App Rep (S) 87, CA.

THE DECISION TO DEPORT: CONSIDERATION OF MERITS

15.35 Whether or not a criminal court recommends deportation, the decision to deport is one for the Secretary of State. Subject to the coming into force and/or application of the automatic deportation provisions in the UK Borders Act 2007 and the thresholds, which will then apply, the general rule for deportations is contained in HC 395, para 364. It applies to all decisions to deport. It reads:¹

'Subject to paragraph 380 while each case will be considered on its own merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical to another in all material respects. In the cases detailed in paragraph 363A deportation will normally be the proper course where a person has failed to comply with or has contravened a condition or has remained without authority.'

For any decision taken before 20 July 2006, the AIT has confirmed that the old para 364 applies.² As that rule continues to be of relevance to those decisions and on-going appeals it is set out below:

15.35 *Deportation and Repatriation*

'In considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case. While each case will be considered in the light of the particular circumstances, the aim is the exercise of the power of deportation that is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. In cases to which [the transitional provisions] apply,³ deportation will normally be the proper course for a person who has failed to comply with or has contravened a condition or has remained without authority. Before a decision to deport is reached the Secretary of State will take into account all relevant factors known to him including:

- (i) age;
- (ii) length of residence in the UK;
- (iii) strength of connections with the UK;
- (iv) personal history, including character, conduct and employment record;
- (v) domestic circumstances;
- (vi) previous criminal record and the nature of any offence of which the person has been convicted;
- (vii) compassionate circumstances;
- (viii) any representations received on the person's behalf.'

In *OP (Jamaica) v Secretary of State for the Home Department*⁴ the Court of Appeal held, following *N (Kenya) v Secretary of State for the Home Department*⁵ that proper weight must be given to the Secretary of State's policy on deportation, and in particular to the fact that she has taken the view, in the public interest, that serious crimes of violence are sufficiently serious to warrant deportation. In such circumstances, her assessment had to be taken as a given, unless it is palpably wrong. For further comment see 15.14A above. At the same time we are reminded by the decision in *DW (Jamaica) v Secretary of State for the Home Department*,⁶ that where the AIT dismissed the claimant's appeal against deportation, stating that someone who committed a serious custodial offence in the United Kingdom could not be permitted to remain here, this was a misdirection of law and the decision could not stand unless it was inevitable that it would have come to the same conclusion if properly directed..

¹ HC 395, para 364, as amended by HC 1337, which took effect on 20 July 2006.

² *EO (Deportation Appeals: scope and process) Turkey* [2007] UKAIT 00062.

³ HC 395, para 363A, inserted by Cm 4851 (transitional deportation of overstayers under the Immigration and Asylum Act 1999, s 10, now redundant through time): see 15.42 below.

⁴ [2008] EWCA Civ 440, [2008] All ER (D) 06 (May).

⁵ [2004] EWCA Civ 1094, [2004] INLR 612.

⁶ [2008] EWCA Civ 1587, [2008] All ER (D) 261 (Oct).

REVOCATION OF DEPORTATION ORDERS

15.62 The effect of a deportation order is to invalidate any leave to enter or remain in the UK given before the order is made or while it is in force.¹ A deportation order comes into force on the day it is signed rather than when it is served.² There are statutory provisions for when it ceases to apply. The order ceases to have effect automatically:

- (1) if the deportee becomes a British citizen;³

- (2) if a spouse, deported under a family order, is divorced from the principal deportee;⁴
- (3) in the case of children deported under a family order, as soon as they reach the age of 18.⁵

An order may also become invalid if the deportee has become a family member of an EEA national exercising Treaty rights in the UK.⁶ In all other circumstances a deportation order continues in force until it is revoked by a further order of the Secretary of State.⁷ Revocation of a deportation order, however, does not entitle the person to re-enter the UK, but merely to qualify for admission under the Immigration Rules.⁸ Application for revocation can be made to the entry clearance officer or the Home Office.⁹ Normally, three years must have elapsed.¹⁰ Time runs from the date the order was signed, not the date of removal, although time spent out of the UK is relevant.¹¹

HC 607, which came into force on 30 June 2008, amends HC 395, para 391, in order to align the period of time, that a criminal offender should normally be absent from the UK before revocation of a deportation order is considered, with those periods now set out in the general grounds for refusal of entry in para 320(7B) of the Immigration Rules. This provides, subject to exceptions, that any immigration offender who has been removed or deported from the UK will be banned from returning for ten years (See 3.55A–3.55D, above). The aim is to ensure that those deported on criminality grounds do not face exclusion for a shorter period than, for example, overstayers and illegal workers. In the case of an applicant with a criminal conviction, continued exclusion will normally be the proper course until the sentence has become spent under the terms of the Rehabilitation of Offenders Act 1974¹² or for ten years, whichever is the longer period. Where an individual receives a custodial sentence of over 30 months, their conviction will never become spent under the terms of the Rehabilitation of Offenders Act 1974 and HC 391, as now amended, provides that in these circumstances, a deportation order is normally never revoked, unless this would be contrary to the Human Rights Convention or the Refugee Convention.

¹ Immigration Act 1971, s 5(1).

² *Peerbocus* [1987] Imm AR 331; *Dey (Sri Kumar) v Secretary of State for the Home Department* [1996] Imm AR 521, CA.

³ Immigration Act 1971, s 5(2). But an order is not revoked merely because a Commonwealth citizen marries a British citizen after the order is signed: *R v Secretary of State for the Home Department, ex p Hayden* [1988] Imm AR 555, QBD.

⁴ Immigration Act 1971, s 5(3), (4).

⁵ Immigration Act 1971, s 5(3), (4).

⁶ IDI Ch 13, s 5, para 2; see chapter 7 above.

⁷ Immigration Act 1971, s 5(2). A deportation order cannot be impliedly revoked and the grant of entry clearance while the order is in existence does not have this effect: *Watson* [1986] Imm AR 75.

⁸ HC 395, para 392.

⁹ HC 395, para 392.

¹⁰ HC 395, para 391; but since the question of revocation is a matter of the minister's discretion, shorter or longer periods are possible: *Udoh* [1972] Imm AR 89, where it was held that one year was a sufficient time for atonement; and see further *Dervish* [1972] Imm AR 48 where it was felt that 12 months was too soon to revoke the order, but a further seven months led the Tribunal to recommend an early consideration of revocation. See now IDI, Ch 13 Annex A, 'Periods normally appropriate for revocation'.

¹¹ *Peerbocus* [1987] Imm AR 331, IAT.

15.62 *Deportation and Repatriation*

- ¹² Where an individual receives a custodial sentence of over 30 months, his or her conviction will never become spent under the terms of the Rehabilitation of Offenders Act 1974.

REPATRIATION

Prison repatriation

15.68 The Council of Europe Convention on the Transfer of Sentenced Persons 1983 provided for repatriation to enable prisoners sentenced abroad to serve their sentences in their home country, with the consent of the prisoner and the agreement of the two countries concerned. Under the Convention the prisoner must have at least six months of his or her sentence left to serve and be a national of the state to which he or she is to be transferred. There should be no outstanding appeal to a higher court against sentence or conviction. The Repatriation of Prisoners Act 1984 was enacted to give effect to the Convention in UK law. British prisoners convicted overseas may be repatriated to complete their sentence in a British jail or other institution, and overseas prisoners in UK jails may be sent back to their own countries to complete their sentences. Under the 1984 Act any repatriation must take place under an international arrangement, such as the Council of Europe Convention or some bilateral arrangement between the UK and another government,¹ and consent must be given by the prisoner and the two countries concerned.² Transfer in and out is effected at the British end by a warrant issued by the Secretary of State for the Home Department. In outward transfers this authorises the taking of a prisoner to any place in any part of the UK, his or her delivery at a place of departure to the custody of an agent of the transfer country and the removal of the prisoner from the UK.³ In inward transfers the 1984 Act authorises the return of prisoners to the UK and their subsequent detention in a prison, hospital or other institution as authorised by the Secretary of State's warrant.⁴ Once a prisoner has been transferred back to the UK the Secretary of State has the power to give that person a pardon and is not prevented from doing so by the 1983 Convention.⁵ A prisoner who is in the UK or on board a British ship, aircraft or hovercraft is deemed to be in the legal custody of the Secretary of State.⁶ A prisoner who escapes can be arrested by the police without warrant.⁷ The provisions of the 1984 Act do not apply to anyone who is detained in pursuance of a sentence of the International Criminal Court.⁸

¹ Repatriation of Prisoners Act 1984, ss 1(1) and 8(1).

² Repatriation of Prisoners Act 1984, s 1(1)(b) and (c). The Habeas Corpus Act of 1679, s 11 forbids the sending of any person as a prisoner out of the realm (ie, without his or her consent) and imposes the penalty of life imprisonment upon anyone taking part in such illegal repatriation or deportation. But s 12 exempts from this prohibition any persons, who 'by contract in writing agree with ... any merchant or owner of any plantation, or other persons whatsoever, to be transported to any parts beyond the seas'.

³ Repatriation of Prisoners Act 1984, s 2.

⁴ Repatriation of Prisoners Act 1984, s 3.

⁵ *R (on the application of Shields) v Secretary of State for Justice* [2008] EWHC 3102 (Admin), (2009) Times, 14 January.

⁶ Repatriation of Prisoners Act 1984, s 5(2).

⁷ Repatriation of Prisoners Act 1984, s 5(5).

⁸ International Criminal Court Act 2001, s 42(5)(a).

Early Removal Scheme

15.74 To alleviate the disparity which arose as a result of the exclusion from the HDC of those who were liable to removal, the Criminal Justice Act 2003 (CJA 2003) introduced an early release scheme which impacted on persons liable to removal from the UK.¹ The Early Removal Scheme (ERS) came into effect in April 2005 and enables eligible FNPs to secure their discharge from prison, for the sole purpose of effecting removal,² at sentencing points, equivalent to those operating in respect of HDC.³ The definition of persons liable to removal is identical to that operating in respect of the HDC.⁴ The Early Removal of Short-Term and Long-Term Prisoners (Amendment of Requisite Period) Order 2008, SI 2008/977, with effect from 7 April 2008, amends s 46A of the CJA 1991 to expand the early release scheme so as to enable foreign national prisoners to be removed from prison, and hence the UK, at an earlier point in their sentence. The Order doubles the maximum number of days from which a prisoner may be removed from prison under the ERS, from 135 days before the halfway point of the sentence to 270 days before the halfway point of the sentence. Certain categories of FNP are statutorily excepted from the scheme:

- (a) where sentence is imposed under ss 227 (detention for life for public protection for serious offences committed by those under 18) or 228 (extended sentences for certain sexual or violent offences committed by those over 18) CJA 2003;
- (b) the sentence is for an offence under s 1 of the Prisoners (Return to Custody) Act 1995;
- (c) the prisoner is subject to a hospital order, hospital direction or transfer direction under ss 37, 45A or 47 of the Mental Health Act 1983;
- (d) the prisoner is subject to the notification requirements of Part 2 of the Sexual Offences Act 2003; or
- (e) in the case of a prisoner to whom a direction under s 240 of CJA 2003 relates, the interval between the date on which the sentence was passed and the date on which the prisoner will have served the requisite custodial period is less than 14 days.⁵

Where a FNP is removed under the ERS who re-enters the UK before their sentence expiry date is liable to be detained to serve out their sentence.⁶

¹ See s 49A of the Criminal Justice Act 1991 (as amended by Sch 20 of the CJA 2003) and ss 259–261 of the CJA 2003. Baroness Scotland of Asthal (made the following statement on the ERS on behalf of the Government in the course of debates on the CJA 2003:

‘My Lords, this group of amendments deal with foreign national prisoners who make up a rising proportion of the prison population. About 800 foreign national prisoners are deported or otherwise removed each year. Those liable to deportation at the end of the custodial portion of their prison sentences are currently ineligible for the early release arrangements available to other prisoners. The purpose of these amendments is therefore to introduce an early removal scheme for this group of prisoners. Eligible prisoners will be deported up to a maximum of 135 days early, depending on sentence length. The scheme will save a small number of prison places. But, as importantly, it will provide fairer release and removal arrangements for prisoners who are ineligible for the early release provisions available to other prisoners’. (Lords Hansard text for 5 November 2003, Column 900, page 132, line 22)

15.74 *Deportation and Repatriation*

² CJA 1991, s 46A(3); CJA 2003, s 259(3).

³ CJA 1991, ss 46A(5) and 260(2) demarcate the ERS eligibility date (ERED) for admission to the scheme by reference to the duration of the custodial sentence imposed.

⁴ CJA 1991, s 46A; CJA 2003, s 259 states:

‘For the purposes of this Chapter a person is liable to removal from the United Kingdom if—

(a) he is liable to deportation under section 3(5) of the Immigration Act 1971 and has been notified of a decision to make a deportation order against him,

(b) he is liable to deportation under section 3(6) of that Act,

(c) he has been notified of a decision to refuse him leave to enter the United Kingdom,

(d) he is an illegal entrant within the meaning of section 33(1) of that Act, or

(e) he is liable to removal under section 10 of the Immigration and Asylum Act 1999.’

⁵ CJA 1991, s 46A(2)(a), (b); CJA 2003, s 260(3).

⁶ CJA 1991, s 46B(1)–(7); CJA 2003, s 261.

REMOVAL AND OTHER EXPULSION

INTRODUCTION

16.1 In this chapter we examine the grounds for administrative removal from the UK and the means by which it is achieved. In contrast to removal by deportation, which we dealt with in the last chapter, there is no formal ban on return in cases of summary administrative removal, as set out in s 5(1) of the Immigration Act 1971, but because of recent rule changes, the practical effect will in many cases be exactly the same with a gradation of bans running from ten years to one year. Details of these amendments to para 30 of HC 395 are contained at 3.55A–3.55D, above. Immigrants who are liable to removal are those refused leave to enter; illegal entrants; overstayers, and those in breach of their conditions of stay; those using deception to remain; former refugees; family members of those liable to removal, and crew members remaining unlawfully. The Nationality, Immigration and Asylum Act 2002 (NIAA 2002) made it possible for the first time to remove persons who attempted but failed to obtain leave to remain using deception;¹ former refugees² and the UK-born children of all those liable to removal including illegal entrants and persons refused leave to enter.³ The powers of removal are by and large unchanged save for these extensions; removal of those refused leave to enter, illegal entrants, their family members and sea and air crews is dealt with in Schedule 2 to the Immigration Act 1971,⁴ and of the other groups in s 10 of the Immigration and Asylum Act 1999 (IAA 1999) and the Immigration (Removal Directions) Regulations 2000.⁵ Removal of asylum claimants to 'safe third countries' under ss 11 and 12 of the 1999 Act is dealt with in chapter 12 above. In addition, there are provisions for the summary removal of sea, air and train crews who are in the UK illegally, and for detained psychiatric patients and members of visiting forces. We examine each of these categories in turn. Although the arrangements differ slightly according to the category of person being removed, the IAA 1999 introduced greater uniformity, in particular in subjecting overstayers, persons in breach of conditions of leave and others formerly eligible for deportation, to administrative removal procedures without the process of deportation. The most complicated arrangements remain the removal of persons refused entry, for reasons mainly to do with who pays for the cost of removal.⁶

¹ IAA 1999, s 10(1)(b), substituted by the NIAA 2002, s 74, from 10 February 2003: SI 2003/1, Art 2.

² IAA 1999, s 10(1)(ba), inserted by the NIAA 2002, s 76(7), from 10 February 2003: SI 2003/1.

³ Immigration Act 1971, Sch 2, para 10A, inserted by the NIAA 2002, s 73(1), from 10 February 2003: SI 2003/1.

⁴ Immigration Act 1971, Sch 2, paras 8–15 as amended.

⁵ SI 2000/2243.

⁶ See 16.50 below.

DECEPTION, FALSE DOCUMENTS AND CORRUPTION

Treating someone as an illegal entrant

16.29 Although the immigration officer is the official responsible under statute for the decision that a person is to be treated as an illegal entrant and removed,¹ in practice it will often be made by the Home Office, either because of instructions given to the immigration officer or because the main decision is whether or not to grant leave to remain, and that decision is for the Secretary of State for the Home Department under s 4(1) of the Immigration Act 1971. Where the authorities decide to remove someone as an illegal entrant, despite an earlier grant of leave to enter, the burden of proving there was an illegal entry falls on the Home Office, and in any judicial proceedings the court inquires whether the facts precedent to the exercise of the administrative power have been proven.² However, the fact that a person has entered illegally does not oblige the Secretary of State to proceed to summary removal, as there is always a discretion to allow the person to stay.³ In the previous edition, we discussed the difficulty caused by the fact that a number of policy statements⁴ have conferred benefits on illegal entrants and overstayers which did not on their face apply to those seeking leave to enter, who might nevertheless have physically been in the country (on temporary admission), forming relationships and ties with the country, for many years, making it, paradoxically, necessary for persons to be ‘recognised’⁵ as illegal entrants rather than ‘mere’ port applicants to obtain the benefit of policies on family life.⁶ This anomaly has now, we hope, been laid to rest by the Home Office acceptance in *Dabrowski*⁷ that it was illogical and unfair not to give port claimants the benefit of such policies. Thus it should no longer be necessary for illegal entrants to insist on being treated as such, thereby laying themselves open to the charge of seeking to benefit from their own wrongdoing.⁸ In any event, since the policies were designed to meet human rights concerns, the right of appeal on human rights grounds will normally enable the policy issues to be considered before removal.⁹

¹ Immigration Act 1971, Sch 2, para 9. Modifications to Sch 2 made by the Immigration (Entry Otherwise than by Sea or Air) Order 2002, SI 2002/1832 give the same power to the Secretary of State when the illegal entrant arrives from Ireland.

² *Khawaja v Secretary of State for the Home Department* [1984] AC 74, HL. See *R (on the application of Ullah) v Secretary of State for the Home Department* [2003] EWHC 679 (Admin), [2003] All ER (D) 288 (Mar) where the court rejected the argument that an allegation of illegal entry was a ‘criminal charge’ for Art 6 ECHR purposes, adding that the court could give leave to cross-examine where necessary.

³ See *Afunyah v Secretary of State for the Home Department* [1998] Imm AR 201, fn 8 below. Contrast *R v Secretary of State for the Home Department, ex p Urmaza* [1996] COD 479 (seaman deserter was illegal entrant and it was not open to Secretary of State not to treat him as one). See further, on the need for an immigration official to exercise discretion whether or not to treat a person who is an illegal entrant as such, *R (Uluylol and Cakmak) v An Immigration Officer* [2001] INLR 194. The Home Office policy on when to treat port cases as illegal entrants is set out in IDI Ch 20 para 2.4.

⁴ See for example the marriage policy (DP/3/96) and the policies on children (DP/4/95 and DP 5/96).

⁵ *Shahed (Abu) v Secretary of State for the Home Department* [1995] Imm AR 303; *Jackson (Magdalena) v Secretary of State for the Home Department* [1996] Imm AR 243; *Kadi v Secretary of State for the Home Department* [2001] EWHC Admin 375, [2001] All ER (D) 154 (May); cf *R v Secretary of State for the Home Department ex p Jagot (Mobin)* [2000] INLR 501.

- ⁶ See the previous edition of this work, 16.29. The relevant policies are set out in an addendum to *Dabrowski* (fn 7 below).
- ⁷ *R (on the application of Dabrowski) v Secretary of State for the Home Department* [2003] EWCA Civ 580 [2003] Imm AR 454 [2003] INLR 411. See para 17. The distinction between 'on-entry' and 'enforcement' cases is described in a Home Office witness statement reproduced as an addendum. See further *R (on the application of Tozlukaya) v Secretary of State for the Home Department* [2006] EWCA Civ 379, [2006] INLR 354 at para 83 and *NF (Ghana) v Secretary of State for the Home Department* [2008] EWCA Civ 906, [2008] All ER (D) 409 (Jul). For a fuller discussion see 11.124 above.
- ⁸ See *Afunyah v Secretary of State for the Home Department* [1998] Imm AR 201, CA followed in *R v Secretary of State for the Home Department, ex p Olawole* (FC3/000/6002/C) (18 April 2000, unreported), CA; *R (Ahmed) (Khalid) v Immigration Appeal Tribunal* [2002] EWHC Admin 624, [2002] Imm AR 427; contrast decision of Sedley J in *R v Secretary of State for the Home Department, ex p Urmaza* [1996] COD 479 (fn 3 above).
- ⁹ NIAA 2002, s 82, applying to immigration decisions generated on or after 1 April 2003. For pre-1 April 2003 decisions see the IAA 1999, s 65. See further 16.60 below and chapter 8, above.

16.30 Once it is established that the person is an illegal entrant and that the immigration officer or Secretary of State is going to treat the person as such, the practice is to serve an IS 151A notice. There is no statutory requirement to do so, since it is not a decision to give or refuse leave, nor a notice of an immigration decision,¹ since it is not a decision to remove.² The service of such notice is significant in its own right, however, in that it dates the 'commencement of enforcement action' for the purposes of rules, policies and concessions based on long residence, marriage or other ties which the person may seek to rely on to argue that he or she should not be removed.³

¹ *Ie*, one of the decisions listed in the NIAA 2002, s 82(2).

² In practice the IS 151A notice is now generally served together with the IS 151A part 2: See Enforcement Instructions and Guidance, ch 16. The notice of decision to remove gives rise to appeal rights and so attracts the provisions of the Notices Regulations: see Immigration (Notices) Regulations 2003, SI 2003/658, reg 4.

³ See 11.76 above for the policies relating to marriage; 11.124 for those relating to children, and 16.47 below for the long-residence rule. A marriage post-dating the commencement of enforcement action will not benefit from the Home Office policy on marriage, and makes an Art 8 family life claim difficult, see *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840.

OVERSTAYERS AND OTHERS

Overstaying and breach of conditions

16.41 Another issue is whether every overstay or breach of conditions, however trivial, gives rise to liability to removal under s 10 of the IAA 1999. The likely answer is that all breaches give rise to liability, but trivial breaches are likely to be condoned.¹ In *R (on the application of Lim) v Secretary of State for the Home Department*² the Divisional Court noted that nothing obliges the Home Secretary to remove every non-British citizen who commits an infraction, however inconsequential, of his or her conditions of leave to remain, especially where the occurrence of the infraction is itself in issue. A decision to remove always involves the exercise of a discretion, and could be challenged where, for example, Home Office policy is to overlook a minor

16.41 *Removal and other Expulsion*

breach or a short overstay, since it would be inconsistent with good administration and unfair to remove someone on that basis. For example, anyone whose leave is subject to a condition of no recourse to public funds may be liable to summary removal if he or she claims any welfare or social security benefits or homeless persons housing.³ However, Home Office policy in relation to settlement is not to refuse in the case of strictly temporary recourse to public funds;⁴ it would thus be unreasonable to remove someone on this basis. Similar considerations apply to an overstay of a few weeks. In cases of alleged working in breach of employment conditions, the IDI state there must be firm and recent evidence (within 6 months) of working in breach.⁵

¹ See *R v Secretary of State for the Home Department, ex p Amoa* [1992] Imm AR 218, QBD; *R v Secretary of State for the Home Department, ex p Ajayi* (1994) 28 HLR 25 (deportation). Home Office instructions state that working in breach must be recent (within the past six months), and of sufficient gravity to warrant removal: Operational Enforcement Manual Section B, Ch 10, para 10.6.4. Action may be appropriate where it appears that a student's main purpose in being here is work rather than study: para 10.6.5, and persons who have overstayed for only a short period may be removed if there is reason to believe that they have no intention of leaving the UK: *ibid* 10.6.3.

² *R (on the application of Lim) v Secretary of State for the Home Department* [2006] EWHC 3004 (Admin), [2006] All ER (D) 410 (Nov).

³ For the definition of public funds see HC 395, para 6 and 6A.

⁴ See eg IDI (Mar/06), Ch 8, Annex F, para 8.

⁵ IDI, Ch 13, s 2, para 2.1.2.

Use of deception in seeking leave to remain

16.42 A person who obtained leave to remain by deception was for the first time rendered liable to removal (as opposed to deportation) by s 10 of the IAA 1999.¹ Section 74 of the Nationality Immigration and Asylum Act 2002 has substantially extended liability to removal in this category, which is now triggered by any use of deception by a person seeking leave to remain, 'whether successful or not.'² The amendment appears to render irrelevant the proposition that any deception must have been 'effective' in order to permit initiation of enforcement action.³ The wording of the section indicates that the deception must be that of the applicant him- or herself rather than that of a third party, although it can clearly include the use of false documents as well as the making of false representations. Leave granted on the basis of such deception would be invalidated by the issue of removal directions,⁴ but deception must be proved to a high degree of probability.⁵ Removal for practising deception only applies to persons who have practised deception from 1 October 1996.⁶ If it appears that leave to remain was obtained by deception prior to that date this does not stop the case being referred for possible deportation action on non-conducive grounds under s 3(5)(a) of the Immigration Act 1971.⁷ Leave obtained by deception is now invalidated when notice of removal is given, not when removal directions are given.⁸

¹ IAA 1999, s 10(1)(b).

² IAA 1999, s 10(1)(b) as amended by the NIAA 2002, s 74. Section 76 of the Nationality Immigration and Asylum Act 2002 enables the Secretary of State to revoke ILR granted by deception even where the person cannot be removed for legal or practical reasons (eg Art 3 ECHR, or no direct flights to the country or territory concerned). See 5.11 above.

³ See the discussion at 16.16–16.22 above on what constitutes deception, and what is a material deception in leave to enter cases.

⁴ IAA 1999, s 10(8).

⁵ *Khawaja v Secretary of State for the Home Department* [1984] AC 74.

⁶ IDI, Ch 13, s 2, para 2.2.

⁷ See n 6 above.

⁸ IAA 1999, s 10(8), amended by the IAN 2006, s 48, which came into force on 16 June 2006.

USE OF DISCRETION IN REMOVAL CASES

The long residence rule

16.47 The 'long residence' rule incorporated into the immigration rules on 1 April 2003,¹ which was formerly a Home Office concession, originated in the UK's ratification in 1969 of the European Convention on Establishment. Article 3(3) of the Convention provided that nationals of any contracting state who had been lawfully resident for over ten years in the territory of another party could only be expelled for reasons of national security or for particularly serious reasons relating to public order, public health or morality. The Home Office, when implementing this Article, extended it in three respects:

- to include all foreign nationals;
- to grant indefinite leave rather than simply refrain from removal; and
- to allow those who have been in the UK illegally to benefit.

The rule perpetuates the distinction between lawful residence, which confers eligibility for settlement after ten years,² and residence partly or wholly unlawful, conferring eligibility only after 14 years.³ In either case, it must be continuous. Continuity of residence will not be broken by short absences of six months or less at any one time during periods of leave, but will be broken by removal, deportation or departure after refusal of leave to enter; departure from the UK with a clear intention not to return or in circumstances where there was no reasonable prospect of lawful return; by a custodial sentence or hospital order; or by a total of 18 months outside the UK.⁴ In *TT (Long residence – 'continuous residence' – interpretation) British Overseas Citizen*⁵ it was held that a period of continuous residence, as defined in HC 395, para 276A(a), is not broken in circumstances where a person with leave to remain in the United Kingdom obtains further leave from an Entry Clearance Officer while temporarily outside the United Kingdom prior to the expiry of the leave to remain. Although the IDI said otherwise, they were no more than an internal guidance for Home Office officials and did not bind the Tribunal.⁶ The grant of indefinite leave under the rules on the grounds of long residence is discretionary, and ILR will only be granted, if there are no reasons, having regard to the public interest, making it undesirable to do so, taking into account a list of factors almost identical to those the Secretary of State is required to consider when contemplating deportation action. These include: age, strength of connections in the UK, personal history including character, conduct, associations and employment record, domestic and compassionate circumstances, criminal convictions and representations from third parties.⁷

In *Aissaoui v Secretary of State for the Home Department*⁸ the Court of Appeal held that it was wrong to approach the public interest reasons in HC

395, para 276B(ii) in a too literal way, because this would risk automatically excluding in the public interest from the long residence rule many who, absent other factors, are intended to have the benefit of that rule. The Court warned that *MO (Long residence rule – public interest proviso) Ghana*⁹ should be treated with caution. The Court ruled that the immigration judge had erred in determining that an overstayer had deliberately tried to avoid detection, by engaging in employment under the name and national insurance number of another person. In *ZH (Bangladesh) v Secretary of State for the Home Department*¹⁰ the Court of Appeal held that the public interest in an unlawful stay which had lasted 14 years or more was treated by the Immigration Rules, para 276B as met by a grant of indefinite leave to remain provided that there were no countervailing factors which tilted the public interest balance the other way. The use of a false identity might be a relevant factor in gauging where the public interest lay, but nothing in the rule accorded it any given weight, much less made it decisive. The Court said that *MO* should not in future be cited on para 276B(i)(b) appeals even as persuasive authority. Even the Secretary of State's own guidance recognised that applicants under the 14-year rule, if they were to be successful, must be expected to have worked unlawfully for much of their time in the UK.

In *AA (Spent convictions) Pakistan*¹¹ the Tribunal held that convictions that are 'spent' for the purposes of the Rehabilitation of Offenders Act 1974 should not normally be the subject of reference in appeals before the Tribunal. The exception is in s 7(3) of the 1974 Act, which allows spent convictions to be proved if the interests of justice require it: it is for the Respondent to prove that they do. To rely on a spent conviction without considering whether justice could be done without it, is an error of law.

- ¹ HC 395, paras 276A–E, inserted by HC 538 and amended by Cm 6339. HC 398 inserted a requirement to have a knowledge of the English language and of life in the UK.. In *OS (10 years' lawful residence) Hong Kong* [2006] UKAIT 00031 (20 March 2006), the Tribunal noted that the 'long residence' concession had not been withdrawn when the rules relating to long residence were introduced. The Tribunal ruled that paragraphs 276A–D of the Immigration Rules (HC 395) stand alongside the published concession in long residence cases. The rules mean what they say and a person who does not meet the requirements of the rules may still get the benefit of the Secretary of State's exercise of discretion in his favour under the concession. Under the concession, there is no absolute requirement that every day of residence during the ten years be a day of lawful residence.
- ² Lawful residence means continuous residence pursuant to leave to enter or remain, temporary admission where leave is subsequently granted, or an exemption from control: HC 395, para 276A(b). The IDI (Ch 18) para 7 assert that a person who is still exempt from control cannot apply for ILR, but the rule does not require an applicant to have current leave to remain in order to qualify, and on the face of it would not preclude an application from someone whose exemption from control was extant but about to end.
- ³ The distinction was first made in 1987; see 5th edition 16.43. The 14 years' residence under the rule excludes any period spent in the UK following service of notice of liability to removal, of removal directions under Sch 2 to the IA 1971 or s 10 of the IAA 1999, or of a notice of intention to deport: HC 395 para 276B(i)(b) as amended by Cmd 6339 on 24 Sep 2004. This reflects the case law under the previous policy: see *R v Secretary of State for the Home Department, ex p Ofori* [1994] Imm AR 34, CA; *Musah v Secretary of State for the Home Department* [1995] Imm AR 236, *Hussain v Immigration Appeal Tribunal and Secretary of State for the Home Department* [1991] Imm AR 413, although this was held only to apply when the person became aware of the notice: *R v Secretary of State for the Home Department, ex p Popatia and Chew* [2000] INLR 587.
- ⁴ HC 395, para 276A(a) as inserted. For cases on continuity of residence under the old policy see the 6th edition of this work, 16.43 text and fn 4.

⁵ [2008] UKAIT 00038.

⁶ See further *Ishtiaq v Secretary of State for the Home Department* [2007] EWCA Civ 386, (2007) Times, 22 May, at para 3 and *R (on the application of NA (Iraq)) v Secretary of State for the Home Department* [2007] EWCA Civ 759, (2007) Times, 29 August at paras 25 and 26.

⁷ HC 395, para 276B(ii) as inserted.

⁸ [2008] EWCA Civ 37, [2008] All ER (D) 92 (Feb).

⁹ [2007] UKAIT 14.

¹⁰ [2009] EWCA Civ 8, [2009] All ER (D) 118 (Jan).

¹¹ [2008] UKAIT 00027 (25 March 2008).

16.48A Until 14 January 2008 the Secretary of State had policies set out in Chapters 10 and 12 of the Operational Enforcement Manual (OEM)¹ that enforcement action should not be taken against nationals who originate from countries which are currently active war zones. These were withdrawn on 14 January 2008. In *HH (Iraq)*² the Tribunal held that Iraq was a war zone and that the policies in question applied during their currency to those served during the relevant period with either a notice of intention to make a deportation order or to those served with an intention to remove under s 10 of the IAA 1999. Withdrawal of the policy could not save a decision which was made unlawfully during its currency.

¹ Now renamed the Enforcement Instructions and Guidance (EIG).

² AIT I February 2008.

CHALLENGING DECISIONS TO REMOVE

Standard of proof and evidential issues

16.63 If the Secretary of State for the Home Department must discharge the burden of showing that an applicant is an illegal entrant, an overstayer, etc if removal directions are challenged, how and to what standard is it done? In *Khawaja* Lords Bridge and Scarman concluded that the civil standard of proof applied, but that where fraud was alleged ‘the court should not be satisfied with anything less than probability of a high degree’.¹ The Court of Appeal followed this in *Rahman*.² In *Re B (children) (sexual abuse: standard of proof)*,³ the House of Lords dealt with the burden of proof in civil cases. They held that the standard of proof to be applied in Children Act 1989 cases is the balance of probabilities. In reaching this conclusion they identified three categories of decision, the first of which were cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of Art 6 ECHR) but nevertheless thought that, because of the serious consequences of the proceedings, the criminal standard of proof or something like it should be applied. *Khawaja* was one of the cases in this category. In reaching their main conclusion the judges said that they did not intend to disapprove any of the cases in the first category (Lord Hoffman, para 13) and distinguished cases there to punish or to deter from care proceedings (Lady Hale, para 69⁴). *Khawaja*, therefore, stands intact.

Where the immigration appellate authority has decided a disputed issue of identity or relationship after hearing oral evidence, and the Secretary of State later treats the person as an illegal entrant on new information on the disputed

issue, the starting point is the binding decision of an appropriate Tribunal in favour of the applicant, so the standard of proof to establish illegality is even higher.⁵ However, on judicial review or post-removal appeal, the facts may (and in the vast majority of cases will) be established by way of written statements, although in judicial review, cross-examination may be permitted by a judge when justice so demands.⁶ In *Ex p Patel*⁷ Webster J thought that very little assistance would be gained from the cross-examination of witnesses who could only give their evidence through an interpreter or in English as their second or third language. He considered at length the difficulties of assessing the demeanour and credibility of such witnesses – reflections which should be borne in mind by the appellate authority. In *Doldur v Secretary of State for the Home Department*⁸ Thorpe LJ commented that it was incumbent on the Secretary of State to face the applicant with the challenge of cross-examination where the allegation of deceit was based on failure to volunteer information, since, following *Khawaja*, there was no duty of candour, and deception could not be irresistibly inferred. The court should examine all the evidence, including hearsay evidence, on which the Secretary of State or the immigration officer relied in reaching the decision, to decide whether the conclusion of illegal entry, overstay, etc was justified.⁹ Because of the erratic and haphazard way illegal entry interviews were recorded by Home Office officials, Woolf J recommended¹⁰ proper safeguards such as making contemporaneous notes and reading them over to the person being interviewed; in fact most, if not, all illegal entry interviews are now tape-recorded. In England and Wales an allegation that a caution was not properly administered does not render an interview inadmissible, but goes to the weight to be attached to any admissions contained in it.¹¹ But the Scottish courts have held that interviews not conducted under caution may not be relied on to establish illegal entry by deception.¹²

¹ *Khawaja v Secretary of State for the Home Department* [1984] AC 74 (per Lords Bridge and Scarman).

² *R v Secretary of State for the Home Department, ex p Rahman* [1997] Imm AR 197, CA. [2008] UKHL 35, [2009] AC 11.

³ [2008] UKHL 35, [2009] AC 11.

⁴ ‘There are some proceedings, though civil in form, whose nature is such that it is appropriate to apply the criminal standard of proof. Divorce proceedings in the olden days of the matrimonial “offence” may have been another example (see *Bater v Bater* [1951] P 35). But care proceedings are not of that nature.’

⁵ *R v Secretary of State for the Home Department, ex p Miah* [1983] Imm AR 91; *Ali v Secretary of State for the Home Department* [1984] 1 All ER 1009, [1984] Imm AR 23.

⁶ *Khawaja v Secretary of State for the Home Department* [1984] AC 74 at 124. See also *R v Secretary of State for the Home Department, ex p Rouse and Shrimpton* (13 November 1985, unreported), DC where Woolf J said that cross-examination should not be used to shore up a weak case.

⁷ *R v Secretary of State for the Home Department, ex p Patel* [1986] Imm AR 208, affirmed at [1986] Imm AR 515, CA.

⁸ [1998] Imm AR 352.

⁹ *Khawaja* above, per Lord Templeman [1983] 1 All ER 765 at 794–795 and [1984] AC 74 at 128; *ex p Rahman* [1996] 4 All ER 945, QBD; *affd* [1997] Imm AR 197, CA. More recently in *R (on the application of Ullah) v Secretary of State for the Home Department* [2003] EWCA Civ 1366, [2003] All ER (D) 179 (Oct), a case concerning an assertion by a UK settled spouse (the complainant) that a marriage was not genuine and subsisting at the time when leave to enter was granted, the Court of Appeal held that the production of a witness statement from the complainant was not a prerequisite to founding an allegation of illegal entry and that hearsay evidence from the complainant recorded in an interview with an immigration officer was evidence which could be relied on to found the allegation, was

admissible in judicial review proceedings and was evidence to which a judge was entitled to have regard for the purpose of forming his own conclusion, although its weight was a matter for the court.

- ¹⁰ In *R v Secretary of State for the Home Department, ex p Govinden* (1985) Times, 12 July.
- ¹¹ *Yasin v Secretary of State for the Home Department* [1997] Imm AR 97, CA.
- ¹² *Oghonoghov v Secretary of State for the Home Department* 1995 SLT 733, OACS; *Kim (Sofia) v Secretary of State for the Home Department* 2000 SLT 249.

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DETENTION AND BAIL

IMMIGRATION OFFICERS' POWERS TO DETAIN

17.9 The code for regulating the examination and admission of non-nationals to UK territory is contained within the Immigration Acts 1971 to 2007. Incidental to the power to examine or remove a non-national is the ancillary power to detain pending the conclusion of such examination or removal. Under para 16 of Sch 2 to the IA 1971, immigration officers are authorised to detain in the following situations:

- (i) persons arriving in the UK may be detained pending examination by an immigration officer to establish whether they need or should be granted leave to enter.¹ There is no equivalent power to detain those who are seeking to leave the UK, even though such persons may be examined in order to establish whether they are British citizens or to check their identity;²
- (ii) those who, on arrival in the UK with leave to enter granted prior to arrival, have been examined under para 2A of Sch 2 to the IA 1971³ and had their leave suspended, may be detained pending completion of the examination and a decision on whether to cancel leave;⁴
- (iii) those refused leave to enter and those reasonably suspected of having been refused leave to enter⁵ may be detained pending the giving of directions for their removal from the UK;⁶
- (iv) illegal entrants and those reasonably suspected of being illegal entrants may be detained, pending a decision on whether to issue removal directions and pending removal in pursuance of directions;⁷
- (v) those who, having limited leave to enter or remain, do not observe a condition attached to their leave or remain beyond their leave or who have sought or obtained leave to remain by deception, or whose indefinite leave to remain has been revoked, or are reasonably suspected of being such persons, may be detained pending a decision to remove them or pending removal;⁸
- (vi) members of the family of someone who has been given removal directions as described in the previous four paragraphs;⁹
- (vii) members of the crew of a ship, aircraft or train who remain beyond the leave granted to enable them to join their ship, aircraft or train, or abscond having lawfully entered without leave, or are reasonably suspected of doing so, may also be detained.¹⁰
- (viii) a person claiming a right of admission as the family member of an EEA national or as a family member who has retained a right of residence or as a person with a permanent right of residence under the EEA Regulations whilst the person's claim is being examined;¹¹
- (ix) a person claiming a right of admission as an EEA national where there is reason to believe that he or she may be excluded from the UK on grounds of public policy, public security or public health pending examination of the claim;¹²

- (x) a person refused admission to the UK because he or she does not qualify under the EEA Regulations, pending his or her removal from the UK;¹³
- (xi) a person whose EEA residence card or family permit has been revoked on arrival by an immigration officer on the grounds that he or she is not a family member of a qualified person or of an EEA national with a right of residence or does not possess a right of residence him or herself or if the revocation is justified on public policy, public security or public health grounds pending removal from the UK;¹⁴
- (xii) a person refused admission as a family member of an EEA national, a family member who has retained a right of residence or other person with a right of residence under the EEA Regulations on grounds of public policy, public security or public health pending removal from the UK;¹⁵
- (xiii) a person who does not have or ceases to have a right to reside under the EEA Regulations pending his or her removal;¹⁶
- (xiv) a person who enters or seeks to enter in breach of a deportation order;¹⁷
- (xv) immigration officers designated by the Secretary of State can detain an individual for up to three hours if they think the individual may be liable to arrest by a police officer under the Police and Criminal Evidence Act 1984, s 24(1)–(3)¹⁸ (ie as someone who is about to commit, is committing or has committed an offence or is reasonably suspected of doing or having done so).

The Immigration, Asylum and Nationality Act 2006 (IAN 2006), s 47¹⁹ enables the Secretary of State to make a decision that a person with statutory leave²⁰ is to be removed from the UK by way of directions to be given by an immigration officer. The administrative provisions of the IA 1971, Sch 2, including the power to detain under para 16 apply in relation to directions given by an immigration officer under s 47.²¹ However, this does not mean that an immigration officer can detain a person as soon as a s 47 decision is made against him or her, a decision which may be made at the same time as, eg a decision refusing to extend the person's leave to remain. That is because an immigration officer will only be able to detain if there are 'reasonable grounds for suspecting that a person is someone in respect of whom' removal directions may be given.²² The immigration officer will only be able to give removal directions 'if and when' the statutory leave ends;²³ whilst an appeal might be brought or an appeal is pending, the immigration officer has no power to give removal directions and so will be unable to have reasonable grounds for suspecting that removal directions may be given.²⁴

Persons may be detained under Sch 2, para 16 anywhere the Secretary of State directs.²⁵

¹ IA 1971, Sch 2, para 16(1).

² IA 1971, Sch 2, para 3(1).

³ IA 1971, Sch 2, para 2A (inserted by Immigration and Asylum Act 1999, Sch 14, para 57) allows examination on entry of those granted leave prior to entry, to establish (i) if there has been a change circumstances since that leave was given; (ii) whether that leave was obtained as a result of false information or a failure to disclose material facts; (iii) if there are medical grounds on which that leave should be cancelled; (iv) if it would be conducive

17.9 Detention and Bail

to the public good for that leave to be cancelled. Paragraph 2A(2A), inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 18, adds a further ground for holders of entry clearance, and (v) whether the person's purpose in arriving in the UK is different from that specified in the entry clearance.

- ⁴ IA 1971, Sch 2, para 16(1A), inserted by the Immigration and Asylum Act 1999, Sch 14, para 60.
- ⁵ Ie, suspected of having absconded from temporary admission having been refused leave to enter.
- ⁶ IA 1971, Sch 2, paras 8, 16(2), as amended by the IAA 1999, s 140(1); and the NIAA 2002, s 73(5).
- ⁷ IA 1971, paras 9, and 16(2), as amended. Note that the amended wording of para 16(2) allows detention of suspected illegal entrants as well as those who actually are illegal entrants, although actual illegal entry will still be a precedent fact founding the power to remove: see 17.6 above.
- ⁸ IAA 1999, s 10(1)(a), (b), (ba) and (7). The latter applies the provisions of the IA 1971, Sch 2, para 16.
- ⁹ IA 1971, Sch 2, para 10A, 16(2) inserted and amended by the NIAA 2002, s 73(1) and 73(5) respectively; IAA 1999, s 10(1)(c) and (7).
- ¹⁰ IA 1971, Sch 2, paras 12–14, 16(2), modified in relation to Channel Tunnel train crews by the Channel Tunnel (International Arrangements) Order 1993, SI 1993/1813, Sch 4, para 1(11)(n) and (p).
- ¹¹ Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 22(1)(a).
- ¹² SI 2006/1003, reg 22(1)(b).
- ¹³ SI 2006/1003, reg 23(1)(a).
- ¹⁴ SI 2006/1003, reg 23(1)(a).
- ¹⁵ SI 2006/1003, reg 23(1)(b).
- ¹⁶ SI 2006/1003, reg 24(2).
- ¹⁷ SI 2006/1003, reg 24(3).
- ¹⁸ UK Borders Act 2007, s 2(1) for designated immigration officers and s 2 for their powers of detention. Both provisions were brought into effect on 31 January 2008 by SI 2008/99.
- ¹⁹ Brought into force on 1 April 2008 by SI 2008/310.
- ²⁰ Ie leave under the IA 1971, s 3C(2)(b), as amended, or s 3D(2)(a), as inserted by the IAN 2006, s 11 – which is leave extended following a refusal to vary leave, a variation or a revocation of leave whilst an appeal may be brought and whilst any appeal is pending.
- ²¹ IAN 2006, s 47(3).
- ²² IA 1971, Sch 2, para 16(2).
- ²³ IAN 2006, s 47(1).
- ²⁴ The Minister (Tony McNulty) gave an assurance in Parliament that s 47 did not create any new power to impose restrictions on a person, eg to detain him or her, whilst the person has statutory leave: *Hansard*, 29.3.06, col 906.
- ²⁵ IA 1971, Sch 2, para 18(1): see 17.21 below.

SECRETARY OF STATE'S POWERS TO DETAIN

17.14 The NIAA 2002 gave the Secretary of State the following powers to detain:

- (i) the power to detain pending a decision whether to direct removal pursuant to the Secretary of State's powers under Sch 2 to the 1971 Act, and pending removal;¹
- (ii) the power to detain persons seeking leave to enter the UK² who have made an asylum or human rights claim or who have sought departure from the immigration rules, pending the Secretary of State's examination, decision whether to grant or refuse leave to enter, decision whether to remove following refusal, and removal;³
- (iii) the power to detain where the Secretary of State has reasonable grounds to suspect that he or she may make one of the specified decisions above;⁴

- (iv) the power to detain persons who make a claim for asylum when they have leave to enter or remain and who fail to comply with restrictions imposed on them.⁵

In addition to these new powers, the Secretary of State has always had wide powers to detain persons liable to deportation, contained in Sch 3 to the IA 1971. Detention may occur in the following situations:

- (i) *Court recommendation.* Where a recommendation for deportation made by a court is in force and the person is not detained pursuant to the sentence or order of any court, he or she must be detained pending the making of a deportation order,⁶ unless *either* the court by which the recommendation is made, or an appeal court⁷ otherwise directs, *or* the Secretary of State directs that the person be released pending further consideration of the case, *or* he or she is released on bail.⁸
- (ii) *Decision to deport.* Where notice has been given to a person of a decision to make a deportation order under s 3(5) of the IA 1971,⁹ and that person is not detained pursuant to the sentence or order of a court, he or she may be detained under the authority of the Secretary of State pending the making of the deportation order.¹⁰ IAN 2006, s 53 came into force on 31 August 2006 with the effect that a person will be liable to detention not only (as the law previously stood) when he or she has been given notice of a decision to make a deportation order but also when there is such a notice ready to be given to the person. A police or immigration officer will have the power to arrest the person once notice of a decision to make a deportation order is ready to be given.¹¹
- (iii) *Deportation order made.* Persons against whom a deportation order is in force may be detained under the authority of the Secretary of State pending their removal or departure from the UK. If they are already detained under either of the previous provisions they shall continue to be detained unless the Secretary of State directs otherwise or they are released on bail.¹²

In cases (ii) and (iii) above, the powers of arrest, entry, search and seizure possessed by immigration officers under Sch 2 to the IA 1971 in relation to persons detained pending removal also apply to detained deportees.¹³ Detained deportees may also benefit from the bail provisions in paras 22 to 23 of Sch 2 to the IA 1971.¹⁴ A person admitted to or residing in the UK under the EEA Regulations may be detained under the powers contained in the IA 1971, Sch 3 if a decision is taken to remove the person on the grounds that he or she does not have or no longer has a right of admission or residence under the Regulations or the person's removal is justified on public policy, public security or public health grounds.¹⁵ The Secretary of State's powers to detain 'foreign national prisoners' were greatly increased by the UK Borders Act 2007¹⁶ which allows for the Secretary of State to detain a person who has served a period of imprisonment whilst the Secretary of State considers whether the provision for 'automatic deportation'¹⁷ applies and if the Secretary of State thinks that it does, pending the making of the deportation order.¹⁸ The provision for 'automatic deportation' applies to people who are not British citizens who have been convicted in the UK and sentenced to at least 12 months' imprisonment or to a period of imprisonment for an offence

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specified by an order made under s 72(4)(a) of the Nationality, Immigration and Asylum Act 2002.¹⁹ Where a deportation order is made under that provision the Secretary of State ‘shall’ exercise the power to detain pending removal from the UK²⁰ ‘unless in the circumstances the Secretary of State thinks it inappropriate’.²¹

¹ Ie, directions to remove persons refused leave to enter, illegal entrants and members of their families, and overstaying crew members in the situations described at the IA 1971, Sch 2, paras 10, 10A and 14: NIAA 2002, s 62(1)(a), (b).

² Ie, port claimants or illegal entrants.

³ NIAA 2002, s 62(2), (3)(a). The powers on which the power to detain is contingent are set out in the Immigration (Leave to Enter) Order 2001, SI 2001/2590, Art 2, made under the IA 1971, s 3A (inserted by the Immigration and Asylum Act 1999, s 1).

⁴ NIAA 2002, s 62(7).

⁵ NIAA 2002, s 71(1)–(3).

⁶ IA 1971, Sch 3, para 2(1), as amended by Asylum and Immigration (Treatment of Claimants etc) Act 2004, s 34(1). Before amendment by the AI(TC)A 2004, the paragraph allowed (or arguably required) the release of a person recommended for deportation who was on bail from the criminal court. See explanatory Notes to the AI(TC) Bill (HL), para 109.

⁷ The appeal court may direct release while upholding the recommendation: IA 1971, Sch 3, para 2(1A), inserted by the Criminal Justice Act 1982, s 64, Sch 10.

⁸ IA 1971, Sch 3, para 2(1), as amended by the Immigration and Asylum Act 1999, s 54(3) which finally came into force on 10 February 2003: SI 2003/2. The paragraph has no application where the person is serving a sentence or on remand to a criminal court: see *Re Nwafor* [1994] Imm AR 91, QBD.

⁹ Deportation deemed conducive to the public good, and of family members of deportees: IA 1971, s 3(5), as substituted by the IAA 1999, s 169 and Sch 14, para 44(2).

¹⁰ IA 1971, Sch 3, para 2(2), as amended the Asylum and Immigration (Treatment of Claimants etc) Act 2004, s 34(2).

¹¹ SI 2006/2226.

¹² IA 1971, Sch 3, para 2(3), as amended by the Immigration and Asylum Act 1999, s 54(3) (in force 10 February 2003: SI 2003/2).

¹³ These powers do not apply to those detained by the Secretary of State following a recommendation for deportation: IA 1971 Sch 3, para 2(4) as amended by IAA 1999.

¹⁴ IA 1971, Sch 3, para 2(4A), inserted by the IAA 1999.

¹⁵ Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 24(3).

¹⁶ UK Borders Act 2007, s 36.

¹⁷ Ie that the person is a ‘foreign criminal’ against whom the Secretary of State must make a deportation order under the UK Borders Act 2007, s 32(5).

¹⁸ Presently, the detention powers under s 36 apply only in relation to those liable to automatic deportation because they have been sentenced to imprisonment for 12 months or more. They do not apply in relation to those liable because they have been imprisoned for an offence specified by order of the Secretary of State. See the UK Borders Act 2007 (Commencement No 3 and Transitional Provisions) Order 2008, SI 2008/1818.

¹⁹ UK Borders Act 2007, s 32. The order referred to is currently the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004, SI 2004/1910.

²⁰ Section 36(2) of the UK Borders Act 2007, referring to the power under the Immigration Act 1971, Sch 3, para 2(3).

²¹ UK Borders Act 2007, s 36(2).

Restriction orders

17.15 In each of these cases, including the case of recommendations by the courts, an alternative to detention is provided. On the Secretary of State’s direction, the person may instead be subjected to a restriction order which places him or her under such restrictions as to residence, employment or

occupation and a requirement to report to the police or immigration officer, as the Secretary of State may from time to time notify in writing.¹ The restrictions mirror those which an immigration officer may impose on temporary admission, for which see 17.6 above.

¹ IA 1971, Sch 3, para 2(5) and (6), as substituted by the CJA 1982, s 64, Sch 10 and amended by the IA 1988, Sch, para 10; Asylum and Immigration Act 1996, Sch 2, para 13. Applied by the UK Borders Act 2007, s 36(5) to detention under s 36(1) of that Act.

WHY, WHERE AND HOW DETAINED

Reasons for detention

17.26 There is no requirement in primary legislation for reasons to be given for detention, despite the obligation in Article 5(2) ECHR.¹ The 1998 White Paper contained a commitment for written reasons to be given on initial detention and at monthly intervals thereafter, or shorter periods in cases involving families.² Since October 1999 immigration officers have served written reasons in the IS 91 in the form of a checklist.³ They are instructed to ensure that the contents of the checklist are interpreted into the detainee's language.⁴ Rule 9 of the Detention Centre Rules 2001⁵ represents the first statutory requirement for written reasons for detention, and incorporates the commitment that reasons be given monthly and not just on first detention. The Enforcement Instructions and Guidance ('EIG') requires regular reviews of detention, in order to determine whether continued detention remains lawful and consistent with detention policy.⁶ One of the consistent failings of the immigration service, even where they have carried out the review, is a failure to serve the reasons for continued detention on the detainee, even where there have been significant changes in circumstances between the reviews. In, *ex p B*⁷ the failure of the Secretary of State to consider 'carefully and urgently' new circumstances that had emerged, relating to the merits of the claim for asylum and the availability of sureties, led the court to rule that the continued detention of the claimant was unlawful. The need for such a review was described by Kay J as 'imperative'. Human rights implications should be considered as part of the regular review.⁸ In *Faulkner* it was held that there was an obligation to inform a person of the essential factual and legal grounds for his or her detention and that failure to give reasons for detention made the detention unlawful.⁹ In *Saadi v United Kingdom* the European Court of Human Rights held that there was a breach of the obligation under Article 5(2) of the Convention to inform a person 'promptly' of the reasons for his arrest in circumstances where an asylum seeker was not told for 76 hours why he was being detained at Oakington Detention Centre.¹⁰ In *R (SK) v Secretary of State for the Home Department*¹¹ the failure to provide written reasons for the detention following monthly reviews was severely criticised as not only non-compliance with rule 9(1) of the 2001 Rules but a breach of a fundamental and constitutional principle which requires notice to the person for a decision to have legal effect.¹²

¹ See 8.67 above.

² *Fairer, Faster and Firmer – a Modern Approach to Immigration and Asylum* (Cm 4018, July 1998).

17.26 Detention and Bail

- ³ The use of a checklist has been criticised as contrary to UNHCR's requirements of individualised written reasons, and there are indications that the checklist often masks the real reasons for detention: see Leanne Weber *Deciding to detain* (University of Cambridge Institute of Criminology, 2000).
- ⁴ EIG, Chapter 55.6.3.
- ⁵ SI 2001/238.
- ⁶ EIG, Chapter 55.8 requiring reviews of detention following specified periods of detention and by officials of specified seniority.
- ⁷ *R v Special Adjudicator and Secretary of State for the Home Department, ex p B* [1998] INLR 315, QBD. See also *R v Secretary of State for the Home Department, ex p Brezinski and Glowacka* (19 July 1996, unreported) QBD.
- ⁸ EIG, Chapter 55.8.
- ⁹ *R (on the application of Faulkner) v Secretary of State for the Home Department* [2005] EWHC 2567 (Admin), [2005] All ER (D) 03 (Nov).
- ¹⁰ *Saadi v United Kingdom* (Application No 13229/03) (2006) Times, 3 August, [2006] All ER (D) 125 (Jul), ECtHR and Grand Chamber (29 January 2008, unreported).
- ¹¹ *R (on the application of SK) v Secretary of State for the Home Department* [2008] EWHC 98 (Admin).
- ¹² *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, para 26.

POLICY AND CRITERIA FOR DETENTION

17.26A The main text makes reference to the policy on detention set out in Chapter 38 of the Operation Enforcement Manual ('OEM'). That has now been replaced by Chapter 55 of the EIG which is in broadly similar terms. The principal differences relate to the policy in respect of 'foreign national prisoners'.

17.27 The criteria for detention are based on a series of policy statements set out in Immigration Service Instructions to staff on detention dated 3 December 1991 and 20 September 1994,¹ factors set out in two White Papers of 1998 and 2002,² and now incorporated in a single detailed document, the EIG, Chapter 55.³ The 1991 and 1994 criteria were previously confidential and only came to the attention of practitioners through accidental disclosure. The general policy is set out in Chapter 55.1 of the EIG and can be summarised as follows:

- (i) detention is only to be used as a last resort;
- (ii) detention will usually only be appropriate to effect removal, establish identity or the true basis of the claim, or prevent absconding;
- (iii) detention at Oakington (and now under the fast track asylum procedure at Campsfield House, Colnbrook House, Harmondsworth and Yarls Wood Immigration Removal Centres)⁴ will only be used where it appears that the claim can be decided quickly;
- (iv) people should not be detained for lengthy periods if it would be practical to effect detention later in the process once appeal rights have been exhausted.⁵

Chapter 55.1 of the EIG reiterates that '1. there is a presumption in favour of temporary admission or temporary release. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or release for detention to be justified. 2. All reasonable alternatives

to detention must be considered before detention is authorised' and goes on to say 'Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.' (Chapter 55.3.1.) The factors identified in the policy statements as relevant to the exercise of the power to detain are as follows:

- (i) the likelihood of the person being removed and after what timescale;
- (ii) previous absconding from detention;
- (iii) previous failure to comply with conditions of temporary admission or bail;
- (iv) evidence of a determined attempt to breach the immigration laws (eg entry in breach of a deportation order, attempted or actual clandestine entry);
- (v) previous attempts to gain entry by presenting falsified documentation;
- (vi) history of compliance with the requirements of immigration control – eg by applying for a visa, further leave, etc;
- (vii) the ties with the UK evidenced by a settled address, employment, close relatives (including dependants) in the country;
- (viii) the individual's expectations about the outcome of the case and any factors which would provide an incentive to keep in contact with the department, such as an outstanding application for judicial review, representations or an appeal;
- (ix) whether the person is under 18;
- (x) a history of torture;
- (xi) the physical or mental health of the subject;⁶
- (xii) the duration of the detention – the longer a person has been detained, particularly if it is the result of a failure on the part of the Home Office to resolve the case, the greater the onus on the Secretary of State to justify continuation of detention.⁷

¹ Cited in *R v Secretary of State for the Home Department, ex p Brezinski and Glowacka* (CO 4251/1995) and (CO 4237/1995) (19 July 1996, unreported), Kay J.

² *Fairer, Faster and Firmer – a Modern Approach to Immigration and Asylum* (Cm 4018, July 1998); *Secure Borders, Safe Havens: Integration with Diversity in Modern Britain* (Cm 5387, February 2002).

³ EIG, Chapter 55 which replaced Operational Enforcement Manual relevant paragraphs of which are referred to below. Section 38, which deals with detention, was not posted on the IND website, for some considerable period of time. The updated version of Chapter 38 is available (but is undated), is now on the IND website. In section 38.3 it sets out the same factors relevant to decisions on detention as listed in this paragraph in the original text save that (xi) is not amongst them.

⁴ The removal centres specified for fast track asylum applicants (see 12.111) under SI 2005/560, Sch 2.

⁵ For the way in which decisions to detain are actually taken see Leanne Weber's valuable study *Deciding to detain* (17.26 fn 3 above).

⁶ These factors are all set out in the 1991 policy, ISC 26/1991 and now in the EIG, Chapter 55.

⁷ The additional factor set out in the 1994 statement, which deals largely (but not exclusively) with detention of asylum seekers.

17.28 The Immigration Service has designed a form, the IS91R, which identified six justifications for detention and which is intended to inform the detainee of the reasons for their detention. It is an important part of the published policy.¹ The specified reasons are as follows:

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- (1) You are likely to abscond if given temporary admission or release.
- (2) There is insufficient reliable information to decide on whether to grant you temporary admission or release.
- (3) Your removal from the United Kingdom is imminent.
- (4) You need to be detained whilst alternative arrangements are made for your care.
- (5) Your release is not considered conducive to the public good.
- (6) I am satisfied that your application may be decided quickly using the fast track procedure at Oakington/Harmondsworth etc Reception/Removal Centre.

The most significant issues in the application of the policy are normally (i) the assessment of the timescale for removal and whether removal can said to be *imminent* – the criteria adopted by the Home Office as the touchstone for detention at the end of the process; and (ii) the effect of outstanding legal obstacles to removal, including outstanding applications, representations, and, in particular, legal proceedings by way of appeals and judicial review, each of which is accepted as providing an incentive to comply with conditions of release² and meaning that removal is not imminent. The EIG say that removal is ‘imminent’ if ‘a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks’.³ Even prior to the adoption of this definition of ‘imminent’, detention could not be justified on the ground that removal was imminent when removal directions were not even given until 4 weeks after the person was detained.⁴ In *Nadarajah and Amirthanathan*⁵ N was detained, although the immigration officer knew that judicial review proceedings were about to be issued. In A’s case, he was detained after his human rights claim was rejected, even though the immigration officer knew he had a right of appeal, which he intended to exercise. The detention policy was described by a senior executive officer in the Home Office, who explained that ‘an application for judicial review suspends removal of the claimant and it would be most unlikely that detention would be maintained throughout protracted judicial review proceedings’, and that ‘removal will not be treated as imminent once proceedings which challenge the right to remove have been initiated’.⁶ The court upheld the finding in the Administrative court that it was not realistic to say that removal was imminent in either case and dismissed the Secretary of State’s appeals.

¹ Referred to in Chapter 55.6 of the EIG; *R (on the application of Amirthanathan) v Secretary of State for the Home Department* [2003] EWCA Civ 1768, [2004] INLR 139, at para 55.

² EIG, Chapter 55.3.1.

³ Chapter 55.3.2.4. By contrast, the OEM which the EIG replaced did not define ‘imminent’ so that in *R (on the application of Ahmed) v Secretary of State for the Home Department* [2008] EWHC 1533 (Admin), [2008] All ER (D) 29 (Jul), a case concerned with the OEM, the Court could hold that removal could be imminent even in the absence of removal directions.

⁴ *R (on the application of K) v Secretary of State for the Home Department* [2008] EWHC 1321 (Admin), [2008] All ER (D) 229 (May).

⁵ *R (on the application of Amirthanathan) v Secretary of State for the Home Department* [2003] EWCA Civ 1768, [2004] INLR 139.

- ⁶ [2003] EWCA Civ 1768 at para 58. The court summarised the policy as follows (para 28): 'Where proceedings have been initiated which challenge the right to remove an immigrant, it is not the policy of the Secretary of State to detain an immigrant on the ground that his removal is imminent. Normally, in such circumstances he will be granted temporary admission pending the result of those proceedings'.

Special categories of detainee

17.30 In its 1998 White Paper,¹ the government set out certain special categories of asylum seeker whose detention would not normally be appropriate. This includes cases where there is evidence of torture, which should weigh strongly in favour of temporary admission. It referred to the need to exercise particular care in considering a person's physical or mental health in deciding whether to detain.² It stated that unaccompanied minors should never be detained other than in the most exceptional circumstances, and then only overnight.³ In all cases, children under the age of 18 are to be referred to the Refugee Council Children's Panel. Where reliable medical evidence indicates that a person is under 18 years of age he or she will be treated as a minor and should not be detained. Detention of families should be effected (if at all) as close to removal as possible so as to ensure that families are normally not detained for more than a few days.⁴ The Operational Enforcement Manual (OEM) Chapter 38, now replaced by Chapter 55 of the EIG incorporated these intentions and identified a number of 'special cases' which, in the current version, are:

- (i) *Pregnant women* should not normally be detained. Exceptions to that are cases where removal is imminent and medical advice does not suggest that confinement before removal and women who are less than 24 weeks' pregnant may be detained at Yarl's Wood as part of the fast-track process.⁵
- (ii) *Cohabiting spouses of British nationals* in cases not dealt with by the Criminal Cases Directorate may only be detained with the authority of an inspector or senior caseworker and where 'strong representations' continue to be received, the decision to detain must be reviewed by an Assistant Director.⁶
- (iii) *Spouses of EEA nationals* should not be detained unless there is strong evidence that the EEA national spouse is no longer exercising treaty rights in the UK or it can be proved that the marriage was one of convenience and the parties had not intention to live together from the outset of the marriage;⁷
- (iii) *Unaccompanied minors and those under 18 years of age* should only ever be detained in the most exceptional circumstances where it is necessary for the minor's care and safety and then only overnight whilst alternative arrangements are made. In the absence of responsible family or friends, unaccompanied minors and those under 18 will be placed in the care of the local authority. In criminal deportation cases, a person under 18 may be detained in exceptional circumstances where it can be shown that they pose a serious risk to the public and a decision to deport or remove has been taken. Children may be detained for the purpose of removing them but only on the day of planned removal.⁸

- (iv) *Age dispute cases*: where age is disputed, Home Office policy up until November 2005 was to treat as adults those whose appearance strongly suggested that they are such, particularly (but not only) where they initially claimed to be adult, until credible documentary or medical evidence is produced to the contrary,⁹ although the policy stated that the benefit of the doubt should be given in borderline cases.¹⁰ On the 30 November 2005 the policy¹¹ significantly changed so that detention including for the purposes of fast tracking would only take place if:
- there is credible and clear documentary evidence that they are 18 or over;
 - a full Merton compliant social services age assessment is available (assessments by social services Emergency Duty Teams not being acceptable as evidence of age) stating that they are 18 or over;
 - their appearance is very strongly indicates that they are significantly over 18 and no other credible evidence exists to the contrary. If there is any room for doubt as to whether a person is under 18 they should not be detained.

The Home Office made it clear in an announcement on the 30 November 2005, referring to cases falling within the third bullet point above, that 'category 3 cases is intended for the fairly exceptional case – for claimants appearing to be in their 30's or older'.¹² On 26 January 2007 the Court declared by consent that the previous 'strongly suggest policy' was unlawful and did not strike the right balance with regard to the interests of children.¹³ As a consequence such children whose age had been wrongly disputed had been unlawfully detained.¹⁴

- (v) *Families*: whereas previous policy was to detain families, if at all, as close to removal as possible, the current policy is that families including families with children can be detained on the same footing and in accordance with the same criteria as all other persons liable to detention.¹⁵ The policy stresses that its aim is to keep the family as a single unit and to have proper regard to Article 8 of the ECHR although separation of parent and child is contemplated if it is in the best interests of the child to be accommodated elsewhere and in the care of the local authority.¹⁶

In addition, other groups considered unsuitable for detention, who should be detained only in very exceptional circumstances are:¹⁷

- (i) the elderly, especially where supervision is required;
- (ii) pregnant women;
- (iii) those suffering from serious medical conditions;
- (iv) those who are mentally ill,¹⁸ although they may be detained somewhere other than an immigration removal centre;
- (v) those where there is independent evidence that they have been tortured;
- (vi) people with serious disabilities.

¹ *Fairer Faster and Firmer – A Modern Approach to Immigration and Asylum* (Cm 4018, July 1998).

² These factors are reflected in the EIG, Chapter 55.

- ³ The EIG, Chapter 55.9.3 also indicates that minors should be detained only in a 'place of safety' as defined in the Children and Young Persons Act 1933, the Social Work (Scotland) Act 1958 or the Children and Young Persons (Northern Ireland) Act 1968. In England and Wales this includes local authority accommodation, a remand home, a police station, a hospital, a surgery or an 'other suitable place'. In Scotland and Northern Ireland the statutory definition is narrower.
- ⁴ For detention of families see *A Few Families Too Many: Detention of Asylum-Seeking Families in the UK* Emma Cole, Bail for Immigration Detainees, London, March 2003.
- ⁵ EIG, Chapter 55.9.1.
- ⁶ EIG, Chapter 55.9.2.
- ⁷ EIG, Chapter 55.9.2.
- ⁸ EIG, Chapter 55.9.3.
- ⁹ For the experiences of women in detention see Sarah Culter and Sophia Ceneda *They took me away: women's experiences of immigration detention in the UK* (BID and Refugee Women's Project, 2004).
- ¹⁰ For age assessment see 11.118 and 12.117 above. The leading case on age assessment, *R (on the application of B) v Merton London Borough Council* [2003] EWHC Admin 1689 (Admin), [2003] 4 All ER 280 (12.117 above) was followed and applied in *R (on the application of C) v Enfield London Borough Council* [2004] EWHC 2297 (Admin), [2005] 3 FCR 55. Significant numbers of young people spend substantial periods of time in detention before their acceptance as minors by the Home Office or the appellate authority, and there is increasing litigation both by judicial review and in civil actions. In *R (on the application of A) v Secretary of State for the Home Department* (CO/2858/2004) (8 October 2004, unreported) the Secretary of State conceded that a cursory assessment carried out by a social worker was not a proper basis to detain the claimant. In *R (on the application of I) v Secretary of State for the Home Department* [2005] EWHC 1025 (Admin), (2005) Times, 10 June Owen J held that the continued detention of the applicants was irrational once their claims to be minors were supported by age assessments by a consultant paediatrician.
- ¹¹ The current version of the policy is in the EIG, Chapter 55.9.3.1.
- ¹² OEM at 38.7.3; policy on Unaccompanied asylum seeker children, July 2002, para 6.1.
- ¹³ *R (on the application of A) v Secretary of State for the Home Department* (CO/6277/2005).
- ¹⁴ The declaration states that 'The Secretary of State's policy and/or practice of detaining (as adults) asylum applicants who claim to be under 18 years of age for the purposes of proceedings for the fast track or removal to a third country on the sole basis that an Immigration Officer considered (by way of his/her own brief assessment and/or a brief assessment by a social worker) that the applicant's appearance and/or demeanour strongly suggested that they were 18 or over was unlawful (but for the avoidance of doubt this declaration does not affect or apply to the policy and/or practice adopted by the Secretary of State in age dispute detention cases with effect from 30 November 2005, nor does this declaration affect or apply to decisions made for purposes other than detention).'
- ¹⁵ Four test cases had been selected in A (above) but ultimately the Secretary of State conceded that the children had been wrongly age disputed and had been unlawfully detained. The case of A continues as a test case challenging the legality of 'the strongly suggested' policy for purposes other than detention and for removal on third country grounds. A further case of *R (on the application of HBH) v Secretary of State for the Home Department* (CO/7677/2007) challenges the age dispute policy where it led the Home Office to refer a disputed child as if he were an adult to the police for prosecution under s 2 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 and where reliance was placed on that same assessment by the CPS and the Magistrates Court which remanded the child in an adult prison for over five weeks pending sentence by the Crown Court. Proceedings have also been issued to challenge the legality of his conviction. EIG, Chapter 55.9.4.
- ¹⁶ EIG, Chapter 55.9.4. It is important to stress that the policy with regard to the detention of minors, including where they are part of the family, remains essentially the same: where detention is to effect removal, which will be the majority of cases, it should be done as close to the date for removal as possible and should only be for a few days. This was the approach of Collins J in *R (on the application of Konan) v Secretary of State for the Home Department* [2004] EWHC 22 (Admin), [2004] All ER (D) 151 (Jan), having heard full argument on the effect of changes to policy indicated by the correspondence and the 2002 White Paper. The policies relating to families and children have been held to be lawful and

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in compliance with the UN Convention on the Rights of the Child: see *R (on the application of S) v Secretary of State for the Home Department* [2007] EWHC 1654 (Admin). Nevertheless, concerns relating to the practice of detention of children have been consistently expressed, for example by the Official Solicitor to the Standing Committee on the 1999 Act; HM Chief Inspector of Prisons: *Report of Announced Inspection at Tinsley House Immigration Removal Centre*, 18 May 2005; HM Chief Inspector of Prisons: *Report of Unannounced Inspection at Dungavel IRC*, 18 May 2005; the Children's Commissioner for the UK in reports in 2005 and to the Joint Committee on Human Rights (JCHR) in 2007; the Joint Chief Inspectors Report on Arrangements to Safeguard Children, July 2005, *Every Child Matters: Change for Children 2006 and the JCHR: the Treatment of Asylum Seekers Tenth Report of session 2006–07* (30.03.2007), as well as by NGO's such as the Refugee Children's Consortium, the Medical Foundation for Victims of Torture, Bail for Immigration Detainees Amnesty International: *Seeking Asylum is Not a Crime* (June 2005); Children's Society submissions to the JCHR, *Save the Children: No place for a Child* (February 2005) and IPLA: *Child First, Migrant Second: Ensuring that Every Child Matters* (February 2006), *Seeking Asylum Alone* (November 2006) and *When is a Child not a Child* (May 2007); Sarah Cutler, *Detention of asylum seeking children* (Childright, June 2002); Alison Harvey *Briefing on Detention of Asylum Seeking Children and Young People* (Medical Foundation, September 2000).

¹⁷ EIG, Chapter 55.9.4.

¹⁸ Where there was medical evidence that a detainee was suffering from mental illness, his detention was held to be unlawful owing to the Secretary of State's failure to engage with the policy of not detaining mentally ill people save in exceptional circumstances – *R (MMH) v Secretary of State for the Home Department* and *R (on the application of Hussain) v Secretary of State for the Home Department* [2007] EWHC 2134 (Admin), 151 Sol Jo LB 1228.

Foreign national prisoners

17.30A From April 2006, the Secretary of State applied a policy which was not published until 19 June 2008 whereby there was a presumption in favour of detaining foreign national prisoners after completion of their sentences and pending deportation for as long as there was a realistic prospect of removal within a reasonable period of time.¹ Application of such a presumption was held to be unlawful.² The current version of the policy says that the presumption in favour of release also applies in respect of foreign national prisoners but where the 'deportation criteria' are met, substantial weight should be given to the risk of reoffending and of absconding as rebutting the presumption. The deportation criteria are that the person is a non-EEA national, convicted in the UK and sentenced to 12 months' imprisonment or two or more sentences amounting to 12 months or more in total over the past 5 years or a custodial sentence of any length for a serious drugs offence.³ In the case of EEA nationals, the criteria are a sentence of at least 24 months' imprisonment and a recommendation from the sentencing court. Greater weight is to be given to the risk of further offending and harm to the public according to the seriousness of the offence to the extent that in relation to violent, sexual and drug related offences, release is likely only if there are 'particularly compelling' factors in favour of release.⁴ Where removal is 'imminent' detention 'will usually be appropriate and removal is said to be imminent if a travel document exists, removal directions are set, there are no outstanding legal barriers to removal and removal is likely to take place in the next four weeks.'⁵ Where removal is not imminent, risk of absconding is to be considered. Among the factors said to indicate such a risk is conduct of the individual frustrating removal, including by not co-operating with attempts to document him or her.⁶

- ¹ *R (on the application of Abdi) v Secretary of State for the Home Department* [2008] EWHC 3166 (Admin), [2008] All ER (D) 247 (Dec).
- ² *R (on the application of Abdi)*. It was unlawful because not authorised by the statutory power, the Immigration Act 1971, Sch 3, para 2 as construed in *R (on the application of Sedrati) v Secretary of State for the Home Department* [2001] EWHC 410 (Admin).
- ³ EIG, Chapter 55.1.2.
- ⁴ EIG, Chapter 55.3.2.
- ⁵ EIG, Chapter 55.3.2.4.
- ⁶ EIG, Chapter 55.3.2.5.

Fast track detention

17.32 The use of detention to facilitate accelerated determination of asylum claims and the removal of unsuccessful applicants has become a significant practice. In March 2000, a much wider use of detention was sanctioned by the government in a parliamentary answer¹ amending the White Paper² criteria in respect of detention at Oakington, a reception centre for holding asylum seekers whose claims are expected to be processed swiftly.³ Later in *Saadi*, as we have seen above, the House of Lords and subsequently the European Court of Human Rights upheld the legality of this kind of detention.⁴ Asylum applicants, whatever their country of origin, may be detained whilst their asylum claims are determined if their claims appear to be ones ‘that may be decided quickly’.⁵

- (i) unaccompanied minors;
- (ii) pregnant females of 24 weeks and above;
- (iii) anyone with a medical condition that requires 24-hour nursing or medical intervention;
- (iv) anyone with an infectious/contagious disease;
- (v) anyone presenting with acute psychosis, eg schizophrenia and requiring hospitalisation;
- (vi) anyone presenting with physical and/or learning disabilities requiring 24-hour nursing care;⁶
- (vii) where there is independent evidence that the claimant has been tortured;
- (viii) where there is independent evidence from a recognised organisation, eg the Poppy Project that the claimant has been a victim of trafficking;
- (ix) violent or unco-operative cases;
- (x) those with criminal convictions except where specifically authorised;
- (xi) where detention would be contrary to government policy, eg where the claimant is an unaccompanied asylum seeking child;
- (xii) age dispute cases not falling within the three criteria set out below:
 - (1) there is credible and clear documentary that they are 18 or over;
 - (2) a full Merton compliant social services age assessment is available stating that they are 18 or over (assessments completed by social services Emergency Duty Teams are not acceptable evidence of age);
 - (3) their physical appearance/demeanour very strongly indicates that they are significantly over 18 years of age and no other credible evidence exists to the contrary.

Originally it was intended that the fast track would apply to claims that were both obviously well-founded as well as the obviously unfounded. Fast-tracking was advanced as beneficial to asylum seekers with meritorious claims because they would get a speedy decision. This has been relied on as justification for the measure by the courts domestically and in Strasbourg in the *Saadi* litigation.⁷ However, in reality it is almost exclusively applied to claims thought likely to be refused and it is a procedure in which all but a tiny fraction of claims are rejected and a majority certified as unfounded. Assessment of suitability for the fast track has to continue throughout the claim and if at any stage evidence comes to light indicating that the individual is no longer suitable for the detained fast track on detained non-suspensive appeals procedure then he or she must be removed from the procedure.⁸

- ¹ 346 HC Official Report (6th series) written answers col 263N, 16 March 2000, Barbara Roche.
- ² Cm 4018, above.
- ³ Detention there was to be for a period of seven days, while applicants are interviewed and an initial decision made. If a decision has not been taken, the applicant will be granted temporary admission or transferred to longer-term detention; if refused, a decision about further detention will be made in accordance with normal criteria: *ibid*; see *R (on the application of Saadi) v Secretary of State for the Home Department* [2002] UKHL 41, [2002] INLR 523.
- ⁴ *R (on the application of Saadi) v Secretary of State for the Home Department* [2002] UKHL 41, [2002] INLR 523.
- ⁵ Border and Immigration Agency: Asylum Process Instruction: Suitability for Detained Fast Track (DFT) and Detained Non-Suspensive Appeal Processes, July 2007, the most recent version of a document referred to as 'Fast Track Suitability List'. See also EIG, Chapter 55.4.
- ⁶ The July 2007 'Fast Track Suitability List' also refers to those 'with a disability, except the most easily manageable' as being unsuitable for the detained fast track.
- ⁷ See for example the judgment of Grand Chamber at para 77.
- ⁸ Asylum Intake Unit Instruction: Detained Fast Track and Detained Non Suspensive Appeal – Intake Selection, 11 February 2008.

LIMITS TO THE POWER TO DETAIN

General principles

17.38 The right to liberty is a fundamental right and in the domestic common law there is a presumption of liberty which flows from the Magna Carta.¹ It is a pre-eminent right and a foundation stone of freedom in a democracy. According to Lord Bingham of Cornhill:² 'Freedom from executive detention is arguably the most fundamental and probably the oldest, the most hard won and the most universally recognised of human rights ...' It means no person within the jurisdiction can be deprived of his or her liberty without cause, irrespective of their immigration status or nationality.³ This right was reflected in the Immigration Service Instructions to staff on detention issued in 1991 and 1994 and repeated in the Operational Enforcement Manual and its successor, the EIG, which the courts have confirmed embodies a presumption in favour of release.⁴

- ¹ The right to personal liberty is described by Blackstone as an 'absolute right inherent in every Englishman' see Clayton & Tomlinson *The Law of Human Rights* (OUP, 2000) p 449; *Re S-C (Mental Patient): Habeas Corpus* [1996] QB 599, 603. The right is no longer confined to Englishmen; it now extends to women and foreign nationals: see fn 3,

below. Control Orders under the new Prevention of Terrorism Act have turned the adage that every Englishman's home is his castle into: 'every Englishman's home is his prison.'

² Lord Bingham 'Personal Freedom and the Dilemma of Democracies' (2003) 52 ICLQ 841–858.

³ *Khawaja v Secretary of State for the Home Department* [1984] AC 74, per Lord Scarman at 110–112; *R (on the application of Abbassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76, paras 59–60; *A and X v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 WLR 87.

⁴ *Minteh (Lamin) v Secretary of State for the Home Department* (8 March 1996, unreported), CA, ILD 1996 Vol 3. The stated policy was to 'grant temporary admission/release whenever possible and to authorise detention only where there is no alternative. The aim is to free detention space for all those who have shown a real disregard for the immigration laws and whom we expect to remove within a realistic timetable'. The presumption of release was confirmed in the 1998 White Paper: *Fairer, Faster, Firmer – A Modern Approach to Immigration and Asylum* (Cmd 4018, July 1998).

17.39 The courts will jealously guard the liberty of the person and will require clear words in a statute to take away liberty and to interfere with fundamental rights.¹ Broad statutory discretions to detain will be construed narrowly and strictly ensuring that they are only exercised for the proper statutory purpose.² There is no statutory time limit placed on administrative detention but the power is impliedly limited to a duration and circumstances consistent with that statutory purpose and which are reasonable.³ The lawfulness of a detention therefore depends on a number of considerations:

- (i) whether it is or continues to be for the statutory purpose for which the power is given;
- (ii) whether the detention has gone on or will go on for longer than is reasonably necessary for the purpose for which it is authorised;
- (iii) whether the exercise or continued exercise of the power is in accordance with administrative law principles of rationality, fairness and reasonableness, and in particular, whether the exercise of discretion is consistent with stated policy;⁴
- (v) as an overriding consideration embracing some of the above factors, whether the detention is for a lawful purpose, is prescribed by law and is proportionate to its legitimate aim under Article 5(1)(f) of the ECHR.

The Court of Appeal's judgment in *R (on the application of SK) v Secretary of State for the Home Department*⁵ puts what is said in paragraph (iii) above in question. In the Administrative Court, Munby J decided that the claimant's detention was unlawful because of failure by the Secretary of State to comply with the requirement for regular reviews of detention contained in the OEM. The Court of Appeal held that was wrong because whilst the Secretary of State had a public law obligation to comply with the OEM, such compliance was not necessary in order for the detention to be lawful. So long as the statutory power to detain was exercised in accordance with *Hardial Singh*⁶ principles detention was lawful. The statutory provisions authorising detention were not further limited by an implied condition that they should be exercised in accordance with the OEM or any other policy as well as the *Hardial Singh* principles. We think that this decision is wrong to identify so narrowly the law with which detention has to comply in order to be lawful in common law and ECHR terms. As the Court of Appeal held in *Nadarajah*⁷ domestic law included the published policy which the Secretary of State was obliged to

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follow and because the detention in issue was not in accordance with that policy it was unlawful. The requirement in Article 5(1) that detention be in accordance with a procedure prescribed by law 'lays down the obligation to conform to the substantive and procedural rules of national law'⁸ and in this context, it is not at all clear why compliance with the *Hardial Singh* principles is sufficient to discharge that obligation.

- ¹ *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97; *R v Secretary of State for the Home Department, ex p Simms* [1999] 3 WLR 328, 341F.
- ² In *Re Mahmood (Wasfi)* [1995] Imm AR 311 Laws J stated the position as follows 'While of course Parliament is entitled to confer power of administrative detention without trial, the courts will see to it that ... the statute that confers it will be strictly and narrowly construed and its operation and effect will be supervised by the court according to high standards'.
- ³ *R v Governor of Durham Prison, ex p Singh* [1984] 1 WLR 704 approved by the PC in *Tan Te Lam* and applied in *Re Mahmood (Wasfi)* [1995] Imm AR 311 and reviewed and approved by the House of Lords in *R (on the application of Khadir) v Secretary of State for the Home Department* [2005] UKHL 39, [2006] 1 AC 207 as relevant to the exercise of the discretion to detain rather than the existence of the power to detain itself.
- ⁴ *R (on the application of Amirthanathan) v Secretary of State for the Home Department* [2003] EWCA Civ 1768, [2004] INLR 139; *R v Special Adjudicator and Secretary of State for the Home Department, ex p B* [1998] INLR 315, *R (on the application of Konan) v Secretary of State for the Home Department* [2004] EWHC 22 (Admin), [2004] All ER (D) 151 (Jan).
- ⁵ [2008] EWCA Civ 1204, (2008) Times, 21 November.
- ⁶ *R v Governor of Durham Prison, ex p Hardial Singh* [1984] 1 All ER 983.
- ⁷ *Nadarajah v Secretary of State for the Home Department* [2003] EWCA Civ 1768, 148 Sol Jo LB 24.
- ⁸ See for example, *Eminbeyli v Russia* [2009] ECHR 359, para 43.

The purpose and length of detention

17.42 The question of what is a reasonable period for carrying out the statutory purpose of effecting a person's removal from the UK is a question of fact and depends on all of the circumstances of the particular case.¹ The relevance of the fact that a detainee could voluntarily return and thereby bring an end to his detention and of the risks that he would abscond and commit further offences were he to be released were considered by the Court of Appeal in *R (on the application of A) v Secretary of State for the Home Department*.² The appellant in that case had been held in administrative detention for a month short of 3 years following a criminal sentence. The judge at first instance held that he was detained unlawfully for 20 months of that period because, although he could have returned voluntarily to Somalia, he refused to do so and it was not possible to enforce his removal. The Court of Appeal held unanimously that his refusal to return to Somalia voluntarily was relevant to the assessment of whether he would abscond if released.³ The risk of absconding was held to be relevant because absconding would hinder or prevent his removal from the UK and his removal was the very purpose for which the statute authorised detention. The majority went much further and also found that his ability to return voluntarily was important because it meant that 'the loss of liberty involved in the individual's continued detention is a product of his own making'.⁴ That the claimant refused to return voluntarily because of the 'volatile and chaotic' situation in Somalia was said not to be relevant to assessing the lawfulness of continued detention. Keene LJ

accepted that the refusal to return voluntarily was of some relevance but was not of 'fundamental importance' as asserted by the Secretary of State and he questioned whether refusal to accept voluntary departure could justify detention in a case where there was no real risk of absconding.⁵ We think that the attachment of substantial weight, let alone decisive weight to the individual's refusal voluntarily to repatriate strikes at the heart of the common law's protection of individual liberty by shifting responsibility from the state to justify detention by demonstrating that it is timeously and effectively operating its powers to remove and instead requiring the individual to effect his or her own removal. In any event, *R (on the application of A) v Secretary of State for the Home Department* is not authority for the proposition that the Secretary of State has power to detain indefinitely any person who refuses to depart voluntarily.⁶ The Court held unanimously that the risk that the appellant would reoffend if released was relevant because the statutory purpose for which he was detained was to effect his removal, such removal having been ordered for the very reason that his propensity to commit serious offences meant that his presence was not conducive to the public good. Its reasoning on that issue does not support a wider proposition that risk of committing offences would be relevant in a case where the removal was not a response to a propensity to commit offences.

¹ *R (on the application of A) v Secretary of State for the Home Department* [2007] EWCA Civ 804, para 45, (2007) Times, 5 September.

² See fn 1.

³ It had been found by the judge at first instance that the appellant would abscond if he considered that necessary to remain in the UK.

⁴ Toulson LJ, para 54, Longmore LJ agreeing. Toulson LJ said that 'where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important facts, and likely often to be decisive factors'. Contrast Dyson LJ in *R (on the application of I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, para 51, [2002] All ER (D) 243 (Jun) 'the mere fact (without more) that a detained person refuses the offer of voluntary repatriation cannot make reasonable a period of detention which would otherwise be unreasonable'.

⁵ *R (on the application of A) v Secretary of State for the Home Department*, para 79, although accepting that the individual's ability to avoid detention by his voluntary act of returning was of relevance, it was not of 'fundamental importance'.

⁶ *R (on the application of SK) v Secretary of State for the Home Department* [2008] EWHC 98 (Admin), para 95, [2008] All ER (D) 192 (Jan); *R (on the application of Bashir) v Secretary of State for the Home Department* [2007] EWHC 3017 (Admin), [2007] All ER (D) 493 (Nov), para 20. Lord Justice Dyson said in *R (on the application of Mamki) v Secretary of State for the Home Department* [2008] EWCA Civ 307, [2008] All ER (D) 95 (Apr): 'however grave the risk of absconding and reoffending, there must come a time when it can no longer be said that the detention is reasonable'.

17.43 *R (on the application of A) v Secretary of State for the Home Department*¹ has been applied in a number of cases in which claimants were detained pending removal to Iraq pursuant to decisions to deport made in consequence of their criminal offences. Whilst voluntary return by scheduled flight to Baghdad was possible, enforced removal was not because, following Foreign Office advice, conditions in Iraq were too dangerous for the escorts needed to accompany deportees.² The claimants refused to return voluntarily. In *MMH Beatson J* held that the detention of one claimant for 13 months, the other for 9 months was not unlawful having regard to their refusal to depart voluntarily 'so that their detention was a product of their own making' and

the significant risk that they would abscond.³ In another, factually similar case, 11 months' detention was held not to be unlawful.⁴ In a case that was also factually similar save that the claimant had been detained for 23 months, Mitting J held that the claimant's detention had become unlawful.⁵ He did so because 23 months 'on any view must be at or near the top of the period during which detention can lawfully occur'; the claimant had not committed 'truly grave offences' such as those in *R (on the application of AA) v Secretary of State for the Home Department* 'repetition of which would put the public at very grave risk'; whilst the risk of absconding was significant it was not as high as in *R (on the application of AA) v Secretary of State for the Home Department* and whereas in *R (on the application of AA) v Secretary of State for the Home Department* the period of detention had come to an end by the time the case was considered by the Court, detention in this case was continuing with no indication of when it might end. With 'some hesitation' the Court of Appeal held because of the substantial risk of absconding and the 'very high risk' of reoffending that detention had not become unlawful after 15½ months, even though there was 'no immediate prospect that deportation will take place' (because it was too dangerous to escort the appellant to Baghdad).⁶ Where removal is delayed by the individual's failure to co-operate with attempts to document him or her, the period of time during which detention is lawful is increased.⁷ However, where the Secretary of State could not give an indication of how much longer it would take to document an individual and admitted that an 'impasse' had been reached in attempting to do so, detention had become unlawful after 18 months.⁸

¹ *R (on the application of A) v Secretary of State for the Home Department* [2007] EWCA Civ 804, (2007) Times, 5 September.

² See Secretary of State's evidence, recited in *R (on the application of MMH) (and SRH) v Secretary of State for the Home Department* [2007] EWHC 2134 (Admin), 151 Sol Jo LB 1228.

³ 17.42, fn 6 above. Beatson J accepted that the risk of absconding was less than in *R (on the application of AA) v Secretary of State for the Home Department* and that there was not the risk of grave criminal offences being committed were they to be released so that detention for as long as that in *R (on the application of A) v Secretary of State for the Home Department* would not necessarily be justified.

⁴ *R (on the application of M) v Secretary of State for the Home Department* [2007] EWCA Civ 3115 (Admin).

⁵ *R (on the application of Bashir) v Secretary of State for the Home Department* [2007] EWHC 3017 (Admin).

⁶ *R (on the application of Mamki) v Secretary of State for the Home Department* [2008] EWCA Civ 307, [2008] All ER (D) 95 (Apr).

⁷ *R (on the application of Qaderi) v Secretary of State for the Home Department* [2008] EWHC 1033 (Admin), [2008] All ER (D) 148 (May); *R (on the application of Jamshidi) v Secretary of State for the Home Department* [2008] EWHC 1990 (Admin), [2008] All ER (D) 304 (Jun).

⁸ *R (on the application of Oppong) v Secretary of State for the Home Department* [2008] EWHC 2596 (Admin), [2008] All ER (D) 87 (Oct).

CHALLENGING DETENTION IN THE HIGH COURT

Damages, judicial review and county court actions

17.53 Although CPR Part 54 provides for the Administrative Court to award damages in addition to other relief on an application for judicial review,¹ it

has no jurisdiction to entertain a claim for damages alone.² Further, there are no facilities whereby a jury may be empanelled in the Administrative Court to try an action for damages for false imprisonment,³ and contested actions involving a human rights element often require cross-examination which is more conveniently provided for outside the Administrative Court list. In *R (on the application of Wilkinson) v Responsible Medical Officer, Broadmoor Hospital Authority*⁴ Hale LJ said that it should not matter whether proceedings in respect of forcible treatment of detained patients were brought by way of an ordinary action in tort, an action under s 7(1) of the Human Rights Act 1998, or judicial review.⁵ In *ID v Home Office*⁶ the Court of Appeal expressed the hope that claims of procedural exclusivity might fall away under the CPR regime,⁷ and held that if proceedings are viable, they can be properly brought as a private law action in the county court or begun as a judicial review challenge in the Administrative Court.⁸ Where a claim for damages for false imprisonment is made ancillary to a public law challenge in the Administrative Court, the damages claim survives even if the underlying immigration decision is quashed or settled and thereby falls away and/or the person is released from detention. It often happens that the person has been released from detention before the conclusion of proceedings challenging the detention, but this does not prevent the Administrative Court determining the issue, granting a declaration as to the legality of the past detention and where appropriate awarding damages. Damages, however, can only be awarded if the claimant is able to establish a private law cause of action which in the ordinary case will be a claim for false imprisonment¹⁰ and/or possibly misfeasance in public office¹¹ or a claim under the Human Rights Act 1998.¹² To establish entitlement to damages, the claimant would have to show that the illegality caused the detention. However, once illegality is shown, the burden is on the detainer to show that lawful detention would in any event have taken place.¹³

¹ Supreme Court Act 1981, s 31(4); CPR 54.1(2).

² CPR 54.3(2).

³ See the County Courts Act 1984, s 66(3)(b) and the Supreme Court Act 1981, s 69(1)(b).

⁴ *R (on the application of Wilkinson) v Responsible Medical Officer, Broadmoor Hospital Authority* [2001] EWCA Civ 1545, [2002] 1 WLR 419.

⁵ *R (on the application of Wilkinson) v Responsible Medical Officer, Broadmoor Hospital Authority* [2001] EWCA Civ 1545, [2002] 1 WLR 419 at para 62. See also Simon Brown LJ at para 24, and *R (on the application of Q) v Home Secretary* [2001] EWCA Civ 1151 at [20], [2001] 1 WLR 2002, 2037.

⁶ *ID v Home Office* [2005] EWCA Civ 38, [2005] All ER (D) 253 (Jan).

⁷ The court referred to Lord Woolf MR in *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 at paras 25–27 and 32–39, who said that the relevant question was not whether ‘the right procedure’ had been adopted, but whether the protection provided by (then) RSC Order 53 had been flouted in circumstances which were inconsistent with the proceedings being able to be conducted justly in accordance with the general principles contained in CPR Part 1. ‘These principles are central to determining what is now due process,’ (para 39).

⁸ ‘To restrict access to justice by insisting on proceeding by way of CPR Part 54 in a damages claim would in such circumstances amount to the antithesis of the overriding objective in CPR Part 1’ (para 106, per Brooke LJ).

⁹ In *R (on the application of Konan) v Secretary of State for the Home Department* [2004] EWHC 22 (Admin), [2004] All ER (D) 151 (Jan) the claimant had been on adjudicator bail for several months and had been given a limited leave to remain by the time of the hearing of the challenge to the lawfulness of the detention.

17.53 Detention and Bail

- ¹⁰ In *R v Secretary of State for the Home Department, ex p Honegan* (13 March 1995, unreported), QBD, a settlement of £17,000 was agreed for four days' detention over Christmas, following a judgment that the refusal of leave to enter on which the detention depended was irrational. £17,000 was awarded for detention of a British citizen and her infant child for approximately five days following a successful judicial review of her detention in *R v Secretary of State for the Home Department, ex p Ejaz* [1994] Imm AR 300, CA. In *ex p AKB* [1998] INLR 315 the damages claim was transferred to the Queens Bench Division for assessment by a Master, who awarded £10,000 for 63 days of unlawful detention (which followed a substantial period of lawful detention) and £8,000 for damages for exacerbation of a psychiatric condition. In *Konan* (fn 9 above), £60,000 was awarded to the claimant mother and child for six months' detention, including a sum for deterioration in the mother's mental health and the stress of caring for a sick infant in difficult circumstances. In *R (on the application of Q) v Secretary of State for the Home Department* (CO/5162/2003), a claim for unlawful detention and removal of a Kosovan family was resolved by consent on 28 January 2004, with £7,500 each for the father and children's claims for a day's detention prior to removal and a further six days' detention on return. The mother obtained damages of £18,500, reflecting the exacerbation of her psychiatric condition. See also *R (on the application of Johnson) v Secretary of State for the Home Department* [2004] EWHC 1550 (Admin), where £15,000 was agreed in settlement of Mr Johnson's claim for 32 days of unlawful detention after it became apparent that his claim was not suitable for fast tracking at Oakington. In *Youssef v Home Office* [2004] EWHC 1884 the claim was settled in the sum of £9,000 for the two weeks of unlawful detention following the lengthy period of lawful detention. In *R (on the application of Beecroft) v Secretary of State for the Home Department* [2008] EWHC 3189 (Admin), [2008] All ER (D) 46 (Dec), basic damages of £32,000 were awarded for 6 months of unlawful detention with £6,000 of aggravated damages because of failure to apply the Detention Centre Rules intended to avoid detention of torture victims and the defendant's failure to respond with due diligence to claims that the individual was unlawfully detained.
- ¹¹ See, eg *R (on the application of Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin), [2003] UKHRR 148; *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] 1 All ER 833.
- ¹² The principles of misfeasance are beyond the scope of this book; see *Bourgoin SA v Ministry of Agriculture* [1986] QB 716; *Three Rivers District Council v Bank of England* (No 3) [2003] 2 AC 1, [2000] 2 WLR 1220. Detention and forcible removal from the jurisdiction without any or any adequate notice to the claimant and in particular his or her legal representative, with refusal to stay removal for legal proceedings to be initiated or even after their initiation, could found a misfeasance claim; see *R (on the application of Changuizi) v Secretary of State for the Home Department* [2002] EWHC 25; *R (on the application of Q) v Secretary of State for the Home Department* (CO/5162/2003). See *Conka v Belgium* 34 EHRR 54 1298.
- ¹³ *R (on the application of Abdi) v Secretary of State for the Home Department* [2008] EWHC 3166 (Admin), [2008] All ER (D) 247 (Dec).

IMMIGRATION APPEALS

RIGHTS OF APPEAL

Immigration decisions

18.15 The following are the 'immigration decisions' against which a person may appeal under s 82 of the NIAA 2002:

- (a) refusal of leave to enter the UK;¹
- (b) refusal of entry clearance;²
- (c) refusal of a certificate of entitlement to the right of abode under s 10 of the NIAA 2002;³
- (d) refusal to vary a person's leave to enter or remain in the UK if the result of the refusal is that the person has no leave to enter or remain;⁴
- (e) variation of a person's leave to enter or remain in the UK if when the variation takes effect the person has no leave to enter or remain;⁵
- (f) revocation under s 76 of the NIAA 2002 of indefinite leave to enter or remain;⁶
- (g) a decision that a person is to be removed from the UK by way of directions under s 10(1)(a), (b), (ba) or (c) of the IAA 1999 (ie as an overstayer; a person who has breached a condition of his or her leave to enter or remain; a person who has obtained leave to remain by deception; a person whose indefinite leave as a refugee has been revoked because the person has availed him or herself of the protection of the country from which asylum was sought or of another country or as the family member of someone being removed on these grounds).⁷ The Tribunal has held that such a decision in respect of a person who has current leave to enter or remain is also to be treated as a variation of leave because one effect of such a decision is to 'invalidate' the person's leave.⁸ The Administrative Court does not agree⁹ and the conflict of authority is not yet resolved. The issue is of importance because it may determine whether an appeal can be brought in country or only out of country;
- (h) a decision that an illegal entrant is to be removed from the UK;¹⁰
- (i) a decision that a person is to be removed from the UK by way of directions under para 10A of Sch 2 to the IA 1971 (ie as the family member of a person being removed as an illegal entrant or after refusal of leave to enter;
- (j) a decision to make a deportation order under s 5(1) of the IA 1971);¹¹
- (k) a decision to make a deportation order under s 5(1) of the IA 1971, (other than a decision to make an 'automatic deportation' order against a 'foreign criminal' as defined in the UK Borders Act)¹² either following a recommendation to deport by a court under s 3(6) or on the ground that the person's deportation, or that of a family member, is deemed conducive to the public good under s 3(5);¹³

18.15 Immigration Appeals

- (l) a decision by the Secretary of State that the UK Borders Act 2007, s 32(5) applies, ie that the person is a 'foreign criminal' (as defined) against whom the Secretary of State must make a deportation order;¹⁴
- (m) a refusal to revoke a deportation order;¹⁵
- (n) a decision to give directions for the removal of an overstaying member of the crew of an aircraft or ship under para 12 of Sch 2 to the IA 1971;¹⁶
- (o) a decision that a person is to be removed by way of directions given under s 47 of the IAN 2006;¹⁷
- (p) a decision of the Secretary of State to make an order under the IA 1971, s 2A depriving a person of his or her right of abode on the ground that it would be conducive to the public good for the person to be excluded or removed from the UK.¹⁸

Decisions which are not 'immigration decisions' for the purposes of s 82(1) and which do not therefore give rise to a right of appeal include:

- refusal of asylum;¹⁹
- refusal to grant a work permit;²⁰
- the imposition of conditions of leave or refusal to revoke conditions;²¹
- the grant of a lesser period of leave than that sought;²²
- refusal to grant leave to a person who had no leave at the date of the application.

The cancellation of leave when the holder is outside the common travel area, which did not previously attract a right of appeal, now does so because of the changed wording of the appeals provisions of s 82.²³

¹ NIAA 2002, s 82(2)(a).

² NIAA 2002, s 82(2)(b).

³ NIAA 2002, s 82(2)(c).

⁴ NIAA 2002, s 82(2)(d). If on being refused an extension of leave the person has leave that continues, even if only for some days, the refusal is not an 'immigration decision': *SA (Pakistan)* [2007] UKAIT 00083.

⁵ NIAA 2002, s 82(2)(e). The variation 'takes effect' when it is notified to the person, not on the day when the leave is brought to an end if that happens at a later date than the notification. Consequently, a curtailment of leave which foreshortens but does not extinguish leave is not an 'immigration decision' because when it takes effect, the person still has leave: *R (Araromi) v Secretary of State for the Home Department* [2007] EWHC 2765 (Admin).

⁶ Ie revocation of indefinite leave to enter or remain because the person (i) is liable to deportation but cannot be deported for legal reasons (eg because deportation would breach Article 3 of the ECHR), (ii) obtained the leave by deception and would be liable to removal as a result but cannot be removed for legal or practical reasons, (iii) obtained the leave as a refugee but ceases to be a refugee as a result of a voluntary acquisition of nationality, establishment or availment of protection of his or her own or another country, or (iv) is a dependant of a person to whom (iii) applies: see 12.84 above. NIAA 2002, s 82(2)(f).

⁷ NIAA 2002, s 82(2)(g).

⁸ *CD (India)* [2008] UKAIT 00055.

⁹ *R (Saleh) v Secretary of State for the Home Department* [2008] EWHC 3196 (Admin) and *R (Yu) v Secretary of State for the Home Department* [2008] EWHC 3072 (Admin).

¹⁰ NIAA 2002, s 82(2)(h).

¹¹ NIAA 2002, s 82(2)(i).

¹² UK Borders Act 2007, s 35(3), inserting the NIAA 2002, s 82(3A) in respect of a decision to make a deportation order in accordance with the UK Borders Act 2007, s 32(5).

- ¹³ NIAA 2002, s 82(2)(j). A decision to make a deportation order following a recommendation by a court was not previously appealable. The Immigration Rules relating to deportation were radically amended on 20 July 2006. However, paras 378 and 381 of HC 395, as substituted from 2 October 2000 by HC 4851, have still not been brought up to date to reflect the creation of a right of appeal against a decision to make a deportation order following the recommendation of a court. The Rules (HC 395, para 378) wrongly state that there is no right of appeal against such a decision.
- ¹⁴ UK Borders Act 2007, s 35(3), inserting the NIAA 2002, s 82(3A).
- ¹⁵ NIAA 2002, s 82(2)(k).
- ¹⁶ NIAA 2002, s 82(2)(ia) as inserted by the Asylum and Immigration (Treatment of Claimants etc) Act 2004, s 31, thereby restoring the old right of appeal which disappeared when NIAA 2002 was originally enacted.
- ¹⁷ NIAA 2002, s 82(2)(ha). The Immigration, Asylum and Nationality Act 2006, s 47 which enables the Secretary of State to make the immigration decision that a person who has statutorily extended leave (ie by operation of the IA 1971, s 3C – leave pending a decision or an appeal) is to be removed from the UK after the leave ends and inserts s 82(2)(ha) into the NIAA 2002.
- ¹⁸ NIAA 2002, s 82(ib). The power to make such orders and the corresponding right of appeal were created by the IAN 2006, s 57.
- ¹⁹ The refusal of asylum is not an ‘immigration decision’ for the purposes of s 82, although it may be appealable under the limited circumstances dealt with by s 83 or s 83A considered in the next two paragraphs.
- ²⁰ Work permit decisions were until 2001 the province of the Department of Work and Pensions or its previous incarnations, and although they were brought under the umbrella of the Home Office in 2001 there is still no appeal right, although there is now a right to internal review: see 10.58.
- ²¹ Conditions imposed under s 3(1)(c) of the IA 1971 were appealable under that Act, but were excluded under the IAA 1999, and their continued exclusion is achieved by the definition of ‘immigration decision’ in the NIAA 2002, s 82.
- ²² Curtailment of leave is however appealable as an immigration decision if it results in the person having no leave: s 82(2)(e).
- ²³ Under the Immigration (Leave to Enter and Remain) Order 2000, SI 2000/1161, Art 13(2): NIAA 2002, s 82(2)(d). The wording of the appeals provisions of the 1999 Act (IAA 1999, s 61), couched in terms of being ‘required to leave the UK within 28 days’, manifestly precluded appeals against variation or refusal to vary leave while the holder was abroad. This wording was not repeated in the 2002 Act.

Exclusion of the right of appeal

18.22 The right of appeal is excluded in the following cases:

- (1) against a refusal of leave to enter, refusal of entry clearance, refusal to vary a leave to enter or remain, or a variation of leave to enter or remain taken on the ground that the person—
 - (i) does not satisfy a requirement as to age, nationality or citizenship specified in the Immigration Rules.¹ This would mean, for example, that a person refused leave to enter as an au pair would not be able to appeal against the refusal if he or she was younger than 17 or older than 27 or was not a national of one of the countries specified in the applicable rule;²
 - (ii) does not have an immigration document, ie an entry clearance, a passport, a work permit or other immigration employment document;³
 - (iii) is seeking to be in the UK for a period greater than that permitted by the Immigration Rules,⁴ for example, an au pair seeking to remain in the UK for more than two years⁵ or a visitor seeking to enter the UK for more than six months;⁶

- (iv) is seeking to enter or remain in the UK for a purpose other than one permitted by the Immigration Rules;⁷ or
- (v) failed to supply a medical report or medical certificate in accordance with a requirement of the Immigration Rules;⁸
- (vi) is a dependant of a person in (i)–(v);⁹ except that a person otherwise excluded from appealing for these reasons may bring an appeal on human rights grounds, race discrimination grounds or asylum grounds.¹⁰ The exclusion of the right of appeal in the above cases is characterised as ‘ineligibility’ in the NIAA 2002;¹¹

The Tribunal has highlighted that the ‘ineligibility’ provision operates where the decision is ‘taken’ on a particular ground, not where it is stated to have been taken on a particular ground. Consequently, so it held, albeit hesitantly, if the stated reason was one giving rise to ineligibility but it was apparent that the decision was not taken on the stated ground, eg because it bore no relation to the application that had been made then the right of appeal would not be excluded;¹²

- (2) against refusal of entry clearance, taken on grounds which relate to a provision of the Immigration Rules specified for that purpose in a statutory instrument. No provisions have yet been specified by statutory instrument. However, the provision does not exclude an appeal on race discrimination or human rights grounds;¹³
- (3) against refusal of leave to enter unless the person holds an entry clearance on arrival in the UK and the purpose of entry specified in the entry clearance is that same as that specified by the person when applying for leave to enter.¹⁴ A person who arrives in the UK with non-lapsing leave¹⁵ but no entry clearance will not be prevented by the want of entry clearance from appealing against cancellation of the leave. The cancellation of leave will be treated as a refusal of leave to enter and the cancelled leave as entry clearance.¹⁶ The Tribunal has given the provision excluding the right of appeal against refusal of leave to enter a very narrow construction, holding that it does not operate against a person who is treated as having obtained leave to enter prior to arrival in the UK because he or she holds an entry clearance.¹⁷ The provision does not exclude an appeal on asylum, human rights or race discrimination grounds;¹⁸
- (4) against refusal of entry clearance as a short-term or prospective student or their dependant,¹⁹ or as a visitor (except to visit family members),²⁰ save on race discrimination or human rights grounds;²¹
- (5) against a second immigration decision where there has been an earlier right of appeal, if the Secretary of State issues a certificate under s 96 of NIAA 2002 (as to which, see below);
- (6) against a refusal of leave to enter the UK or a refusal of entry clearance taken by the Secretary of State personally on public good grounds.²² There is an appeal on human rights, race discrimination and (in the case of a refusal of leave to enter) asylum grounds;²³
- (7) against an EEA decision, where the appellant cannot produce proof of EEA nationality or membership of an EEA national’s family.²⁴

When s 4 of the IAN 2006 comes into force, inserting a new s 88A into the 2002 Act, it will exclude the right of appeal against refusal of entry clearance, save on race discrimination and human rights grounds or where entry

clearance was sought for the purpose of visiting a person of a prescribed class or description or entering as a dependant of a person in prescribed circumstances. As yet there are no regulations prescribing who are the classes or descriptions of people to be visited but the likelihood is that they will be defined by reference to a family relationship.²⁵ They may also be defined according to the circumstances of the applicant and the person to be visited and the immigration status of the person to be visited.²⁶ Nor have regulations yet been made prescribing the circumstances in which entry clearance sought as a dependant will attract a right of appeal if refused. However, they may define dependency and how it is to be determined; make provision in relation to the circumstances of the applicant or the person upon whom he or she depends, including the immigration status of the person in the UK; the duration of their residence together and the purpose for which entry is sought.²⁷

¹ NIAA 2002, s 88(1) and (2)(a).

² See HC 395, para 89(ii) (age), (v) (nationality).

³ NIAA 2002, s 88(1), (2)(b) and (3). Clearly, this means the 'required' immigration document; entry clearance for visa nationals, work permits for those coming to work etc. IA 1971, Sch 2, para 4, and the Immigration Rules, HC 395, para 11, require persons arriving in the UK to produce a valid national passport or other document satisfactorily establishing their identity and nationality. Thus, if a passport is required it must be valid and must satisfactorily establish the person's identity (*MC (Gambia)* [2008] UKAIT 00030) and a work permit must be current, not expired (*DS (India)* [2008] UKAIT 00035). Note that s 88 applies not only to refusal of leave to enter but also to refusal of variation. Thus, a visitor seeking to remain for a purpose for which entry clearance is required would not get a right of appeal against refusal, for want of the relevant entry clearance: *R v Secretary of State for the Home Department, ex p Ahmed* [1995] Imm AR 590; on appeal [1996] Imm AR 260, CA.

⁴ NIAA 2002, s 88(1) and (2)(c).

⁵ See HC 395, para 92(iv).

⁶ See HC 395, para 41(i).

⁷ NIAA 2002, s 88(1) and (2)(d). Previously someone seeking to enter or remain for a purpose outside the Rules could appeal on the merits, since where there was no rule, there could be no request to the Secretary of State to depart from the rules: see *Rahman (Jinnah)* [1989] Imm AR 325 (a refugee recognised elsewhere seeking to transfer his status to the UK), see 5th edn, 18.75. There is however an appeal on human rights grounds; see text and fn 9.

⁸ NIAA 2002, s 88(2)(ba), inserted by the Immigration and Asylum Act 2006, s 5, from 31 August 2006.

⁹ NIAA 2002, s 88(1) and (2).

¹⁰ NIAA 2002, s 88(4).

¹¹ See headnote to the NIAA 2002, s 88.

¹² *AM (Ghana)* [2009] UKAIT 0002.

¹³ NIAA 2002, s 88A, inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 29, in force 1 October 2004: SI 2004/2523.

¹⁴ IAA 2002, s 89(1) as substituted by the Immigration, Asylum and Nationality Act 2006, s 6, from 31 August 2006.

¹⁵ *le leave to enter or remain which a person has when he or she leaves the UK – Immigration (Leave to Enter and Remain) Order 2000*, SI 2000/1161, art 13(2).

¹⁶ IA 1971, Sch 2, para 2A(9).

¹⁷ *GO (Nigeria)* [2008] UKAIT 00025.

¹⁸ NIAA 2002, s 89(2) as substituted by the Immigration, Asylum and Nationality Act 2006, s 6.

¹⁹ NIAA 2002, s 91.

²⁰ NIAA 2002, s 90(1), (2). For this purpose, family members are defined by the Immigration Appeals (Family Visitor) Regulations 2003, SI 2003/518, reg 2 as the applicant's spouse, parent, child, sibling, grandparent, grandchild, uncle, aunt, nephew, niece, first cousin; the applicant's spouse's parent, sibling or child; the applicant's stepfather, stepmother, stepson,

18.22 Immigration Appeals

stepdaughter, stepbrother or stepsister or a person with whom the applicant has lived as a member of an unmarried couple for at least two of the three years before the date of the application. In *GP (Ethiopia)* [2007] UKAIT 00063 the Tribunal held that a sibling under the regulations including a half-sibling.

²¹ NIAA 2002, s 90. There is no appeal on asylum grounds in entry clearance cases.

²² NIAA 2002, s 98(1)–(3).

²³ NIAA 2002, s 98(4), (5).

²⁴ EEA nationals must produce a valid national ID card or passport issued by an EEA Member State, and family members must produce an EEA family permit or other proof of the relationship: Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 26(2) and (3).

²⁵ NIAA 2002, s 88A(2)(a).

²⁶ NIAA 2002, s 88A(2)(c).

²⁷ NIAA 2002, s 88A(2)(b)–(f).

Presence of appellants in the UK

18.24 A person may not appeal against an immigration decision from within the UK unless his appeal is one to which s 92 of the NIAA 2002 applies. The application of s 92 results in the following:

- (1) where the person has made a human rights claim or asylum claim to the Secretary of State whilst in the UK and the claim is not certified by the Secretary of State as ‘clearly unfounded’ then the person can appeal against any immigration decision from within the UK;¹
- (2) an appeal against any kind of immigration decision can be brought from within the UK if the person is an EEA national or the family member of an EEA national and makes a claim to the Secretary of State that the decision breaches his or her community law rights.² Even if such a person made an asylum or human rights claim and the Secretary of State certifies that claim as ‘clearly unfounded’, the appeal can still be brought from within the UK;³
- (3) where the appeal is against refusal of entry clearance the appeal cannot be brought from within the UK unless (1) or (2) above applies.⁴ However, in practice there are likely to be few instances in which a person refused entry clearance could nevertheless gain admittance to the UK to appeal against the refusal;
- (4) an appeal against refusal of leave to enter can be brought from within the UK if the person has an entry clearance.⁵ However, if the refusal is on the ground that the leave to enter is being sought for a purpose other than one specified in the entry clearance, the person cannot rely upon the entry clearance to have an in-country appeal.⁶ Similarly, a person with non-lapsing leave can appeal in-country against the cancellation of the leave⁷ unless the cancellation of leave is on the ground that the person’s purpose in arriving in the UK is different from that specified in the non-lapsed leave⁸ In addition, an appeal against refusal of leave to enter (or cancellation of leave treated as refusal of leave to enter) can be brought in-country, even if the grounds of refusal would otherwise prevent the appeal being brought in-country if the person is a British national⁹ who holds a work permit and is in the UK,¹⁰ or if (1) or (2) above applies;

- (5) an appeal against refusal of a certificate of entitlement to the right of abode can be brought in-country¹¹ unless the person has made a human rights or asylum claim which has been certified clearly unfounded;¹²
- (6) an appeal against a refusal to vary leave to enter or remain can be brought in-country¹³ unless the person made an asylum or human rights claim to the Secretary of State and the claim was certified clearly unfounded;¹⁴
- (7) an appeal against a variation of leave can be brought in-country¹⁵ unless the person has made a human rights or asylum claim to the Secretary of State which has been certified clearly unfounded.¹⁶ The Tribunal has held that where a decision to give directions for a person's removal under the Immigration and Asylum Act 1999, s 10 is made against a person with current leave to enter or remain, such a decision is also to be treated as a variation of leave and as such appealable in country;¹⁷
- (8) an appeal against revocation of indefinite leave to remain as a refugee under the NIAA 2002, s 76 can be brought in-country¹⁸ and there is no provision to prevent the appeal being brought in-country by certification of the asylum or human rights claim;¹⁹
- (9) an appeal against a decision to remove the person as an overstayer, for breach of conditions, for deception in obtaining or seeking to obtain leave to remain, as a person whose indefinite leave to remain as a refugee has been revoked or as a family member of such a person cannot be brought in-country,²⁰ or as the member of a ship or aircrew who fails to embark unless (1) or (2) above applies;
- (10) an appeal against a decision to remove a person as an illegal entrant cannot be brought in-country,²¹ unless (1) or (2) above applies;
- (11) an appeal against a decision to remove a person as the family member of a person against whom removal directions have been given as an illegal entrant or following refusal of leave to enter cannot be brought in-country,²² unless (1) or (2) above applies;
- (12) when the IAN 2006, s 47 comes into force a person will be able to appeal against a decision that he or she, as a person with statutorily extended leave, is to be removed from the UK. That decision will be appealable in-country²³ unless the person has made an asylum or human rights claim to the Secretary of State which has been certified clearly unfounded;²⁴
- (13) a decision to remove a member of a sea or aircrew who failed to embark with his or her ship or aircraft²⁵ may not be appealed in-country unless (1) or (2) above applies;
- (14) a decision to make an order that a person's right of abode be removed²⁶ cannot be appealed whilst the person is in the UK unless (1) or (2) above applies;
- (15) an appeal against a decision to make a deportation order can be brought in-country²⁷ because it is an immigration decision of a kind to which s 92 applies. The Secretary of State cannot prevent the bringing of an in-country appeal by certification of any human rights or asylum claim the person may have made.²⁸ However, if the Secretary of State certifies that the decision to make the deportation order was taken on national security grounds²⁹ then the person may not appeal against the

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decision from within the UK³⁰ unless he or she makes a human rights claim which the Secretary of State does not certify as 'clearly unfounded'.³¹ If the Secretary of State certifies the human rights claim, the person can appeal to the SIAC, whilst in the UK, against the certificate;³²

- (16) an appeal cannot be brought in-country against a refusal to revoke a deportation order,³³ unless (1) or (2) above applies;
- (17) where an asylum or human rights claim has been certified clearly unfounded,³⁴ unless the immigration decision is to revoke indefinite leave under s 76 of the NIAA 2002 or to make a deportation order under s 5(1) of the IA 1971;³⁵
- (18) a person may not appeal from within the UK against an EEA decision refusing admission to the UK, refusing to revoke a deportation order, refusing to issue an EEA family permit or to remove a person who entered or sought entry in breach of a deportation order,³⁶ unless (a) the person held an EEA family permit, a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card on arrival in the UK or can otherwise prove that he or she is a UK resident;³⁷ (b) the person has been in the UK with temporary admission or in immigration detention for three months or more when given notice of the decision³⁸ or (c) a ground of appeal is that the decision breaches the Human Rights or Refugee Convention and the Secretary of State has not certified the ground 'clearly unfounded'³⁹ on arrival in the UK, or (b) the ground of appeal is that the decision breaches the appellant's rights under the ECHR or the Refugee Convention or (c) the appeal is to the SIAC (ie the decision is on national security or public interest grounds);⁴⁰
- (19) where the Secretary of State certified before 1 October 2004 that an asylum seeker was being removed to a safe third country under s 11(2) or 12(2) of the IAA 1999,⁴¹ (ie to countries which are members of the European Community or otherwise designated as a safe countries), unless the person makes a human rights claim which is not certified clearly unfounded;⁴²
- (20) where the Secretary of State certifies after 1 October 2004 that an asylum or human rights claimant is to be removed to a safe third country under Sch 3 to the 2004 Act, and certifies the human rights claim clearly unfounded.⁴³

¹ NIAA 2002, ss 92(4)(a) and 94(2).

² NIAA 2002, s 92(4)(b).

³ Because the NIAA 2002, s 92(4)(b) is not one of the provisions which the Secretary of State can prevent a person relying on by the making of a certificate.

⁴ NIAA 2002, s 92. Refusal of entry clearance is an immigration decision under s 82(2)(b) and so not one of the decisions to which s 92(2) applies.

⁵ NIAA 2002, s 92(3).

⁶ NIAA 2002, s 92(3C).

⁷ By reliance on the NIAA 2002, s 92(3) because the leave is treated as entry clearance and the cancellation of the leave as refusal of leave to enter (IA 1971, Sch 2, para 2A(9)).

⁸ NIAA 2002, s 92(3A) and (3B).

⁹ Ie a British Overseas Territories citizen, a British Overseas citizen, a British National (Overseas), a British Protected person or a British subject: NIAA 2002, s 92(3D)(c), inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 28.

- 10 NIAA 2002, s 92(3D), as inserted. Before the 2004 Act amendment, possession of a work permit was by itself sufficient to confer an in-country right of appeal against refusal of leave to enter.
- 11 NIAA 2002, s 92(1) applying because such a decision is an immigration decision under s 82(2)(c), one of those listed in s 92(2).
- 12 NIAA 2002, s 94(1A).
- 13 NIAA 2002, s 92(1) applying because such a decision, being an immigration decision under s 82(2)(d) of the Act, and therefore one to which s 92(2) applies.
- 14 NIAA 2002, s 94(1A).
- 15 Being an immigration decision of a kind specified in the NIAA 2002, s 82(2)(e) and to which s 92(2) therefore applies.
- 16 NIAA 2002, s 94(1A).
- 17 CD (India) [2008] UKAIT 00055. The Administrative Court has held the contrary in *R (on the application of Saleh) v Secretary of State for the Home Department* [2008] EWHC 3196 (Admin) and *R (on the application of Yu) v Secretary of State for the Home Department* [2008] EWHC 3072 (Admin). The conflict between these authorities is yet to be resolved.
- 18 Because it is an immigration decision listed in the NIAA 2002, s 92(2).
- 19 Because it is not an immigration decision listed in the NIAA 2002, s 94(1A).
- 20 By virtue of the IAA 1999, s 10: removal is an immigration decision under the NIAA 2002, s 82(2)(g) which is not in the list of decisions appealable within the UK in s 92(2).
- 21 Ie under the IA 1971, Sch 2, para 9. Such a decision is an immigration decision under the NIAA 2002, s 82(2)(h) and so not one of the decisions that can be appealed in-country by operation of the NIAA 2002, s 92(2).
- 22 Ie under the IA 1971, Sch 2, para 10A, inserted by the NIAA 2002, s 73(1), which is an immigration decision under the IAA 2002, s 82(2)(i).
- 23 Because the IAN 2006, s 47 will add it to the list of immigration decisions to which the NIAA 2002, s 92(2) applies.
- 24 NIAA 2002, s 94(1A) whereby the effect of certification by the Secretary of State is to prevent an appeal being brought in-country.
- 25 NIAA 2002, s 82(2)(ia).
- 26 NIAA 2002, s 82(2)(ib).
- 27 NIAA 2002, s 82(2)(j).
- 28 A decision to make a deportation order is not among the list of immigration decisions in the NIAA 2002, s 94(1A) in respect of which s 92 is disapplied by a certified human rights or asylum claim.
- 29 NIAA 2002, s 97A(1), inserted by the IAN 2006, s 7.
- 30 In response to arguments that denial of an in-country right of appeal against deportation was unfair the government said (with breath-taking candour as to the value of an appellant's right to be heard by SIAC): 'I do not think that appellants are disadvantaged by conducting the appeal from overseas. In the great majority of cases, much of the evidence is closed; that is, the detail is not disclosed to the appellant. The noble Lord, Lord Avebury, referred to the role of the special advocate. The appellant of course will be able to have a solicitor to represent him or her and to deal with open evidence' (The Baroness of Ashton of Upholland, 7 February 2006, Hansard col 549).
- 31 NIAA 2002, s 97A(2).
- 32 NIAA 2002, s 97A(3).
- 33 Ie an immigration decision under the NIAA 2002, s 82(2)(k).
- 34 NIAA 2002, s 94 (as amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 27 from 1 October 2004). This applies to variation appeals (ie immigration decisions under the NIAA 2002, s 82(d) and (e), as well as to refusal of certificate of entitlement (s 82(2)(c)), meaning that someone in the UK as a visitor or student, who seeks to remain on asylum or human rights grounds, may be forced to leave the UK before appealing against a negative decision, if the claim is certified clearly unfounded.
- 35 These decisions, which are immigration decisions under the NIAA 2002, s 82(2)(f) (revocation of ILR), (j) (decision to deport), attract an in-country appeal under s 92(2), which is not subject to s 94(1A) (inserted by s 27 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, in force 1 October 2004: SI 2004/2523).
- 36 Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 27(1).
- 37 SI2006/1003, reg 27(2)(a).
- 38 SI 2006/1003, reg 27(2)(b).
- 39 SI 2006/1003, reg 27(2)(c).

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- ⁴⁰ SI 2000/2326 as amended, reg 30(3). These restrictions on in-country appeal rights may be incompatible with Community law. The ECJ held in *R (on the application of Yiadom) v Secretary of State for the Home Department* Case C-357/98 [2001] All ER (EC) 267 that where a Community national has been physically present in the UK on temporary admission for a period of several months pending refusal of leave to enter, the refusal constitutes a decision concerning expulsion rather than entry, and so must attract a right of appeal or review before implementation by removal. See also *R v Secretary of State for the Home Department, ex p Darwiche* (CO 413/98).
- ⁴¹ NIAA 2002, s 93, repealed by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, ss 33(3)(b), 47, Sch 4 from 1 October 2004. For the transitional provisions see SI 2004/2523, Art 3. By the Asylum (Designated Safe Third Countries) Order 2000 SI 2000/2245, Canada, Norway, Switzerland and the United States of America are designated safe third countries. IAA 1999, ss 11 and 12 were substituted by the NIAA 2002, s 80, also repealed by the AI(TC)A 2004, s 33(2).
- ⁴² NIAA 2002, s 93(2), repealed as above.
- ⁴³ Asylum and Immigration (Treatment of Claimants, etc) Act 2004, Sch 3, paras 5, 10, 15, 19.

18.25 As can be seen from the foregoing paragraph, whether an appeal can be brought in-country depends in many cases on whether the person 'has made an asylum claim, or a human rights claim, while in the United Kingdom'.¹ If the person has made such a claim, the NIAA 2002, s 92 applies and the appeal can be brought in-country. In this context, an asylum or human rights claim is defined by the NIAA 2002, s 113 as a claim made to the Secretary of State at a place designated by her.² Prior to 4 April 2005 (when appeals to the AIT replaced appeals to adjudicators), an asylum or human rights claim within the statutory definition could be made by including an asylum or human rights ground in a notice of appeal. That was because the Procedure Rules then applicable provided for notice of appeal to be given to the Secretary of State.³ The current Procedure Rules require notice of appeal to be given to the Tribunal⁴ not to the Secretary of State, so that an asylum or human rights ground contained in a notice of appeal does not meet the current statutory definition of a claim (both in respect of the person to whom and the place where such a claim must be made) and therefore would not entitle the person to an in-country right of appeal.⁵ Section 12 of the IAN 2006, when it comes into force, will amend the definition of an asylum or human rights claim in the NIAA 2002, s 113. The new definition does not specify the person to whom the claim must be made, nor does it specify where the claim must be made. For those reasons it will once again be sufficient to include a human rights or asylum ground in a notice of appeal so as to have made an asylum or human rights claim to which s 92 of the 2002 Act will apply. If an immigration decision is made in respect of person, is a human rights or asylum claim that has already been determined by the Secretary of State and has been the subject of an earlier appeal sufficient for s 92 to apply or where there has been a previous claim must the Secretary of State first of all accept a 'fresh claim'?⁶ The Court of Appeal doubted the proposition that in such circumstances an accepted fresh claim is necessary for s 92 to apply⁷ and the Tribunal has held that it is not.⁸ The Administrative Court has held that neither a historical but unsuccessful asylum or human rights claim nor a further claim brings the would-be appellant within s 92 unless the Secretary of State accepts a 'fresh claim' under para 353 of the Immigration Rules.⁹

¹ NIAA 2002, s 92(4)(a).

- ² NIAA 2002, s 113. Immigration, Asylum and Nationality Act 2006, s 12 will substitute new definitions of an asylum claim and a human rights claim in the NIAA 2002, s 113 but is not yet in force.
- ³ *SS (Turkey)* [2006] UKAIT 00074.
- ⁴ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 6(2).
- ⁵ *SS (Turkey)*.
- ⁶ In accordance with para 353 of the Immigration Rules (HC 395).
- ⁷ *JM v Secretary of State for the Home Department* [2006] EWCA Civ 1402.
- ⁸ *ST (Turkey)* [2007] UKAIT 00085.
- ⁹ *R (on the application of Etame) v Secretary of State for the Home Department* [2008] EWHC 1140 (Admin), [2008] 4 All ER 798 (appeal to the Court of Appeal pending).

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18.35 Under the 1971 Immigration Act the right of appeal against a refusal to vary leave was limited to situations where there was an existing leave at the time of the lodging of the appeal.¹ In *Subramaniam* in the Court of Appeal² and in *Suthendran* in the House of Lords³ it was decided by a majority of the judges that on its true construction IA 1971, s 14(1), the precursor of s 61 of IAA 1999, and in similar terms, gave a right of appeal to ‘a person who has a limited leave under this Act’ and not to ‘a person who has had’ such limited leave. Thus there was no right of appeal under s 61 of the IAA 1999 for a person whose limited leave to remain in the UK had expired at the time of applying for a variation⁴ and the position is the same under the current statutory provisions relating to variation appeals.⁵ The interpretation adopted by the majority in the House of Lords in *Suthendran* also meant that someone whose application was made in time, but whose limited leave expired before the Home Office reached a decision, would have no right of appeal. The majority of the House of Lords realised this, but said that the injustice could be cured by administrative means. The ‘leave gap’ was closed by the Variation of Leave Order 1976;⁶ it is now dealt with by s 3C of the 1971 Act.⁷ This provides that if a person with limited leave to enter or remain applies before the expiry of the leave for variation and when it expires no decision has been taken, the leave is to be treated as continuing until the end of the period allowed for appealing the decision and, if an appeal is brought, pending the appeal.⁸ The section also provides that during this period of statutory leave, no further application for variation may be made, although the original application, which gave rise to the statutory leave, may be varied.⁹ The application may be varied up until a decision is made on the application; thereafter there is no longer an application to vary.¹⁰ However, submission of a statement of additional grounds¹¹ may be made at any time after the making of an application for leave to enter or remain in the UK. This enables any new basis for a grant of leave to be raised and will then have to be considered by the Tribunal hearing the appeal.¹² Statutory leave lapses if the applicant leaves the UK.¹³

¹ *Akhtar v Secretary of State for the Home Department* [1991] Imm AR 232, CA; see also *Wa-Selo v Secretary of State for the Home Department* [1990] Imm AR 76, CA.

² *R v Immigration Appeal Tribunal, ex p Subramaniam* [1977] QB 190, [1976] 3 All ER 604.

³ *Suthendran v Immigration Appeal Tribunal* [1977] AC 359, [1976] 3 All ER 611.

⁴ Since all applications (with some exceptions such as EEA, asylum and Article 3 of the ECHR or discrimination ones) must be on prescribed forms, which must be completed in full and sent with all requisite documents and fees to constitute a valid application, the effect of a letter seeking further leave, or (previously a common practice among students) the mere sending in of a passport to the Home Office for further endorsement, will be that

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no valid application has been made prior to expiry of leave, and so no right of appeal will accrue: see HC 395, para 32 as amended by HC 329 and HC 704. See further 4.7–4.8 above.

⁵ *SA (Ghana)* [2007] UKAIT 0006.

⁶ SI 1976/1572, as amended by SI 1989/1005, known as ‘VOLO’, and deemed leave under the Order was known as VOLO leave.

⁷ Inserted by the IAA 1999, s 3, substituted by the NIAA 2002, s 118.

⁸ IA 1971, s 3C(2) (as substituted). For ‘finally determined’, ‘withdrawn’ and ‘abandoned’ see 18.104–18.106 below. Statutory leave under the section is subject to the same conditions as the original leave.

⁹ IA 1971, s 3C(4) and (5) (as substituted).

¹⁰ *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78, [2009] All ER (D) 193 (Feb). The Court said that in *DA (Ghana)* [2007] UKAIT 00043 the Tribunal was wrong to have held that an application could not be varied so as to change the purpose for which leave to remain was sought. Note paras 34A and 34E of the Immigration Rules as to the procedural requirements for variation of a variation application.

¹¹ Under the NIAA 2002, s 120.

¹² By virtue of the NIAA 2002, s 85(2).

¹³ IA 1971, s 3C(3) (as substituted).

Appeals against removal: overstayers, illegal entrants, ship and aircrews

18.39 Illegal entrants,¹ overstayers (including overstaying crew members),² those in breach of conditions, persons who have remained in the UK by deception and their family members may be summarily removed by directions given by an immigration officer.³ They have an unrestricted right of appeal against the decision to remove them⁴ (by contrast to the right of appeal that existed under the IAA 1999, which was limited to challenging the existence of the power to remove on the grounds stated in the notice).⁵ However, the right of appeal may only be exercised after removal⁶ unless the person has made an asylum or human rights claim, which has not been certified clearly unfounded⁷ or a claim that the decision breaches Community law, whilst in the UK.⁸ An appeal against refusal of leave to enter is not an appeal against removal directions, even though the notice of decision may include such directions or refer to an intention to give them.⁹

¹ See 16.3 above.

² See 6.36 above.

³ Under the IA 1971, Sch 2, paras 9, 10, 12(2), 13(2), and the IAA 1999, s 10; see chapter 16.

⁴ NIAA 2002, s 82(2)(g),(h), (i) and (ia) (s 82(2)(ia) inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 31 from 1 October 2004.

⁵ IAA 1999, s 66; see 5th edn at 18.25–18.26.

⁶ NIAA 2002, s 92(1).

⁷ NIAA 2002, s 92(4)(a) and 94(2) as amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 27 from 1 October 2004 (SI 2004/2523).

⁸ NIAA 2002, s 92(4)(b).

⁹ *MA (Somalia) v Secretary of State for the Home Department* [2009] EWCA Civ 4, [2009] All ER (D) 65 (Jan).

POWERS OF THE TRIBUNAL

‘In accordance with the law’

18.53 The issue has lost some of its relevance, now that no right of appeal attaches against refusal to allow someone to remain for a purpose other than

one for which entry or stay is permitted under the rules, save on asylum, human rights and race discrimination grounds.¹ There is still room for an argument that the decision is ‘not in accordance with the law’ under s 86(3)(a), in cases where the *purpose* of stay is recognised by the rules, although waiver of part of the rule’s requirements, or an extension of its application, is sought, in accordance with Home Office policy, and s 86(6) precludes argument on the merits of the extra-statutory discretion.² This might apply, for example, to cases involving family reunion (a purpose recognised by the rules) where the sponsor has discretionary leave (a status which does not provide for immediate family reunion). Another factor limiting the relevance of these old arguments on jurisdiction is that many of the policies which formed the basis of extra-rules appeals have now been incorporated into the rules,³ and even where they have not, since policies are generally based on human rights considerations, many of the old arguments can be recast to better effect in human rights terms. Relevant policies may be relied on to support an argument about the proportionality of an interference with a right protected by Article 8 (as to which, see chapter 8). This has the added benefit that the Tribunal can, in the course of determining whether there is a breach of Article 8, decide whether the appellant benefits from the policy; if the Tribunal finds such a breach, it must allow the appeal and, where appropriate issue directions for the grant of leave or entry clearance. It is not restricted to leaving it for the Secretary of State to decide on the proper basis – the limit of what could generally⁴ be achieved in appeals relating to extra-rules discretion before the Human Rights Act.⁵ Nevertheless, in appeals against removal in particular, it is still possible to argue that a decision is not in accordance with the law because it fails to have regard to a relevant policy (such as that on expulsion of families with children),⁶ and this can be a free-standing ground of appeal; although the prerequisite of an in-country appeal against removal is an asylum or human rights claim in the UK, the appeal is not limited purely to human rights grounds.⁷ A decision to make a deportation order was ‘not in accordance with the law’ because of failure to have regard to a policy that was in force at the time of the decision but withdrawn by the time of the appeal.⁸

¹ NIAA 2002, s 88(2)(d), although it is arguable that once an appeal is brought under s 88(4) on human rights grounds, the Tribunal would be obliged to allow it if the decision is not in accordance with the law; in other words the human rights ground acts as a gateway to all the statutory grounds of appeal under s 84(1).

² An example from earlier times would be the Somali Family Reunion Policy, which (inter alia) extended the scope of family reunion to all family members living as part of the family unit before the sponsor’s departure. The purpose of the stay, family reunion, was clearly recognised under the rules, but its extension to relatives other than spouse and minor children required extra-statutory discretion, not appealable on the merits but appealable by reference to the terms of the policy itself.

³ For example, former policies on long residence, unmarried partners, domestic violence, access to UK-based children are now all within the rules.

⁴ *Abdi (Dhudi Saleban)* [1996] Imm AR 148, CA. Only if the terms of the policy as applied to the facts of the particular case leave no discretion to the Secretary of State might an appellant succeed substantively as opposed to the Secretary of State being required to make a new decision – *AG (Kosovo)* [2007] UKAIT 0082.

⁵ The Tribunal cannot exercise the Secretary of State’s discretion: NIAA 2002, s 86(6), *Kausar* [1998] INLR 141.

⁶ DP5/96 as amended (sometimes known as DP069/99), see *R (on the application of Dabrowski) v Secretary of State for the Home Department* [2003] EWCA Civ 580, [2003] Imm AR 454, [2003] INLR 411. However, policy considerations must be raised at the

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appropriate time, and the Tribunal has held that it is premature to argue that the Secretary of State has failed to have regard to a policy before he or she is required to consider it: *BV (Vietnam)* [2004] UKIAT 00148, on application of policy on unaccompanied asylum seeking children.

⁷ See the NIAA 2002, s 92(4)(a).

⁸ *HH (Iraq)* [2008] UKAIT 00051, concerned with the Secretary of State's policy not to deport to active war zones.

Scottish or English law

18.56 The Immigration Acts and Rules apply throughout the UK and there is a unified appellate authority. This should mean that the law is the same in both Scotland and England. There are divergences in higher court decisions, particularly in areas such as detention,¹ in the exclusion of unfairly obtained evidence in illegal entry decisions,² and over the issue of delay in judicial review,³ but in asylum cases at least, the distinctions between Scottish and English decisions are more apparent than real. Two questions arise. The first is a choice of law and the second a choice of jurisdiction. First, if there is a conflict between the Scottish and English decisions, which law should the Tribunal apply? In *Akbar*⁴ the Tribunal suggested that if the judicial approach differs in any material way, it will be for the appellate authority to decide with which legal system the case is most closely connected. Secondly, can appellants choose whether to litigate in Scotland or England? At Tribunal level, the matter does not arise, since there is no distinct appellate unit in either jurisdiction. In applications for review and in appeals from determinations by the Tribunal the choice of jurisdiction is determined by statute. The appeal goes to the Court of Session where the determination of the Tribunal is made in Scotland and in all other cases to the Court of Appeal;⁵ the application for review of a Tribunal decision made in Scotland goes to the Outer House of the Court of Session, and otherwise, to the Administrative Court.⁶ Decisions of the Tribunal in Northern Ireland go on appeal to the Northern Ireland Court of Appeal and on review to the High Court in Northern Ireland.⁷ Where the appeal was decided determines the jurisdiction in which the application for review or appeal from the Tribunal is made and if an appeal is reconsidered, it is 'decided' in the place where the reconsideration took place.⁸

¹ *Sokha v Secretary of State for the Home Department* [1992] Imm AR 14, CS.

² *Oghonoghor v Secretary of State for the Home Department* 1995 SLT 733; *Kim (Sofia) v Secretary of State for the Home Department* 2000 SLT 249, OHCS, Lord Abernethy.

³ *Singh (Gurjit)* (14 March 2000, unreported), OH CS, Lord Nimmo Smith.

⁴ (8670) IAT.

⁵ NIAA 2002, s 103B(5), (6) (inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 26). The Court of Appeal's decision in *Gardi v Secretary of State for the Home Department* [2002] EWCA Civ 750 [2003] Imm AR 39, [2002] INLR 499 was nullified (see *Gardi v Secretary of State for the Home Department (No 2)* [2002] EWCA Civ 1560, [2002] INLR 557) because it transpired that the decision on appeal emanated from an adjudicator sitting in Scotland, and so should have gone to the Court of Session under the previous provisions, IAA 1999, Sch 4, para 23(3).

⁶ NIAA 2002, s 103A(9), (10) as inserted. Although prior to the NIAA 2002 there was no statutory jurisdictional bar on the High Court hearing applications for review of decisions from adjudicators in Scotland, Jackson J declined jurisdiction in *R (on the application of Majeed) v Secretary of State for the Home Department* [2002] EWHC 2299 (Admin), citing by analogy the provisions of the IAA 1999 (above). See the Court of Appeal's judgment at [2003] EWCA Civ 615 and *Tehrani v Secretary of State for the Home Department* [2006] UKHL 47, [2007] 1 AC 521, [2007] 1 All ER 559.

⁷ NIAA 2002, s 103A(9)(c).

⁸ *HT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA Civ 1508, [2009] All ER (D) 24 (Jan).

‘Including Immigration Rules’

18.58 For the purposes of s 86(3)(a), ‘the law’ includes ‘Immigration Rules’ but is not synonymous with them. We have considered above situations where it is argued that the Immigration Rules themselves do not adequately reflect the relevant law.¹ But in many if not most cases, the Tribunal’s first port of call, if not its last, will be the Immigration Rules. If a decision is not in accordance with Immigration Rules, the appeal should be allowed, subject to the proviso already referred to (that a removal decision will not be invalid because the wrong provision is cited, if the person is removable under another provision).² The rules to be considered by the Tribunal are (absent transitional provisions or a properly established legitimate expectation to the contrary) those applicable at the time of the decision appealed against, not those applicable at the time the application was made or those applicable at the time of the hearing.³ Thus, where the wrong rule is applied, and the decision is based on grounds which are inapplicable to the applicant, the decision is not in accordance with rules;⁴ nor is it in accordance with Immigration Rules where the evidence before the Tribunal establishes the appellant’s eligibility for entry under the relevant rule.⁵ Because of this provision the Immigration Rules have the force of law for the purposes of appeals, though not for other purposes.⁶ The case law reflects some conflict between two principles: on the one hand, the appellate authority must ensure that the decision is in accordance with Immigration Rules generally, implying a broad jurisdiction;⁷ on the other, it is only entitled to determine that which is before it for determination.⁸ The position may be summarised as follows:

- (1) the Tribunal is not restricted to the particular rule or part of a rule relied on in the notice of decision or explanatory statement, but, having found the facts, is entitled to apply the Immigration Rules applicable to the case having regard to those facts, subject to giving the parties a fair opportunity to deal with the issue.⁹ This applies whether the new rule involves mandatory refusal or the exercise of discretion.¹⁰ However, if the facts known to the decision maker could support a ground for refusal that is not cited in the notice of decision, the Tribunal is entitled to assume that that potential ground for refusal is not relied on and is not in issue in the appeal;¹¹
- (2) the Tribunal is not entitled, however, to go behind a finding of fact of the Secretary of State favourable to the appellant;¹²
- (3) similarly, the respondent may seek to rely on a new rule applicable to the facts, subject to providing the appellant with a fair opportunity to deal with the new rule, by amendment of the refusal decision or the issue of a new explanatory statement;¹³
- (4) the respondent may not, however, seek to alter the statutory basis of its decision, eg by relying on a wholly different deportation power in the IA 1971 from that originally exercised;¹⁴
- (5) the principle for appellants is that if they make clear the facts that they rely on when making their application, they are not required to set out

all the different potentially applicable Immigration Rules.¹⁵ They must be permitted to ventilate on appeal eligibility under rules other than those previously considered by the respondent,¹⁶ provided the fact found forms part of the basis of the decision, since to hold otherwise would mean that the scope of the right of appeal would be confined to the basis on which the respondent chose to frame it.¹⁷ The pre-2002 Act cases suggest that there is no jurisdiction to allow an appeal against a decision on the basis that if the application had been made on another ground it might have qualified under another section of the rules,¹⁸ particularly if the grounds are mutually exclusive but this restriction may no longer apply, given the one-stop principle and its draconian enforcement by the NIAA 2002, s 96 on the one hand, and on the other, the new broad jurisdiction of the AIT;¹⁹

- (6) the Tribunal may on its own initiative have regard to any particular rule that bears on the case put forward by the appellant with regard to the decision or action appealed against,²⁰ but it is not required to conduct a roving inquiry into whether the facts could fit any conceivable rule in the absence of submissions to that effect²¹ or reference to the rule in the grounds of appeal as originally formulated or subsequently amended;²²
- (7) the appellant may raise wholly new matters on appeal, in response to a one-stop warning, by providing a statement of additional grounds.²³ Where no one-stop warning has been issued, we suggest that he or she may raise new matters by amendment to the grounds of appeal (subject to the consent of the Tribunal, which ought to give consent, provided the respondent is given a fair opportunity to deal with the new issues) otherwise, once more the scope of the appeal would be determined by the respondent, in this case by its failure to serve a one-stop notice.²⁴ The one-stop provisions²⁵ mean that it is wrong to suggest that an appeal may only succeed if it can be shown that the specific application made by the appellant and to which the immigration decision responds would succeed if decided on the day of the hearing.²⁶ The one-stop procedure expressly contemplates grounds being advanced that were not contained in the original application to which the immigration decision is a response²⁷ and requires the Tribunal to consider them.²⁸
- (8) given the obligation on the Tribunal to consider circumstances in existence at the date of the hearing²⁹ (other than in entry clearance appeals and appeals against refusal of a certificate of entitlement), an appellant able to show that he or she meets the requirements of the rules at the time of the hearing should be entitled to succeed on the ground that the decision was not in accordance with the rules even if he or she did not qualify at the time of the decision.³⁰

¹ See also *M & A v Secretary of State for the Home Department* [2003] EWCA Civ 263, [2003] Imm AR 4, where the Court of Appeal emphasised that the rules must be given a purposive construction, so that the requirement that there be 'adequate accommodation' for children seeking to join parents would not be met when there were serious welfare concerns about the children living with their parents.

² NIAA 2002, s 86(4).

³ *PP (India)* [2005] UKAIT 00141; *MO (Nigeria)* [2007] UKAIT 00057; *EO (Turkey)* [2007] UKAIT 00062; *AA (Pakistan)* [2008] UKAIT 0003; *MO (Nigeria) v Secretary of State for the Home Department* [2008] EWCA Civ 308, [2009] 1 WLR 126.

- ⁴ *R v Immigration Appeal Tribunal, ex p Khan* [1975] Imm AR 26. This happens most frequently in cases involving family settlement, where for example the 'living alone in the most exceptional compassionate circumstances' test is wrongly applied to an appellant. This does not, of course, mean that the appellant would succeed on the merits under the correct rule, and there would be no point in allowing the appeal to the extent of holding that the issue remains outstanding before the Secretary of State or ECO for reconsideration under the correct rule, if it would make no difference to the result. That is why the Tribunal may – and perhaps should – instead consider the appeal under the correct rule, subject to giving the appellant a fair opportunity to deal with the issue; see below.
- ⁵ For a case which illustrates both the 'law' and 'rules' jurisdiction neatly, see *Ibeakanma* (18632) (25 September 1998, unreported).
- ⁶ *Pearson v Immigration Appeal Tribunal* [1978] Imm AR 212; *R v Secretary of State for the Home Department, ex p Hosenball* [1977] 3 All ER 452, [1977] 1 WLR 766, CA; *Singh v Immigration Appeal Tribunal* [1986] 2 All ER 721, [1986] Imm AR 352, HL.
- ⁷ *R v Immigration Appeal Tribunal, ex p Khan* [1975] Imm AR 26; *R v Immigration Appeal Tribunal, ex p Hubbard* [1985] Imm AR 110, QBD.
- ⁸ *R v Immigration Appeal Tribunal, ex p Akhtar* (1982) 126 Sol Jo 430, QBD. The Tribunal leaned towards this approach in *Immigration Officer (Nigeria)* [2004] UKIAT 00179, holding that applicants for entry clearance 'are entitled to assume that their ability to satisfy particular requirements of the rules has not been put in issue unless the entry clearance officer unequivocally puts it in issue'. Although the Tribunal recognised that the immigration judge could give the appellant express notice that another requirement of the rules is being put in issue, it went on to observe that the injustice to the appellant caused by the delay inherent in such a procedure was likely to outweigh that caused by assuming that requirements not put in issue were in fact met.
- ⁹ *R v Immigration Appeal Tribunal, ex p Hubbard* [1985] Imm AR 110; *R v Immigration Appeal Tribunal, ex p Malik* (1981) Times, 16 November, QBD; *Agyen-Frempong v Immigration Appeal Tribunal* [1988] Imm AR 262, CA; see also *Entry Clearance Officer, Manila v Brey* [2002] UKIAT 06655; *CP (Dominica)* [2006] UKAIT 0040; *JF (Bangladesh)* [2008] UKAIT 0008.
- ¹⁰ *Tahir (Nadeem) v Immigration Appeal Tribunal* [1989] Imm AR 98, CA.
- ¹¹ *RM (India)* [2006] UKAIT 00039.
- ¹² *R v Immigration Appeal Tribunal, ex p Hubbard* [1985] Imm AR 110. There is a distinction between a positive finding of fact or credibility by the Secretary of State, which the Tribunal should not seek to subvert, and a mere failure to take the point by the Secretary of State, which leaves the Tribunal free to do so: *Carcabuk and Bla* (00TH01426) (18 May 2000, unreported), IAT. But see *Immigration Officer (Nigeria)* [2004] UKIAT 00179 (fn 8 above).
- ¹³ *R v Immigration Appeal Tribunal, ex p Hubbard* [1985] Imm AR 110; *Parsaiyan* [1986] Imm AR 155, IAT; *Uddin v Immigration Appeal Tribunal* [1991] Imm AR 134, CA.
- ¹⁴ *R v Immigration Appeal Tribunal, ex p Mehmet* [1978] Imm AR 46; *Secretary of State for the Home Department v Ziar (Salah)* [1997] Imm AR 456, [1997] INLR 221 (grounds for certification of claim).
- ¹⁵ *Khatun (Kessori)* (4272).
- ¹⁶ *SZ (Bangladesh)* [2007] UKAIT 00037.
- ¹⁷ *Rahman (Aklakur)* (00TH00307) (10 March 2000).
- ¹⁸ *Uddin (Hawa Bibi) v Immigration Appeal Tribunal* [1991] Imm AR 134, CA (application on the basis of marriage which was found invalid; appeal raised issue of common law relationship).
- ¹⁹ In particular, the omission of the definite article in s 84(1)(a) and the breadth of the matters to be considered in s 86(2)(b) and s 85(2), (4). For the position under the old law see *Hussain (Shabir)* [1991] Imm AR 483 (IAT).
- ²⁰ *Uddin (Hawa Bibi) v Immigration Appeal Tribunal* [1991] Imm AR 134, CA; *R v Immigration Appeal Tribunal, ex p Ali (Tohur)* [1987] Imm AR 189, QBD; whether the appellate authority ought to do so was reserved in Court of Appeal [1988] Imm AR 237. In *Seymour (Selwyn)* [2002] UKIAT 00594 the Tribunal accepted that the adjudicator could have dealt with the appeal on the alternative basis put forward by the appellant.
- ²¹ *Ali (Mohammed Frazor) v Secretary of State for the Home Department* [1988] Imm AR 274, CA; *R v Immigration Appeal Tribunal, ex p Uddin (Hawa)* [1990] Imm AR 309, QBD; on appeal [1991] Imm AR 134, CA; *Robinson v Immigration Appeal Tribunal* [1997] Imm AR 568, CA. But see text and fn 19 above.
- ²² *SZ (Bangladesh)* [2007] UKAIT 00037.

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²³ See 'Scope of Appeal' above.

²⁴ Cf *Rahman (Aklakur)*, fn 17 above. See discussion at 18.52 above.

²⁵ NIAA 2002, ss 84(1), 85(2), 86(2)(b) and 120.

²⁶ As the Tribunal does in *EA (Nigeria)* [2007] UKAIT 00013, suggesting that a student application made for the purpose of studying on a particular course could not succeed if at the date of the appeal the appellant was taking an entirely different course.

²⁷ NIAA 2002, s 120(3).

²⁸ NIAA 2002, s 85(2).

²⁹ NIAA 2002, s 85(4).

³⁰ *LS (Gambia)* [2005] UKAIT 00085.

The appellate jurisdiction in asylum and human rights appeals

18.69 While the jurisdiction of the Tribunal set out in s 86(3) of the NIAA 2002 applies equally to an appeal on asylum or human rights grounds under s 84(1)(g), in cases where no other appeal grounds are available, the ground of appeal is that the appellant's removal in consequence of the decision would breach the UK's obligations under the Refugee Convention or would be unlawful under s 6 of the Human Rights Act 1998 as incompatible with the Human Rights Convention.¹ This has positive and negative consequences for the Tribunal's jurisdiction on appeal. On the one hand, even where the Secretary of State has failed to consider a claim substantively but has refused an application for failure to attend an interview or complete a statement of evidence form, the Tribunal on appeal must decide whether the appellant's removal is in breach of the Refugee Convention (and, we suggest, the Human Rights Convention too).² An appeal on asylum grounds requires the Tribunal to decide whether, if returned, the appellant would face a real risk of persecution, even if for practical, political or other reasons the Home Office is not at that time removing persons to the country concerned.³

Human rights issues can arise in relation to the method, route, timing or destination of removal consequent on an immigration decision, but only if there is sufficient evidence as to what the method, route timing or destination will be; the Tribunal cannot be expected to speculate as to those issues.⁴ The issue may arise if an immigration decision is accompanied by removal directions or, in the absence of removal directions if there is an applicable policy, statement or undertaking in relation to removal. Otherwise the only human rights issues that can be litigated will be the consequences of removal from the UK and of presence in the destination country.⁵ If the Tribunal rejects the appellant's claim to be a national of the country in which he or she claims to be at risk it need not go on to determine whether the person's removal there would in fact breach his or her human rights so long as the Secretary of State undertakes not to remove the person to that country.⁶ The absence of removal directions does not prevent the Tribunal from determining whether, if the appellant was eventually removed, he would be refused entry to his country of habitual residence and whether such refusal would amount to persecution; the relevant ground for appeal ('removal in consequence of the immigration decision would breach the Refugee Convention'⁷) required a hypothetical question to be addressed and did not require the existence of removal directions.⁸ There may be no prospect of imminent removal as a result of an immigration decision because the appeal is against a variation decision as

opposed to a removal decision or in cases where, for practical or policy reasons there is no foreseeable prospect of removal. In such cases the Tribunal is not relieved of the obligation to determine any human rights grounds that may be raised;⁹ the question for the Tribunal is whether removal in consequence of the decision would breach the appellant's human rights.¹⁰ Even if the Secretary of State gave an undertaking not to remove the appellant whilst she was involved in contact proceedings relating to her children, she would be entitled to succeed in her appeal if she could make good the hypothesis that, at the time of the hearing, removing her and thereby preventing her from participating in the contact proceedings would breach her human rights.¹¹ Similarly, an undertaking by the Secretary of State not to remove a minor until and unless adequate reception arrangements had been made did not relieve the Tribunal of the obligation to determine the appeal in the light of what the evidence showed about the actually existing reception arrangements at the time of the hearing. Otherwise the Tribunal would be denying the appellant the statutory right of appeal and instead delegating part of the decision to the Secretary of State.¹² An appeal under s 82 which suspends removal because the person has made an asylum or human rights claim in the UK which has not been certified clearly unfounded¹³ (or a claim under Community law, for that matter),¹⁴ is not limited to those grounds, however, but may include any or all of the statutory grounds under s 84(1).¹⁵ Such an appeal might encompass the lawfulness of the proposed removal destination, or arguably the lawfulness of the asylum procedure applied to a minor.¹⁶ However, this does not apply to an appeal against refusal of leave to enter or refusal to vary leave where a ground of refusal is ineligibility; in such a case, any appeal may be brought only on discrimination, human rights or asylum grounds.¹⁷

¹ NIAA 2002, s 86(3) read with s 84(1)(g), see also s 84(1)(c).

² *Haddad (Ali)* [2000] INLR 117, *Busuulwa* (01TH 00239) IAT; see fn 1. Paragraph 340 (non-compliance refusals) applies to asylum claims, while para 322(10) is an equivalent in non-asylum cases; and the principles of *Haddad* apply to removal which would breach either Convention. For a discussion of the wording of s 86(3) in relation to appeals on asylum and human rights grounds see 18.49 above.

³ *Saad v Secretary of State for the Home Department*, *Diriye v Secretary of State for the Home Department*, *Osorio v Secretary of State for the Home Department* [2001] EWCA Civ 2008, [2002] Imm AR 471, [2002] INLR 34; *R (Secretary of State for the Home Department) v Immigration Appeal Tribunal*; *R (on the application of Hwez) v Secretary of State for the Home Department* [2001] EWHC 1597 (Admin), [2002] Imm AR 116. The difference between the Refugee and Human Rights Convention is that recognition under the Refugee Convention confers a particular status in international law: *I. (Ethiopia)* [2003] UKIAT 00016, paras 62–63.

⁴ *GH v Secretary of State for the Home Department* [2005] EWCA Civ 1182 and *AG v Secretary of State for the Home Department* [2006] EWCA Civ 1342, [2006] All ER (D) 189 (Oct).

⁵ *GH v Secretary of State for the Home Department* [2005] EWCA Civ 1182, [2005] 42 LS Gaz R 25, upheld in the Court of Appeal which said 'the Home Department statutory scheme of immigration control postulated that someone who successfully maintained that their removal would constitute a violation of their ECHR rights should be entitled to leave to enter' – *S v Secretary of State for the Home Department* (sub nom *R (on the application of GG) v Secretary of State for the Home Department*) [2006] EWCA Civ 1157, [2006] All ER (D) 30 (Aug).

⁶ *MA (Somalia) v Secretary of State for the Home Department* [2009] EWCA Civ 4, [2009] All ER (D) 65 (Jan).

⁷ NIAA 2002, s 84(1)(g).

⁸ *AK v Secretary of State for the Home Department* [2006] EWCA Civ 1117, [2006] All ER (D) 470 (Jul).

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- ⁹ *JM v Secretary of State for the Home Department* [2006] EWCA Civ 1402, overturning *JM (Liberia)* [2006] UKAIT 0009*.
- ¹⁰ NIAA 2002, s 84(1)(g).
- ¹¹ *MS (Ivory Coast) v Secretary of State for the Home Department* [2007] EWCA Civ 133, (2007) Times, 27 March.
- ¹² *CL (Vietnam) v Secretary of State for the Home Department* [2008] EWCA Civ 1551, (2009) Times, 7 January.
- ¹³ *Je* under NIAA 2002, s 94.
- ¹⁴ NIAA 2002, s 92(4).
- ¹⁵ *SA (Bangladesh)* [2005] UKAIT 00178.
- ¹⁶ NIAA 2002, s 84(1)(e); see *Shaqiri* [2002] UKIAT 04159; *Melikli* [2002] UKIAT 07428.
- ¹⁷ NIAA 2002, s 88; see 18.21 above. Arguably, once an appeal has been brought on asylum or human rights grounds, ss 85 and 86 oblige the Tribunal to consider all the issues as set out there.

Giving directions where an appeal is allowed

18.72 Under s 87(1) of the NIAA 2002, where an appeal is allowed, the Tribunal may give a direction for the purpose of giving effect to the decision.¹ A direction is part of the Tribunal's decision on appeal, for the purposes of an application for review.² The person responsible for making the immigration decision must act in accordance with any relevant direction,³ but directions have no effect while an in-time onward appeal or application for review may be brought, or has been brought and has not been finally determined, or where the Tribunal has made a reference under s 103C of the Act which is awaiting determination.⁴ The power to make directions under this section is a completely separate power from the power of the Tribunal to give procedural directions for the conduct of the appeal, which is contained in the Procedure Rules.⁵ Directions under the section (i) can only be given where an appeal is allowed, (ii) to give effect to the decision.⁶ The difficulty is in defining when it is necessary to give directions. Where an application for entry clearance is made for settlement and an appeal against a refusal is allowed, there is little difficulty in directing that entry clearance should be issued in the capacity sought. This is because all relevant issues will now have been determined in favour of an appellant. The entry clearance officer will be bound by this direction in the absence of an appeal. But where the appeal is against a refusal of entry in some limited capacity, as a family visitor, an au pair or a student, it is likely that the passage of time since the decision will have led to a change of circumstances. The Tribunal has suggested that entry clearance should not generally be directed in these cases.⁷ If the immigrant still seeks entry, the matter should be remitted for reconsideration by the entry clearance officer in the light of the decision.⁸ In such circumstances the entry clearance officer would be bound by the positive findings in favour of the appellant unless it can be proved to a high civil standard that the findings were obtained by fraud,⁹ but other issues such as *present* intentions or ability to maintain may be considered.¹⁰ The direction given for the grant of entry clearance on a successful appeal is spent when such entry clearance is granted, and the failure of an appellant to use it does not oblige an entry clearance officer to grant another years later without a further decision.¹¹ The making of a direction is not necessary in order to give a determination binding effect upon the respondent, at least where entitlement to status such as indefinite leave to remain on marriage grounds is in issue¹² and once an appeal against refusal of

leave to enter has been allowed and there is no further appeal there is a clear duty on the Secretary of State to give effect to the immigration judge's decision; 'it would strike at the heart of the independent appeal system ... if the Secretary of State felt free to deliberately circumvent an adverse decision by the Tribunal simply because he disagreed with the outcome on the merits'.¹³ The principle is that 'the decision of the Tribunal is binding on the parties and in particular on the Home Secretary'.¹⁴ Thus the Secretary of State could not lawfully withhold refugee status by reference to the person's commission of a 'particularly serious offence' after he who won his appeal on Refugee Convention grounds and the fact of the offence had been considered by the Tribunal;¹⁵ nor could humanitarian protection be denied on the ground that the successful appellant was excluded by virtue of his conviction for threats to kill in circumstances where the Secretary of State could have, but did not rely on the conviction to argue for exclusion before the Tribunal.¹⁶

¹ NIAA 2002, s 87. The power to make directions was formerly contained in the IAA 1999, Sch 4, para 21(5) and para 22(5)–(7). The statutory power to make recommendations when allowing an appeal was rarely used and has been abolished.

² NIAA 2002, s 87(4), amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, Sch 2, para 19(b).

³ NIAA 2002, s 87(2).

⁴ NIAA 2002, s 87(3), amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, Sch 2, para 19(a).

⁵ See the Asylum and Immigration Tribunal (Procedure) Rules 2005, r 45.

⁶ Thus, the Secretary of State cannot be directed to issue a fresh refusal letter as a condition of defending a decision on appeal. The asylum rules are procedural, not substantive: *Mwanza v Secretary of State for the Home Department* [2001] Imm AR 557, [2001] INLR 616, CA; followed in *R (on the application of Emlik) v Immigration Appeal Tribunal* [2002] EWHC 1279 (Admin), [2002] All ER (D) 209 (Jun); *R (on the application of Zaier) v Immigration Appeal Tribunal* [2003] EWCA Civ 937, [2003] All ER (D) 153 (Jul), holding further that there was no power under IAA 1999 to remit an asylum claim to the Secretary of State for redetermination. Directions issued for a purpose other than that of giving effect to the decision on appeal are of no effect: *Secretary of State for the Home Department v Fardy* [1972] Imm AR 192; *R v Immigration Appeal Tribunal, ex p Singh* [1984] Imm AR 1, QBD.

⁷ *MG (Jamaica)* [2004] UKIAT 00140, [2004] Imm AR 377, following *Immigration Officer, Heathrow v Obeid* [1986] Imm AR 341; *EA (Ghana)* [2005] UKIAT 00108 and *EB (Ghana)* [2005] UKAIT 00131.

⁸ An alternative approach might be to direct entry clearance conditional on the production of up to date documents; *Visa Officer, Aden v Thabel* [1977] Imm AR 75. However, in *S (Yemen)* [2003] UKIAT 00008, the Tribunal held directions to an ECO to investigate the sponsor's property and domestic circumstances inappropriate, they were not direction for giving effect to a decision to allow a family visitor appeal, but for not giving effect to it unless satisfied on matters relevant to the genuineness of the visit..

⁹ *R v Immigration Appeal Tribunal, ex p Miah* [1987] Imm AR 143, QBD; *R v Secretary of State for the Home Department, ex p Yousuf* [1989] Imm AR 554; *R (on the application of Saribal) v Secretary of State for the Home Department* [2002] EWHC 1542 (Admin), [2002] INLR 596, [2002] All ER (D) 379 (Jul). See, however, *R (Rahman) v Entry Clearance Officer* [2006] EWHC 1755 (Admin); whilst following a successful appeal against refusal of entry clearance, the ECO could not embark on further enquiries intended to circumvent the decision on the appeal, the ECO was nevertheless obliged to determine on the facts before him or her, including those that might establish earlier deception on mistake of fact, whether entry clearance should be granted.

¹⁰ However, in the absence of an appeal, the failure to give directions to give effect to a determination relating to the subsistence of a marriage did not entitle the Secretary of State to issue a fresh decision after the marriage had broken down, and the applicant was entitled to the benefit of the positive determination: *R (on the application of Bofo) v Secretary of State for the Home Department* [2002] EWCA Civ 44, [2002] 1 WLR 1919.

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- ¹¹ *R v Secretary of State for the Home Department, ex p Moon* [1997] INLR 165, QBD. See also *Hashim* (6421), where directions were quashed by consent because there had been a change of circumstances and a fresh application for entry between the original decision and the appeal.
- ¹² *R (Boafo) v Secretary of State for the Home Department* [2002] EWCA Civ 44.
- ¹³ *R (on the application of GG) v Secretary of State for the Home Department* [2006] EWHC 1111 (Admin), (2006) Times, 14 June, [2006] All ER (D) 143 (May); affd sub nom *S v Secretary of State for the Home Department* (sub nom *R (on the application of GG) v Secretary of State for the Home Department*) [2006] EWCA Civ 1157, [2006] All ER (D) 30 (Aug), upheld in *S v Secretary of State for the Home Department* (sub nom *R (on the application of GG) v Secretary of State for the Home Department*) [2006] EWCA Civ 1157, [2006] All ER (D) 30 (Aug).
- ¹⁴ *Secretary of State for the Home Department v TB (Jamaica)* [2008] EWCA Civ 977, (2008) Times, 9 September. The Tribunal's decision in *MM (Pakistan)* [2008] UKAIT 00040 that entry clearance could lawfully be refused to a successful appellant upon his further application, by reference to the same facts as had been before the Tribunal is incompatible with these authorities.
- ¹⁵ *Secretary of State for the Home Department v TB (Jamaica)*.
- ¹⁶ *R (on the application of Erdogan) v Secretary of State for the Home Department* [2008] EWHC 2446 (Admin), [2008] All ER (D) 102 (Sep).

PROCEDURE ON APPEALS

Notice of appeal

18.92 A notice of appeal has to be made on a form approved for the purpose by the President of the Tribunal,¹ as displayed on the Tribunal's website at the time the notice of appeal is given.² The notice must set out the name and address of the appellant and of his or her representative (if any), the grounds for the appeal and reasons in support of those grounds,³ and must, so far as practicable, list any documents the appellant intends to rely on as evidence in support of the appeal.⁴ The notice must be signed by the appellant or the appellant's representative and dated.⁵ If the appellant's representative signs the notice, he or she must certify in the notice of appeal that it has been completed in accordance with the appellant's instructions.⁶ The notice must be accompanied by a copy of the notice of decision which is the subject of the appeal or, if that is not practicable, the reasons why it is not.⁷ Failure to provide satisfactory reasons may result in the appeal being determined without a hearing.⁸ The form requires other particulars, including details of the appellant's age, citizenship or nationality and of previous appeals. The same provisions apply to appeals under the fast track procedure.⁹ Any notice of appeal or application notice filed with the Tribunal must be completed in English.¹⁰ Cases under the old rules suggest that many of the requirements in the notice are not mandatory, and failure to include some of the information would not invalidate an appeal.¹¹ The guidance provided by the Court of Appeal case of *Jeyanthan*¹² has resonance here, although the language of the Procedure Rules is very strict.¹³

¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 8(1), as amended by SI 2006/2788.

² Asylum and Immigration Tribunal Practice Directions (30 April 2007), para 2A.

³ SI 2005/230, r 8(1)(a)–(d), see below.

⁴ SI 2005/230, r 8(1)(e). This requirement is new, and reflects the fact that the notice goes to the Tribunal, not (as before) to the respondent: see 18.91 below.

⁵ SI 2005/230, r 8(3).

- ⁶ SI 2005/230, r 8(4).
- ⁷ SI 2005/230, r 8(2), as amended with effect from 12 May 2008 by SI 2008/1088. The requirement that the notice of appeal should be accompanied by the decision appealed against is new, and reflects the fact that the notice goes to the Tribunal, not (as before) to the respondent: see 18.91 below.
- ⁸ SI 2005/230, r 15(2)(c), as amended by SI 2008/1088.
- ⁹ The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005, SI 2005/560, r 6(b).
- ¹⁰ SI 2005/230, r 52(1)(a). It may be in Welsh, if the appeal is in or has a connection with Wales: r 52(2). The Tribunal is under no duty to consider a document which is not in English (or if appropriate, in Welsh): r 52(3), (2). Other documents filed with the Tribunal must be accompanied by a certified translation, if not in English or Welsh: r 52(1)(b), (2).
- ¹¹ *Jarvis* [1994] Imm AR 102; *R v Immigration Appeal Tribunal, ex p Begum (Hamida)* [1988] Imm AR 199, QBD; *Re Sogunle* [1994] Imm AR 554. The intention is not to sanction appellants who, through no fault of their own, have failed to complete the form fully or correctly, but to encourage them to do so in order for their appeal to be handled promptly: DCA document following consultation on procedure rules, 8 February 2005.
- ¹² *R v Immigration Appeal Tribunal, ex p Jeyanthan*; *Ravichandran v Secretary of State for the Home Department* [2000] 1 WLR 354, [2000] Imm AR 10, [2000] INLR 241. See 18.84 above.
- ¹³ Under the 2005 Procedure Rules, r 2, a person is not an appellant unless he or she has given a notice of appeal to the Tribunal in accordance with the rules. Too strict an interpretation would be inconsistent with human rights obligations.

Late notice of appeal

18.99 The Procedure Rules indicate that both decisions on timeliness of a notice of appeal, and whether to extend time, are preliminary decisions.¹ Because of this, there is no possibility of appeal² or review³ under the NIAA 2002 as amended, of the Tribunal's decision that a notice of appeal was filed out of time and so that there is no valid appeal before it. A decision on the validity of a purported appeal is treated the same as an exercise of discretion not to extend time, although the two decisions could not be more different, as the Tribunal in *B (Zimbabwe)* explained.⁴ After 4 April 2005, it appears that the only remedy for an unlawful decision that an appeal was lodged out of time is judicial review. However, the Tribunal has taken the view that if it is persuaded that such a decision was wrongly made, it would be 'entitled, indeed required, when made aware of its error to deal with the appeal in a proper way'.⁵ The problem is that there is no procedure for making the Tribunal aware that a preliminary decision was wrongly made and the procedure rules expressly prohibit the Tribunal from taking further action once it has declined to accept notice of appeal.⁶

¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 10(6). See also the definition of 'determination' (excluding procedural, ancillary and preliminary decisions) in r 2. Rules 9–11 of the Procedure Rules also make it clear that a person giving notice of appeal is not thereby an 'appellant', also defined restrictively in r 2 as a person giving notice of appeal 'in accordance with these Rules'. For the fast track equivalents see Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005, SI 2005/560, rr 2(2), 12(1).

² Under the NIAA 2002, s 103E, inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 26. A preliminary decision is not a 'decision on an appeal' for the purpose of an onward appeal: s 103E(7)(a).

³ Under the NIAA 2002, s 103A as inserted. A preliminary decision is not a 'decision on an appeal' for the purpose of review: s 103A(7)(a).

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- ⁴ A decision on the preliminary issue of time was held to be a determination under the 1971 Act (making it appealable) in *Jaayeola* (14819) (2 April 1997). The definition of ‘determination’ under the 2000 Procedure Rules as a decision to allow or dismiss an appeal, excluded a decision on time, with the Tribunal holding in *B (Zimbabwe)* [2004] UKIAT 76 that once it had been established that a notice of appeal was out of time and an extension of time was refused, there was no valid appeal for the purpose of any onward appeal. However, in *MM (Burundi)* [2004] UKIAT 00182 the Immigration Appeal Tribunal held that however ‘determination’ was defined, it had jurisdiction to hear an appeal on a point of law relating to an adjudicator’s decision that an appeal was invalid, which included the issue of timeliness (although not the exercise of discretion). The omission of any definition of ‘determination’ in the relevant part of the NIAA 2002 and the 2003 Rules enabled the Tribunal to reinstate a decision on timeliness as a ‘determination’, holding that a decision on time determined the appeal by bringing it to an end.
- ⁵ *SB (Pakistan)* [2008] UKAIT 00053 (Tribunal had wrongly held that the appellant was not a ‘family visitor’ and therefore not entitled to appeal against refusal of entry clearance), following *EA (Ghana)* [2006] UKAIT 00036 where the Tribunal set aside its earlier erroneous decision that notice of appeal had been given late.
- ⁶ Asylum and Immigration Tribunal (Procedure) Rules 2005, r 9(2)(b), SI 2005/230.

Refusal to accept a notice of appeal

18.101 Rule 9 of the Procedure Rules specifies two situations in which the Tribunal must not accept a notice of appeal.¹ The first is where there is no ‘relevant decision’. A relevant decision is one against which there is an exerciseable right of appeal to the Tribunal.² The second situation is where notice of appeal is given against a refusal of entry clearance which is not appealable because of Nationality, Immigration and Asylum Act 2002, s 88A, ie the entry clearance application was not made for the purpose of visiting or joining as a dependant one of a prescribed class of people and the notice of appeal does not rely on human rights or race discrimination grounds.³ In either of those situations, the Tribunal must notify the would-be appellant and the respondent that it does not accept the notice of appeal and take no further action. This r 9 procedure is not applicable to a situation where notice of appeal has been accepted by the Tribunal but it subsequently makes a decision that it does not have jurisdiction to decide the appeal.⁴

¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 9 as amended by SI 2008/1088.

² SI 2005/230, r 2.

³ SI 2005/230, r 9(1A)(b) as inserted by SI 2008/1088.

⁴ *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78, [2009] All ER (D) 193 (Feb).

Respondent’s duty to file appeal papers

18.103

Once the notice of appeal has been filed with the Tribunal, it must serve a copy on the respondent as soon as reasonably practicable (unless the appellant served notice of appeal on the entry clearance officer),¹ or immediately, if the appeal is in the fast track.² The respondent must then (unless it has already done so) file the notice of the decision to which the notice of appeal relates, any other document giving reasons for that decision, any statement of evidence form completed by the appellant and record of interview with the

appellant relating to the decision under appeal, any unpublished document referred to in the decision notice or reasons for refusal letter, and notice of any other decision made in relation to the appellant in respect of which he or she has a right of appeal under s 82 of the NIAA 2002.³ Under the fast track procedure, the respondent is required to do this not later than two days after being sent the copy appeal notice.⁴ In ordinary appeals, the respondent must lodge the documents in accordance with any directions given by the Tribunal, and if none are given, as soon as reasonably practicable, and in any event no later than 2pm on the day before the first hearing of the appeal.⁵ A copy of all the documents lodged with the Tribunal must be served on the appellant at the same time.⁶ Such is the measure of disenchantment with the Home Office, based on previous experience of its procedural non-compliance,⁷ that no-one connected with immigration appeals expects the appeal documents to be made available to the Tribunal or to appellants earlier than 2pm on the day before the first hearing, and the adjournment provisions may have to be utilised if this duty proves too onerous.⁸ The Tribunal's policy of allowing entry clearance officers 19 weeks in which to file documents with the Tribunal in appeals against refusal of settlement applications was held to be rational and lawful.⁹ This was in part because the Tribunal operates a system to expedite appeals in cases where there are compelling compassionate circumstances; requests for expedition under the scheme are made to the Duty Immigration Judge at the AIT's Operational Support Centre in Loughborough.¹⁰ However, the 'usual practice'¹¹ of entry clearance officers is not to comply with the obligation to produce documents for the appeal and instead to treat judicial directions and procedure rules 'with utter disdain'.¹²

¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 12.

² Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005, SI 2005/560, r 9.

³ SI 2005/230, r 13(1). For the difficulties caused by the previous procedure see *R (on the application of Hasa) v Immigration Appeal Tribunal* [2003] EWHC 396 (Admin), [2003] All ER (D) 232 (Feb); 18.91 above.

⁴ SI 2005/560, r 10. Otherwise the procedure in the principal rules applies: r 2.

⁵ SI 2005/230, r 13(2). Similar provisions apply when the Tribunal has allowed an appeal to proceed following a decision on the timeliness or validity of the notice of appeal: r 13(3).

⁶ SI 2005/230, r 13(4).

⁷ See for example the cases at 18.117 below ('Non-compliance with directions').

⁸ The Department for Constitutional Affairs has said, in response to a consultation on the new procedure rules, that 'where the Home Office fail to provide documents before the case management review hearing, the immigration judge will make a decision whether to proceed with the main hearing date or adjourn ... on the basis of the interests of the appellant not the Home Office.' DCA preliminary response to consultation, by email 8 February 2005. See SI 2005/230, r 21.

⁹ *R (on the application of Uddin) v Asylum and Immigration Tribunal*; *R (on the application of Ali) v Asylum and Immigration Tribunal* [2006] EWHC 2127 (Admin), [2006] All ER (D) 36 (Aug).

¹⁰ See *R (Uddin)*.

¹¹ *AO (Nigeria)* [2008] UKAIT 00073.

¹² *AW (Pakistan)* [2008] UKAIT 00072.

Certification of pending appeal

18.106 The Secretary of State or an immigration officer may, while an appeal to the Tribunal under s 82 or 83 of the NIAA 2002 is pending, issue a certificate under s 97 or 98 (national security, diplomatic or public interest

issues justifying exclusion or removal from the UK). In each case, the certificate has the effect of putting an end to the proceedings before the Tribunal.¹ The Procedure Rules require the Secretary of State to notify the Tribunal of any such certification, whereupon the Tribunal must notify the parties, and take no further action on the appeal.² There is no longer any power for the Secretary of State or an immigration officer to certify a pending appeal under s 96 (earlier right of appeal); although an appeal can be prevented by a certificate under the section, it cannot be aborted once lodged.³ Similarly, whilst certification of an asylum or human rights claim as 'clearly unfounded' may prevent an appeal from being brought whilst the appellant is in the UK,⁴ such a certification cannot prevent an appeal that has already been commenced from being continued in the UK.⁵

¹ See the NIAA 2002, s 99, amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

² Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 16. This provision does not apply to fast track appeals.

³ NIAA 2002, s 96(7), as amended. Note however that s 99 has not been amended, leading to a contradiction between s 96(7): 'A certificate shall have no effect in relation to an appeal instituted before the certificate is issued', and s 99, stating that an appeal 'shall lapse' where a certificate is issued under s 96(1) or (2) in respect of a pending appeal.

⁴ NIAA 2002, s 94(2).

⁵ *R (on the application of AM (Somalia)) v Secretary of State for the Home Department* [2009] EWCA Civ 114, [2009] All ER (D) 248 (Feb).

Withdrawal of appeals

18.107 All appeals may be withdrawn or abandoned. What are the distinctions between withdrawal and abandonment, and what are the consequences? Withdrawal of an appeal implies a positive act, while abandonment suggests a passive failure to prosecute the appeal, or an action incompatible with pursuing it whereby it is deemed abandoned by statute. In the case of a deemed withdrawal, which happens when the decision appealed against is withdrawn,¹ the positive act is that of the respondent rather than the appellant, but the distinction between withdrawal and abandonment vanishes with the concept of 'deemed abandonment' when the appellant is granted leave to enter or remain in the UK.² Much of the case law deals with the issue of who decides whether an appeal has been withdrawn, how the decision is made, and whether a decision that an appeal has been withdrawn is itself challengeable. An appellant may withdraw his or her appeal orally, at a hearing (including a preliminary hearing),³ or at any time, by filing written notice with the appellate authority.⁴ An appeal is treated as withdrawn if the respondent notifies the Tribunal that he or she has withdrawn the decision (or, if the appeal relates to more than one decision, all the decisions) to which the appeal relates.⁵ Withdrawal of an immigration decision would be amenable to judicial review if, for example, it could be shown that it was done with a view to gaining some procedural advantage as opposed to conducting a genuine reconsideration which might lead to a change of mind.⁶ If an appellant dies before his or her appeal is determined, the Tribunal may direct that it is to be treated as withdrawn or, if the Tribunal considers it necessary, the personal representative of the appellant may continue the proceedings.⁷ If an appeal is withdrawn or treated as withdrawn, the Tribunal must serve on the parties a

notice that the appeal has been recorded as having been withdrawn.⁸ Such a notice is not a 'determination' within the meaning of the Procedure Rules,⁹ or a 'decision on the appeal' for the purposes of appeal or statutory review,¹⁰ and could be challenged only by judicial review. It is clear that whether an appeal has been withdrawn is a matter for the Tribunal and the courts, not for the Secretary of State.¹¹ Under the previous procedure rules, when notice of appeal was served on the respondent, giving notice of withdrawal to the respondent was not effective to withdraw an appeal, and the respondent was still obliged to forward appeal papers to the appellate authority even if the appellant notified the respondent of an intention to withdraw the appeal.¹² A withdrawal letter to the Home Office could be superseded by subsequent actions inconsistent with withdrawal, provided the Tribunal had not made a decision to accept the withdrawal.¹³ Now that appeal notices go direct to the Tribunal, there is no reason for withdrawal of appeals to go through immigration authorities. Where an appeal is validly withdrawn prior to the hearing, and the withdrawal accepted by the Tribunal, the appeal does not go into a state of suspended animation but ceases to exist,¹⁴ and any determination of the appeal (on the merits) is a nullity.¹⁵

¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 17(2). Rule 17 is applied to fast track appeals by SI 2005/560, r 6.

² NIAA 2002, s 104(4)(a).

³ SI 2005/230, r 17(1)(a). See *Rahman (Akikur) v Immigration Appeal Tribunal* [1995] Imm AR 372, CA, for an analysis of the position under the IA 1971 (in similar terms to the NIAA 2002, s 104(1)).

⁴ SI 2005/230, r 17(1)(b).

⁵ SI 2005/230, r 17(2).

⁶ *R (on the application of Glushkov) v Secretary of State for the Home Department* [2008] EWHC 2290 (Admin).

⁷ SI 2005/230, r 17(2A) as inserted by SI 2006/2788.

⁸ SI 2005/230, r 17(3).

⁹ SI 2005/230, r 2 (applied to fast track appeals by SI 2005/560 r 6), defining 'determination' as a decision by the Tribunal in writing to allow or dismiss the appeal, taken upon consideration of its merits, and excluding a procedural, ancillary or preliminary decision.

¹⁰ NIAA 2002, ss 103A(7)(a) (review), 103E(7)(a) (appeals from panel), exclude procedural, ancillary or preliminary decisions.

¹¹ *Entry Clearance Officer v Hughes* (01TH01147) (22 May 2001, unreported), IAT, see fn 11 below.

¹² See API, Appeals: withdrawal, para 2.1. The API states that inviting an appellant to withdraw an appeal should only be done 'with great care'. We suggest that the immigration authorities should not do it at all.

¹³ *El-Tuyeb* (12643), where the letter of withdrawal did not reach the appellate authority until the hearing, which the appellant attended to pursue the appeal. The case emphasised the importance of allowing the appellant to argue against withdrawal.

¹⁴ *Adewole* (18538) (22 September 1998, unreported), IAT; *Singh (Nachtar) v Secretary of State for the Home Department* [1991] Imm AR 195; *Osman (Ayse)* [1993] Imm AR 417.

¹⁵ *Kirungi* (13111) (20 March 1996, unreported), IAT. But see *Entry Clearance Officer v Hughes* (01TH01147) (22 May 2001, unreported), where the Tribunal dismissed (albeit on technical grounds) an ECO appeal against an adjudicator's decision allowing an appeal which had apparently been withdrawn, although the Tribunal had doubts about the circumstances of the withdrawal.

Case management and directions

18.119 As we have seen, the Tribunal may (subject to the procedure rules) decide the procedure to be followed in relation to any appeal¹ and it may vary

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any time limit imposed on a party by the procedure rules or by a direction, including (if there are exceptional reasons for doing so) where the time limit has already expired.² Case management includes decisions about whether the case should be heard by an immigration judge or a panel of judges; defining the issues, including any preliminary issues;³ whether the appeal is to be determined without a hearing,⁴ or joined with another appeal in one hearing;⁵ readiness for the full hearing of the appeal; and the preparation and presentation of evidence. We have dealt with defining the issues at 18.108 above. Now, we turn our attention to other aspects of case management. Decisions relating to the constitution of the Tribunal (ie whether the appeal should be heard by one immigration judge or by a panel) are for the Tribunal itself, which is not required to consider representations by any party.⁶ Unless the President's direction specifies otherwise, a single immigration judge may conduct a case management review hearing, give directions to the parties and deal with other preliminary or incidental matters.⁷ The Tribunal may give directions orally or in writing relating to the conduct of any appeal or application, but must give them to every party.⁸ The Tribunal must not direct an unrepresented party to do something unless it is satisfied that he or she is able to comply with the direction.⁹ There may be a direction as to the witnesses to be heard, if any,¹⁰ and how the evidence is to be given, eg by directing that witness statements stand as evidence in chief.¹¹ The power to direct that witness statements stand as evidence in chief is not subject to the appellant's consent, although this does not mean that at the hearing the appellant should not have the opportunity of adding to the witness statement anything necessarily supplementary to it to bring it to life.¹² Directions may also require parties to file and serve, within specified time limits,¹³ statements of the evidence to be called, skeleton arguments, chronologies, paginated and indexed bundles of the documentary evidence to be relied on, time estimates, lists of witnesses, a chronology and details of any interpreter required.¹⁴ Directions may limit the number or length of documents a party may rely on (particularly useful in asylum appeals where 'standard bundles' of over 300 pages are frequently served), the length of oral submissions, the time allowed for examination and cross examination of witnesses and the issues to be addressed at a hearing.¹⁵ The Asylum and Immigration Tribunal Practice Directions contain detailed provision about the instruction of experts and the form and content of expert reports.¹⁶ Directions may provide for a hearing to be conducted or evidence given or representations made by video link or by other electronic means.¹⁷ They may make provision to secure the anonymity of a party.¹⁸ But directions under the procedure rules must relate to the procedure to be followed by the parties for determination of the appeal and may not, for example, require the Secretary of State to re-interview an appellant or to make a fresh decision.¹⁹

¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 43, applied to fast track appeals by the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005, SI 2005/560, r 27.

² SI 2005/230, r 45(4)(c), as amended by SI 2008/1088.

³ SI 2005/230, r 45(4)(d)(i); see 18.113 above.

⁴ SI 2005/230, r 15(2)(a); see 18.118 below.

⁵ SI 2005/230, r 45(4)(g). This might happen where the appeals raise some common question of fact or law, relate to decisions in respect of members of the same family or where it is desirable for some other reason that they be heard together: r 20; see 18.149 below.

- ⁶ SI 2005/230, r 44(1). The Tribunal may give a direction at the case management review hearing that the appeal is to be heard by a group of members: Asylum and Immigration Tribunal Practice Directions (30 April 2007) (AIT PD).
- ⁷ This applies where the appeal is to be heard by a panel: SI 2005/230, r 44(2).
- ⁸ SI 2005/230, r 45(1), (3).
- ⁹ SI 2005/230, r 45(5).
- ¹⁰ SI 2005/230, r 45(4)(d)(iv).
- ¹¹ SI 2005/230, r 45(4)(d)(v). See Practice Direction 1/2005, 6.7, 7.2.
- ¹² *R v Secretary of State for the Home Department, ex p Singh* [1998] INLR 608, CA (permission). The AIT PD insists (para 6.7) that 'in normal circumstances a witness statement should stand as evidence in chief', although it concedes that 'there may be cases where it will be appropriate' for appellants or witnesses to add to their statements. It is a rare case where it is *not* necessary to give such opportunity, at least to appellants.
- ¹³ SI 2005/230, r 45(4)(b).
- ¹⁴ SI 2005/230, r 45(e)(i)–(vii).
- ¹⁵ SI 2005/230, r 45(f)(i)–(iv). Best practice for preparation of bundles includes typed translations of documents not in English, signed by the translator to certify accuracy, with details of that person's qualifications; highlighting of relevant passages of long documents; index; and cross-reference to the documents, with pagination, in the skeleton argument: AIT PD), para 8.2. The parties should not rely on the Tribunal having judicial knowledge of any country information or background reports: para 8.6. The limit on issues to be addressed at the hearing must be read in the light of NIAA 2002, s 85 and in the light of the Tribunal's duty set out in *Robinson v Secretary of State for the Home Department* [1997] Imm AR 568; see 18.48 above.
- ¹⁶ AIT PD, para 8A.
- ¹⁷ SI 2005/230, r 45(4)(h). This provision is routinely used for hearings before the Tribunal where the Tribunal sits in Field House in London and where the parties appear by means of a video link in another hearing centre. It has been used to enable appellants to give evidence from outside the UK: see eg *R (on the application of Ahmadi) v Secretary of State for the Home Department* [2002] EWHC 1897 (Admin), [2002] AIL ER (D) 52 (Sep) at 1926. The refusal by a Tribunal to permit a witness to give evidence over the telephone from Cameroon was held to be at least arguably unlawful in *R (AM (Cameroon)) v Asylum and Immigration Tribunal* [2007] EWCA Civ 131.
- ¹⁸ SI 2005/230, r 45(4)(i). Anonymity for appellants is now provided by the Tribunal as a matter of course by the use of initials in published determinations, but the power is wider, and can be used to protect the anonymity of witnesses.
- ¹⁹ See 18.108 above.

TRIBUNAL HEARINGS

Dispensing with a hearing

18.122 The Tribunal has separate powers to determine an appeal without a hearing,¹ and to determine the appeal following a hearing in the absence of a party.² Here we consider determination of an appeal without a hearing at all. Under the 2005 Procedure Rules, every appeal must be considered by the Tribunal at a hearing except where:

- (1) the appeal lapses pursuant to s 99 of the NIAA 2002, ie where the appeal has been certified under s 97 (certification on national security grounds) or s 98 (certification on other grounds of public good) of the Act;³
- (2) the appeal is treated as abandoned pursuant to s 104(4) of the NIAA 2002, ie as a consequence of the appellant being granted leave to enter or remain or leaving the UK;⁴
- (3) on a deportation order being made with the result that an appeal against refusal of leave to enter, refusal of a certificate of entitlement to

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- the right of abode, variation or refusal to vary a person's leave or revocation of a person's indefinite leave is treated as finally determined, by operation of the NIAA 2002, s 104(5);⁵
- (4) the appeal is withdrawn, or is treated as withdrawn by virtue of rule 17, on the respondent withdrawing the decision;⁶
 - (5) all the parties to the appeal consent;⁷
 - (6) the appellant is outside the UK and is unrepresented⁸ or is represented by someone whose address for service is outside the UK;⁹
 - (7) it is impracticable to give him or her notice of a hearing;¹⁰
 - (8) a party has failed to comply with a provision of the Procedure Rules or a direction of the Tribunal or the appellant has failed to provide a satisfactory explanation for not including the notice of the decision appealed against with the notice of appeal¹¹, and the Tribunal is satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing;¹²
 - (9) in the case of a fast track appeal, if the appellant does not include the notice of decision appealed against with the notice of appeal and fails to provide a satisfactory reasons for not including the notice;¹³
 - (10) the Tribunal is satisfied, having regard to the material before it and the nature of the issues raised, that the appeal can justly be determined without a hearing, and the parties have had notice of its intention and an opportunity to make written representations in support of a hearing.¹⁴

The power to dispense with a hearing must be exercised by the Tribunal personally rather than a member of the administrative staff.¹⁵ The Tribunal cannot decide to determine an appeal without a hearing and then receive submissions from counsel.¹⁶ Where an in-country asylum appeal is to be determined without a hearing, the Tribunal must determine it no later than 35 days after its receipt of the notice of appeal, or its decision on timeliness (if applicable).¹⁷

¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 15; Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005, SI 2005/560, r 13.

² SI 2005/230, r 19, applied (so far as applicable) to fast track appeals by SI 2005/560, r 6(f). The Tribunal should be clear to distinguish between the two situations and should make it clear which procedure it is adopting: *Abali* (15543) (6 October 1997, unreported), IAT; *JZ (Ivory Coast)* [2004] UKIAT 00102.

³ SI 2005/230, r 15(1)(a)(i); SI 2005/560, r 13(1)(b)(i). Note that the Secretary of State can no longer certify under the NIAA 2002, s 96 to bring an end to an appeal: see s 96(7), amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 30, although s 99 has not been amended to reflect this.

⁴ SI 2005/230, r 15(1)(a)(ii); SI 2005/560, r 13(1)(b)(ii). For abandonment of appeals see 18.106 above.

⁵ SI 2005/230, r 15(1)(a)(iii); SI 2005/560, r 13(1)(b)(iii).

⁶ SI 2005/230, r 15(1)(a)(iv); SI 2005/560, r 13(1)(b)(iv). For withdrawal of appeals see 18.104 above.

⁷ SI 2005/230, r 15(2)(a); SI 2005/560, r 13(2)(a).

⁸ SI 2005/230, r 15(2)(b) (there is no equivalent in the fast-track procedure, since appellants will always be in the UK). Before proceeding without a hearing under the rule, the Tribunal must notify both parties and give them an opportunity to make further representations: *Entry Clearance Officer v TMG (Turkey, South Africa, Colombia)* [2004] UKIAT 00028; *PP (India)* [2004] UKIAT 00128. On unrepresented appellants see *R v Diggins, ex p Rahmani* [1985] QB 1109, [1986] Imm AR 195, HL, where it was held that UKIAS had not

ceased to act for the appellant, although they had lost her new address; before proceeding under this rule, the adjudicator should have required an unambiguous declaration from UKIAS either that their instructions had been withdrawn or that they had no instructions. SI 2005/230, r 15(2)(ba) as inserted by SI 2008/1088.

⁹ SI 2005/230, r 15(2)(b).

¹⁰ SI 2005/230, r 15(2)(c), as amended by SI 2008/1088.

¹¹ SI 2005/230, r 15(2)(c); SI 2005/560, r 13(2)(b). The power to dispense with a hearing for non-compliance with directions should be used very sparingly, and probably not at all when parties have appeared for the hearing: *MD (Pakistan)* [2004] UKIAT 00197. Where the appellant was not personally at fault when the representative filed the reply to the notice of hearing late, the appeal should not have been determined without a hearing: *K (Afghanistan)* [2004] UKIAT 00043. While it may be legitimate for an immigration judge to decide to proceed without a hearing, or a further hearing, after a failure to comply with directions, and even to decide to pass the case to another immigration judge, the second immigration judge must not determine the case as if he or she was the original immigration judge: *JZ (Ivory Coast)* [2004] UKIAT 00102, 'Reported'.

¹² Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005, r 13(2) as inserted by SI 2008/1089.

¹³ SI 2005/230, r 15(2)(d), (3); SI 2005/560, r 13(2)(c). Where both parties want a hearing, it would rarely be appropriate to dispense with one: *MD (Pakistan)* [2004] UKIAT 00197, and never when credibility is in issue: *Federation of Canadian Sikh Societies v Canadian Council of Churches* [1985] 1 SCR 178 (cited in *R v Immigration Appeal Tribunal, ex p S* [1998] Imm AR 252 at 267 and *R v Secretary of State for the Home Department, ex p Yousaf* [2000] INLR 432). Note that in the fast track procedure, the power is not subject to any opportunity to make representations.

¹⁴ *Singh (Piara)* (7069), IAT.

¹⁵ *Sivayokam* (16015) (8 January 1998), IAT.

¹⁶ SI 2005/230, r 23(1), (2)(b), as amended by SI 2006.2788, r 8. This time limit does not apply if the respondent has failed to comply with directions regarding service of appeal documents: r 23(3).

Proceeding in a party's absence

18.125 Most of the case law concerns allegations of non-receipt of notices of hearing, leading to hearings in the absence of appellants. Parties and representatives are obliged to notify the Tribunal in writing of a postal address for service of documents, and until change of address is notified, documents sent to that address are deemed to have been properly served on the appellant.¹ The respondent is also obliged to notify the Tribunal if he or she knows that the appellant has changed address.² They also have a duty to maintain contact with representatives until the appeal is finally determined, and to notify them of any change of address.³ Representatives have a duty to notify the Tribunal and the other party when they begin to act for a party,⁴ and if they cease to act, both the representative and the party must notify the Tribunal and the other party, and give them the name and address of any new representative, if known.⁵ The Tribunal is entitled to continue to treat a representative as acting for a party until there has been strict compliance with the Procedure Rules for notifying a change of representative, even where the party has withdrawn instructions from that representative.⁶ Notice given to the immigration authorities of a change is not enough;⁷ the respondent is under no duty to notify the Tribunal of an appellant's change of address or representative.⁸ But all deemed service must arguably be subject to a proviso, whether or not expressly stated, allowing proof of non-receipt.⁹ Procedural requirements are designed to further the interests of justice.¹⁰ The Tribunal is obliged to consider an allegation of non-receipt of the notice of hearing in an application

for reconsideration.¹¹ It would be a 'strong step' not to accept the assertion of any professional person that a notice sent otherwise than by recorded delivery had not been received.¹² Service of a notice of hearing is not legally adequate if the name on the envelope is incorrect.¹³ Earlier decisions on judicial review suggest that where a direction requires a certificate of readiness to be submitted, failing which the party is to appear on the date in the notice, and a certificate of 'unreadiness' is sent in, the Tribunal is entitled to proceed in the absence of the appellant and the representative,¹⁴ but most reported cases indicate that a failure by a representative to comply with procedural requirements should not prejudice the appellant to the extent of preventing his or her attendance to give oral evidence, where this is necessary for the just disposal of the appeal.¹⁵ There is a clear tension between the mandatory terms of the rule where no satisfactory reason has been given for absence, and the need for substantive justice.

¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 56. For the difficulties this rule caused when appeals were lodged with the respondent rather than the appellate authority, so that the appellate authority had no file to which to attach notices of changes of address, see *R (on the application of Hasa) v Immigration Appeal Tribunal* [2003] EWHC 396 (Admin), [2003] All ER (D) 232 (Feb).

² SI 2005/230, r 56(3), inserted by SI 2008/1088.

³ SI 2005/230, r 48(6).

⁴ SI 2005/230, r 48(4).

⁵ SI 2005/230, r 48(7).

⁶ SI 2005/230, r 48(9); *R (on the application of Ahmed) v Immigration Appeal Tribunal* [2004] EWCA Civ 399, [2004] All ER (D) 594 (Mar), where the Tribunal was held to have waived the strict requirement of the rules, by corresponding with the second representative.

⁷ *R v Secretary of State for the Home Department, ex p Hannach* [1997] Imm AR 162, QBD.

⁸ *R v Secretary of State for the Home Department, ex p Hannach* [1997] Imm AR 162, QBD, and see *Lapido v Secretary of State for the Home Department* [1997] Imm AR 51, CA.

⁹ Following *R v Secretary of State for the Home Department, ex p Saleem*, [2000] Imm AR 529, [2000] INLR 413, upholding Hooper J at [1999] INLR 621. See also *R (on the application of Hasa) v Immigration Appeal Tribunal* [2003] EWHC 396 (Admin), [2003] All ER (D) 232 (Feb).

¹⁰ *Ravichandran v Secretary of State for the Home Department* [2000] 1 WLR 354 at 359, per Lord Woolf MR.

¹¹ *R v Immigration Appeal Tribunal, ex p Susikanth* [1998] INLR 185, CA, and grounds explaining non-attendance at a hearing as caused by solicitor error gave an explanation for non-attendance: *R (on the application of Haby) v Immigration Appeal Tribunal* [2002] EWHC 2313 (Admin), [2002] All ER (D) 237 (Oct). The old case of *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876, in which the House of Lords held that a representative's failure to send the notice of hearing to the appellant did not ground an allegation of procedural impropriety in the subsequent hearing, where the appellant was absent and unrepresented, has been held inapplicable to cases in which human rights or asylum issues are engaged: *Haile v Immigration Appeal Tribunal* [2001] EWCA Civ 663, [2002] Imm AR 170, [2002] INLR 283; cf *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] 2 WLR 1351.

¹² *R (on the application of Karagoz) v Immigration Appeal Tribunal* [2003] EWHC 1228 (Admin); *R (on the application of Smeer) v Immigration Appeal Tribunal* [2003] EWHC 2683 (Admin), [2003] All ER (D) 419 (Oct), holding that it was irrational for the IAT to reject as without foundation the assertion made in grounds of appeal to the IAT that notice of hearing had not been received. But see *R (on the application of Maqsood) v Special Adjudicator and Secretary of State for the Home Department* [2002] Imm AR 268 where the claimant's solicitor's evidence of non-receipt of the notice of hearing was rejected.

¹³ *Choudhry* (15911) (7 January 1998, unreported), IAT. See also *Idrissi v Immigration Appeal Tribunal* [2001] EWCA Civ 235, [2001] All ER (D) 390 (Feb) where a decision was quashed on the basis that the Tribunal proceeded on a mistaken view of the facts (ie a

belief that the appellant had been properly served), when an administrative mistake led to a notice of hearing going to the wrong representative.

¹⁴ *R v Secretary of State for the Home Department, ex p Butt* [1999] Imm AR 341, QBD; *R v Special Adjudicator, ex p Arshad* (CO 1145/97) (15 April 1997, unreported), QBD.

¹⁵ *K (on the application of Afghanistan)* [2004] UKIAT 00043; see also cases cited at fnn 8–10 above.

Procedure at the hearing

18.133 There is extensive jurisprudence from the Tribunal and the higher courts on the scope of the duty of fairness in immigration appeals. At the hearing, each party may address the Tribunal, give evidence and call witnesses, and put questions to any witness. Each party should also be given an opportunity to make representations on the evidence (if any) and on the subject matter of the appeal generally. Where evidence is taken, the representations are normally made after the evidence is completed. The issues addressed, the oral and documentary evidence received and the submissions entertained may be limited in accordance with directions previously given and with the time estimate put in by the parties.¹ However, the Tribunal should not prevent an advocate from developing his or her submissions.² The Tribunal has power to conduct the proceedings in the manner it considers appropriate in the circumstances for ascertaining the matters in dispute and determining the appeal.³ In doing so it must act fairly,⁴ and should give an appellant a chance to comment on any adverse material in the evidence.⁵ However, fairness does not require that every point that may be decided against an appellant should first of all be put to him or her; whether this is necessary depends on the circumstances of the particular case.⁶ The Tribunal is not obliged to accept an improbable account simply because it has not been tested.⁷ The Tribunal should not refuse to allow cross-examination of any witness who has been called to give oral evidence.⁸ In cross-examining an appellant, the respondent is not limited to the issues raised in the ‘reasons for refusal letter’.⁹ The Tribunal’s provisional conclusions should not be indicated at the outset of the hearing.¹⁰ If an immigration judge has particular knowledge or experience relevant to the facts in issue, that should be made known to the parties and they should be invited to state whether they have any objection to that immigration judge hearing the appeal.¹¹ An immigration judge’s personal knowledge should not be taken into account in a manner that may suggest bias.¹² If the Tribunal has access to relevant evidence not produced by the parties, their attention should be drawn to it.¹³ A Tribunal may take into account material that comes to light after the hearing, but must inform the parties of its intention to do so and afford them an opportunity to comment on it.¹⁴ If, having heard the evidence, the Tribunal expresses a positive view as to the credibility of the appellant, the hearing should be reconvened and submissions invited if the Tribunal subsequently changes its mind.¹⁵ Similarly, if at the end of the hearing, the Tribunal indicates that the appeal is to be allowed, it may change its mind when giving a written determination, but only after inviting the parties to make further representations¹⁶ unless the announcement of the provisional view had no impact on the way in which the case was put.¹⁷ The parties should be given an opportunity to deal with any case they have not referred to which appears to be

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determinative or call for argument,¹⁸ although immigration judges are entitled to take account of well-known Tribunal decisions, meaning those given under the Tribunal's reporting system, even if neither party has cited them.¹⁹ In an asylum appeal, the Tribunal may introduce the issue of internal flight even if the Secretary of State has not, but should be cautious about doing so and must give the parties an opportunity to deal with it.²⁰ All representatives, including respondents', are under a duty to assist the Tribunal by presenting it with all relevant case law, including that contrary to the argument put forward.²¹ The respondent must put to a witness any matter said to undermine the witness' credibility,²² and must not knowingly mislead the court by not disclosing material which detracts from its case.²³ Further, the respondent is under an obligation to produce any evidence about which he or she knows or ought to know and which shows that an 'authoritative' Tribunal decision does not accurately describe material conditions in the appellant's country.²⁴ It may be that asylum and human rights is a field where, since the court has an overriding obligation to ensure the highest standards of fairness, litigation privilege would not allow a party to refuse production of an expert report.²⁵ There is a need to be especially vigilant in fast track appeals, where each stage in the appeal process follows very swiftly, and the Tribunal must take care not to allow itself to be misdirected by the Secretary of State on the objective evidence.²⁶

¹ See 18.116 above and *R v Secretary of State for the Home Department, ex p Singh* [1998] INLR 608, CA, upholding an adjudicator's refusal to allow a witness to add orally to her statement, which was the subject of a direction that it stand as evidence in chief.

² *Katrinak v Secretary of State for the Home Department* [2001] EWCA Civ 832, [2001] INLR 499.

³ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 43(1), applied to fast track appeals by Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005, SI 2005/560, r 27.

⁴ So, for example, where an appellant put in a report from Amnesty International concerning the dangers facing failed asylum seekers from Algeria, which was unchallenged by the presenting officer, the adjudicator should not have rejected the evidence without allowing the appellant to adduce further evidence to confirm it: *Kriba v Secretary of State for the Home Department* 1998 SLT 1113, OHCS (Scot). And after an appellant had given evidence in the absence of the respondent's representative, whose inability to attend the hearing was the fault of the appellate authority, the hearing should not have proceeded, in fairness to the respondent, but should have been transferred: *Secretary of State for the Home Department v I (Somalia)* [2004] UKIAT 00062.

⁵ *Ahmed v Secretary of State for the Home Department* [1994] Imm AR 457, CA; *R v Immigration Appeal Tribunal, ex p Seri* (CO/2135/99) (27 June 2000, unreported); *R v Immigration Appeal Tribunal, ex p Gunn* (22 January 1998, unreported), QBD. This obligation does not extend to obvious discrepancies on matters central to the appellant's case and already drawn to the appellant's attention in the refusal letter: *R v Immigration Appeal Tribunal, ex p Williams* [1995] Imm AR 518; *Sahota v Immigration Appeal Tribunal* [1995] Imm AR 500, nor must the Tribunal foresee and put at the hearing every aspect of the evidence which goes into its findings on the facts: *R v Immigration Appeal Tribunal, ex p Hansford* [1992] Imm AR 407; *AA (Sudan)* [2004] UKIAT 00152. The Tribunal will not generally make findings of fact based on an allegation against former representatives unless they have had an opportunity to respond to the allegation and the Tribunal is shown the response or correspondence revealing that there has been no response: *BT (Nepal)* [2004] UKIAT 00311.

⁶ *R (on the application of Maheshwaran) v Secretary of State for the Home Department* [2002] EWCA Civ 173, [2004] Imm AR 176. An appellant should, for example, be told if the Tribunal does not believe his or her claim to have scars and should be given an opportunity to show them: *Sabouhi* [2002] UKIAT 06662; if the Tribunal is dissatisfied with the extent of the appellant's knowledge about the political party he or she claimed to

- belong to, where the inadequacy of his or her knowledge is not self-evident: *Kucher* [2002] UKIAT 7439; or if the Tribunal considers the evidence to be 'vague' *B (DR Congo)* [2003] UKIAT 00012.
- ⁷ *R (on the application of Hyseni) v Immigration Appeal Tribunal* [2002] EWHC 1239 (Admin), [2002] All ER (D) 561 (May).
- ⁸ *GY (Iran)* [2004] UKIAT 00264.
- ⁹ *Secretary of State for the Home Department v D (Iran)* [2003] UKIAT 00087.
- ¹⁰ *Rajah* (15159) (24 June 1997, unreported), IAT. In *Gashi v Secretary of State for the Home Department* [2002] UKIAT 03935 an appeal was allowed against an adjudicator's dismissal of a Kosovan appeal where, at the beginning of the appeal hearing, he indicated that in his view Kosovan cases lacked merit.
- ¹¹ *Secretary of State for the Home Department v MM* (2001) (01TH00994) IAT.
- ¹² *Muse* [2002] UKIAT 01957 where the adjudicator rejected the appellant's complaint that she was ill served by her previous solicitors because of her personal knowledge of two partners in that firm. cf *BA (Israel)* [2004] UKIAT 00118, where the adjudicator's personal knowledge of the Gaza strip had not affected the decision.
- ¹³ *R v Secretary of State for the Home Department, ex p Fortunato* [1996] Imm AR 366, QBD; *Ghana Varathan and Norbert v Special Adjudicator* [1995] Imm AR 64, CA; *R v Immigration Appeal Tribunal, ex p Kang* (CO 497/2000) (6 October 2000, unreported), QBD; *Junaid* (01TH02540) IAT. Reaching adverse conclusions on credibility on the basis of material which formed the basis of the presenting officer's cross-examination of the appellant but which was not disclosed was unfair: *Ozmico* [2002] UKIAT 00484.
- ¹⁴ *Laci* (2001) (01/TH/01348), IAT.
- ¹⁵ *Paudel* [2002] UKIAT 06868.
- ¹⁶ *R v Special Adjudicator, ex p Bashir* [2002] Imm AR 1, AC; *K (Rwanda)* [2003] UKIAT 00047; *SK (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 495, (2008) Times, 27 May.
- ¹⁷ *ML (Zambia) v Secretary of State for the Home Department* [2008] EWCA Civ 589, [2008] All ER (D) 42 (Jun).
- ¹⁸ *R v Immigration Appeal Tribunal, ex p Sui Rong Suen* [1997] Imm AR 355.
- ¹⁹ *M (Afghanistan)* [2004] UKIAT 0004.
- ²⁰ *He (Bai Hai)* (00TH00744), IAT; *Mehta* (17861), IAT.
- ²¹ *Choudhury* (10646) (11 February 1994, unreported), IAT.
- ²² *Ezzi* (G0003A) (29 May 1997, unreported), IAT.
- ²³ *Kerrouche v Secretary of State for the Home Department* [1997] Imm AR 610, CA; *Konan v Secretary of State for the Home Department* (IATRF 00/0020/C) (20 March 2000, unreported), CA. The majority conclusion in *R v Secretary of State for the Home Department, ex p Gawe, Abdi v Secretary of State for the Home Department* [1996] Imm AR 288, HL, of no general disclosure duty of country information, does not undermine this principle.
- ²⁴ *R (on the application of Cindo) v Immigration Appeal Tribunal* [2002] EWHC 246 (Admin), [2002] All ER (D) 181 (Feb). Failure to produce such evidence would make the Tribunal's decision, made in reliance on the 'authoritative' Tribunal decision, procedurally unfair or founded on a 'wrong factual basis'.
- ²⁵ *R v Secretary of State for the Home Department, ex p Gashi* [1999] Imm AR 415, CA.
- ²⁶ *G (Turkey)* [2004] UKIAT 00070.

18.136 The Tribunal should not dictate to representatives which witnesses to call,¹ prevent cross-examination of a witness (although he or she may intervene to prevent unfairness).² or stop re-examination on the basis that a matter had been dealt with in chief.³ At appeal hearings it is the usual practice to exclude witnesses (other than parties) from the hearing room until they give their evidence, a practice which it has been said Tribunals are entitled to follow by virtue of the general control over proceedings given to them by the Procedure Rules,⁴ but which is not a rule of law.⁵ In the vast majority of cases the decision whether an interpreter should be used is for the appellant and his or her advisers, and it is not the function of the Tribunal to disagree or express any view on the matter.⁶ Where an interpreter of the kind requested by an

appellant is not provided, with the result that the appellant is inhibited in giving evidence, the Tribunal's adverse assessment of credibility is likely to be unsustainable.⁷ The Tribunal should immediately address any dissatisfaction about the quality of the interpretation raised by a responsible legal representative.⁸ If the Tribunal begins to hear evidence but has to adjourn the hearing owing to problems with the interpreter, it should not continue to hear the case with a new interpreter unless the parties expressly consent owing to the danger of being influenced by the tainted evidence.⁹ It would be unfair for the Tribunal to permit the respondent to call the court interpreter to give opinion evidence about the appellant's language or accent.¹⁰ The Tribunal must ensure that unrepresented appellants are aware of their entitlement to give evidence.¹¹ Women appellants alleging sexual abuse ought to be allowed an all-female Tribunal if requested.¹²

¹ *Nabhani* (13195) (17 April 1996, unreported), IAT; *Petre* (12998) (13 February 1996, unreported), IAT; *Riasat* (13256) (17 April 1996, unreported), IAT; *Biley* (11579) (22 November 1994, unreported), IAT.

² *GY (Iran)* [2004] UKIAT 00264.

³ *Kamara* (11984) (3 April 1996, unreported), IAT.

⁴ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 43(1), applied to fast track appeals by SI 2005/560 r 27; *Wadia v Secretary of State for the Home Department* [1977] Imm AR 92.

⁵ *Moore v Registrar Lambeth county court* [1969] 1 All ER 782 at 783–784, DC; *R v Immigration Appeal Tribunal, ex p Patel (Jebunisha)* [1996] Imm AR 161, QBD.

⁶ *Cavusoglu* (15357) (28 May 1997, unreported). But there is no absolute right to an interpreter wholly irrespective of need: *R v Special Adjudicator, ex p Naqvi* (23 February 2000, unreported), CA.

⁷ AT [2002] UKIAT 02883. But an allegation of incompetence or inaccurate interpretation must be made at the hearing: *AW (Somalia)* [2004] UKIAT 00093.

⁸ *Perera (Jude) v Secretary of State for the Home Department* [2004] EWCA Civ 1002; *Y (Afghanistan)* [2003] UKIAT 00100. It was an error of law to permit an interpreter who had been criticised by the appellant's interpreter to lower his voice so that he could not be heard: *SJ (Iran)* [2004] UKIAT 00131.

⁹ *A (Ethiopia)* [2003] UKIAT 00103. The power to transfer proceedings, contained in the 2003 Procedure Rules, SI 2003/652, r 52, which was held to be an appropriate way of dealing with this situation (and others where a part-heard hearing could not be completed: see *I (Somalia)* [2004] UKIAT 00062), is absent from the 2005 Rules.

¹⁰ *Hydir* [2002] UKIAT 01132 See also *AA (Somalia)* [2008] UKAIT 00029.

¹¹ *Singh (Santokh)* (13002) (22 February 1996, unreported); *Tamba* (13525) (12 June 1996, unreported).

¹² *Tiganov* (11193) (29 July 1994, unreported); *Akyol* (14745) (25 March 1997, unreported), IAT. See Berkowitz and Jarvis *Asylum Gender Guidelines* (IAA, November 2000); H Crawley *Refugees and gender: law and process* (2001).

Credibility of witnesses

18.139 Credibility is not in itself a valid end to the function of an immigration judge, and over-emphasis on the issue may distort his or her findings.¹ An adverse credibility finding should not be based solely on the fact that no oral evidence was called at the hearing.² However, credibility findings are one of the primary functions of the immigration judge, and in some cases may be the fulcrum of the decision.³ The appellant must make a case,⁴ and where credibility has been put in issue by the respondent, an appellant who does not give evidence cannot complain of an adverse credibility finding.⁵ On the other hand, if there is an agreement between the parties as to the facts or a

concession as to credibility it would be an error of law for the Tribunal to go behind the agreement.⁶ It is an error of law to require corroboration for an appellant's evidence.⁷ However, the Tribunal may take account of an unexplained failure to produce supporting evidence that should have been available to the appellant.⁸ Where an allegation is made against a previous representative in order to explain a procedural failing or an earlier deficiency in the evidence, it will be difficult to establish the credibility of the allegation if evidence is not produced to show that it was put to the previous representative together with evidence of the previous representative's reply or want of reply.⁹

- ¹ *R v Immigration Appeal Tribunal, ex p Hussain* (CO/990/95) (25 April 1996, unreported), QBD; *Guine* (13868) (9 September 1996, unreported); *Jawaid* (17159) (20 May 1998, unreported), IAT.
- ² *Ahmed (Kaleem)* (12774) (8 November 1995, unreported), IAT; *Gok* (15971) (7 January 1998, unreported); *Coskuner* (16769) (23 July 1998, unreported); *Sad-Chaouche* (17423) (19 June 1998, unreported), IAT; *Secretary of State for the Home Department v Kacaj* [2001] INLR 354 (starred), IAT. Contra when potential witness who could have given highly relevant evidence was sitting in court but was not called: *R v Secretary of State for the Home Department, ex p Kajenthra* [1998] Imm AR 158, QBD.
- ³ *SW (Somalia)* [2005] UKIAT 00037, where the Tribunal ruled that the extract from *Guine* (fn 1 above) that 'a decision which concentrates primarily on findings of credibility for its outcome is in general more likely to be found to be flawed' was always quoted out of context and should no longer be cited.
- ⁴ *Singh v Secretary of State for the Home Department* [2000] Imm AR 340, CA; *Adebola* (16731) (19 August 1998, unreported), IAT; *Nderitu* [2002] UKIAT 01058.
- ⁵ *Nassir v Secretary of State for the Home Department* (1999/5682/4) [1999] Imm AR 250, CA (permission). See also *Carcabuk and Bla* (00TH0146), distinguishing between a concession or agreement on the facts, which the Tribunal should not disturb, and mere failure to challenge, which does not bind it.
- ⁶ *Carcabuk and Bla* above; *R (on the application of Ganidagli) v Secretary of State for the Home Department* [2001] EWHC 70 (Admin), [2001] INLR 479. So, for example, when at the end of cross-examination the Secretary of State's representative indicated that 'credibility was not an issue', it should not have been questioned: *Kabanda* (2001) (01TH01401), IAT.
- ⁷ *Saspo* (14759) (24 March 1997, unreported); *Ozer (Nazim)* (14698) (13 March 1997, unreported), IAT; *Otkay* (01TH00722) (April 2001, unreported), IAT; *Yildirim* (01TH02606) (14 November 2001, unreported), IAT; *Ates* [2002] UKIAT 06221.
- ⁸ *Jeichandrapalan* (01TH00512) (10 May 2001, unreported), IAT; *Jeyabalan* [2002] UKIAT 05992 (para 7); *Khan (Rashid)* [2002] UKIAT 06026; *C v Secretary of State for the Home Department* [2006] EWCA Civ 151, [2006] All ER (D) 122 (Feb) and *TK (Burundi) v Secretary of State for the Home Department* [2009] EWCA Civ 40, [2009] All ER (D) 29 (Feb).
- ⁹ *MM (Burundi)* [2004] UKIAT 00182*; *SV (Iran)* [2005] UKAIT 00160.

Credibility of witnesses

18.142 Section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 identifies various matters which the Tribunal is obliged to consider as damaging the credibility of an asylum seeker or human rights claimant.¹ The obligation arises even if the matter predates the coming into force of s 8.² However, the assessment of credibility remains a matter for the Tribunal considering the evidence as a whole and attaching such weight to individual features of the evidence as the Tribunal considers appropriate.³ The word 'potentially' is to be read into s 8 so that various matters are 'potentially damaging' of the appellant's credibility. Otherwise the provision would be

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inconsistent with the principles of legality and the separation of powers whereby the judicial decision maker is required to make his or her own decision on credibility.⁴

¹ See 12.166.

² *MM (Iran)* [2005] UKAIT 00115.

³ *SM (Iran)* [2005] UKAIT 00116. See also Carnwath LJ's judgment in *Y v Secretary of State for the Home Department* [2006] EWCA Civ 1223.

⁴ *JT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA Civ 878, [2008] All ER (D) 348 (Jul).

Medical and psychiatric evidence

18.144 In asylum and human rights appeals, medical and psychiatric evidence capable of supporting an appellant's claim deserves careful and specific consideration,¹ and Tribunals should not make credibility findings in isolation from it.² An experienced immigration judge must have regard to the possibility that the quality of a witness' evidence may be affected by his or her mental state, which might explain inconsistency and forgetfulness.³ A lay person cannot express a view on a medical matter without the benefit of medical evidence and should not reject a doctor's prognosis, without contrary medical evidence or without giving adequate reasons for doing so.⁴ However, experienced Tribunals are entitled to assess the weight to be given to a medical report,⁵ taking into account the doctor's qualifications, specialisation and experience,⁶ the quality of the doctor's reasoning⁷ and the extent to which any conclusion is related to established diagnostic criteria,⁸ and the material on which the opinion is based.⁹ The Tribunal should not regard the account given to the doctor as being unreliable without first of all deciding whether the doctor's opinion supports a positive finding as to the credibility of the appellant,¹⁰ but a negative inference may be drawn from inconsistencies between the history given to a doctor and the evidence given to the Secretary of State or the Tribunal.¹¹ An immigration judge should not reject an appellant's account of being tortured on the ground that there were no visible marks on the appellant's body unless medical evidence or the judge's own, explicitly disclosed expertise established that such marks would be present.¹² A GP's report is capable of constituting independent evidence of torture.¹³ A medical report that merely documents scars or injuries without stating the doctor's opinion as to their consistency with the appellant's account will have little or no corroborative weight.¹⁴ Those preparing medical reports intended as corroborative should have regard to the Istanbul Protocol, in particular, paragraphs 186–187 on 'Examination and Evaluation following specific forms of torture'.¹⁵ Where a doctor had given detailed evidence, corroborative of an appellant's account, about the likely causation of injuries, more was required to explain rejection of that evidence than the assertion that the injuries were equally consistent with incidents in an agrarian community not involving violence.¹⁶ Greater weight would be given to a medical report that considered and commented on the likelihood of other possible causes for the person's injuries.¹⁷

¹ *Mohammed (Swaleh)* (12412) (4 August 1995, unreported); *Ibrahim v Secretary of State for the Home Department* [1998] INLR 511, IAT; *Guney* (19159) (4 August 1999, unreported); *Sivakarathas* (01056) (12 May 2000, unreported), IAT.

- ² *Kitshi* (11920) (23 March 1995, unreported). It is putting the cart before the horse to make an adverse assessment of credibility, based on the appellant's oral evidence, and then reject the medical evidence he or she has produced in support: *R (on the application of Begaraj) v Special Adjudicator* [2002] EWHC 1469 (Admin), [2002] All ER (D) 99 (Jun); *MT (Syria)* [2004] UKIAT 00307. See also *Diaby v Secretary of State for the Home Department* [2005] EWCA Civ 651, [2005] All ER (D) 32 (Jul).
- ³ *Mageto v Immigration Appeal Tribunal* [1996] Imm AR 56, CA; *Yahiaoui* [2002] UKIAT 03504; *Khan (Rashid)* [2002] UKIAT 06026. However, in *Singh (Amrik) v Secretary of State for the Home Department* [2000] Imm AR 340 the Court of Appeal held that psychiatric evidence of the effect of an appellant's mental state on his ability to recall reliably entitled the Tribunal to find his evidence unreliable and so reject his claim – an illustration of the double-edged nature of such evidence. The UNHCR Handbook recommends reliance on other sources of evidence in the case of mentally disturbed asylum claimants (paras 206–212).
- ⁴ *R v Secretary of State for the Home Department, ex p Khaira* [1998] INLR 731. See also *SP (Yugoslavia)* [2003] UKIAT 00017; *Secretary of State for the Home Department v S (Georgia)* [2003] UKIAT 00082; *Januzi v Secretary of State for the Home Department* [2003] EWCA Civ 1188; *R (on the application of Minani) v Immigration Appeal Tribunal* [2004] EWHC 582 (Admin), [2004] All ER (D) 410 (Feb).
- ⁵ *SP (Yugoslavia)* [2003] UKIAT 00017; *KK v Secretary of State for the Home Department* [2005] EWCA Civ 1082, [2005] All ER (D) 214 (Jul).
- ⁶ *Demaku* [2002] UKIAT 06001; *SP (Yugoslavia)* above.
- ⁷ *Jeyarajasingham* (2001) (01TH00845), IAT, para 16 (reasoning to be expected in medical reports dealing with scars). Expert psychiatrists exercise their critical faculties and experience, and should not be treated as accepting claimants' accounts uncritically: *R (on the application of Minani) v Immigration Appeal Tribunal* [2004] EWHC 582 (Admin), [2004] All ER (D) 410 (Feb); *Ademaj* [2002] UKIAT 00979.
- ⁸ *Demaku* above; *Secretary of State for the Home Department v Lama* [2002] UKIAT 07554; *M (DRC)* [2003] UKIAT 00054.
- ⁹ *Secretary of State for the Home Department v AE and FE* [2002] UKIAT 05237 [2003] Imm AR 152. This might include consideration how many times the psychiatrist met the subject of the report and for how long, what if any medical records were seen, and the extent to which the psychiatrist relied on the subject's untested account: *Cinar* [2002] UKIAT 06624; see also *SP (Yugoslavia)* [2003] UKIAT 00017. In *HE (DRC)* [2004] UKIAT 00321 'Reported', the Tribunal urged advocates seeking to support credibility by reference to medical reports to show that the support it provides is independent of what the claimant has told the psychiatrist.
- ¹⁰ *R (on the application of Gautam) v Special Adjudicator* [2003] EWHC 1160 (Admin), [2003] All ER (D) 81 (May); *R (on the application of Begaraj) v Special Adjudicator* [2002] EWHC 1469 (Admin), [2002] All ER (D) 99 (Jun); *M (DRC)* [2003] UKIAT 00054.
- ¹¹ *Basak* [2002] UKIAT 03570.
- ¹² *Reka v Secretary of State for the Home Department* [2006] EWCA Civ 552, [2006] All ER (D) 224 (May).
- ¹³ *R (on the application of D) v Secretary of State for the Home Department; R (on the application of K) v same* [2006] EWHC 980 (Admin), 150 Sol Jo LB 743, [2006] All ER (D) 300 (May).
- ¹⁴ *SA v Secretary of State for the Home Department* [2006] EWCA Civ 1302, [2006] All ER (D) 103 (Oct).
- ¹⁵ *SA v Secretary of State for the Home Department*. The Istanbul Protocol is the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Submitted to the United Nations High Commissioner for Human Rights – 9 August 1999). Under the heading 'D. Examination and Evaluation following specific forms of Torture' the Istanbul Protocol says:

'186.... For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution:

(a)Not consistent: the lesion could not have been caused by the trauma described;

(b)Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;

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(c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;

(d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;

(e) Diagnostic of: this appearance could not have been caused in anyway other than that described.

187. Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story (see Chapter IV.G for a list of torture methods).⁷

¹⁶ *KP (Sri Lanka) v Secretary of State for the Home Department* [2007] EWCA Civ 62, [2007] All ER (D) 91 (Jan).

¹⁷ *RT (Sri Lanka)* [2008] UKAIT 0009.

Expert evidence and country background evidence

18.145 Credibility findings can only really be made on the basis of a complete understanding of the entire picture, placing a claim into the context of the background information regarding the country of origin,¹ although going into detail about the background circumstances will not always be necessary or fruitful,² and the Tribunal is not required to set out in detail all the background evidence it has read.³ Instead of simply rejecting a claim to fear being persecuted because of a young appellant's inability to explain why she should be at risk, particular reliance should be placed on the background material to see whether it affords an explanation.⁴

Where the background evidence is in conflict, the Tribunal and the courts have expressed a preference for independent, sourced reports,⁵ but where there are divergent opinions from reputable human rights organisations about the conditions in a country, there should be an in-depth examination to see if the evidence can be reconciled,⁶ and a real attempt to balance them.⁷ If they cannot be reconciled, the Tribunal should give reasons for preferring one report over another.⁸ The Tribunal need not invite oral evidence from an expert witness whose report he or she is minded to reject,⁹ but expert evidence should not be rejected merely because it has not been tested in cross-examination,¹⁰ or because it does not identify its sources,¹¹ nor should it be rejected as 'mere speculation'.¹² The Court of Appeal has been critical of the cursory and at times contemptuous way the appellate authorities have treated the evidence of reputable experts, and has pointed out that such evidence should not be lightly rejected¹³ and that the Tribunal is 'bound to place heavy reliance on the views of experts and specialists'.¹⁴ The Tribunal should not reject the opinion of an expert on grounds of the expert's 'partiality' without explaining why that label is applied to that expert.¹⁵ In its reasoning it should clearly indicate what it has accepted from expert reports.¹⁶ But expert witnesses' duty is to the court and it is important that they appreciate that, comply with it, believe in the truth of the facts in the report and the accuracy of the opinion given, cover all relevant matters and set out any matters affecting its validity.¹⁷ In *Slimani*,¹⁸ a starred Tribunal approved the guidance given in *The Ikarian Reefer*¹⁹ that to be relied on, the expert needs to provide independent assistance to the Tribunal, must not assume the role of an advocate, and needs to specify the facts on which his or her opinion is based.

The Tribunal deprecated the practice of putting in evidence in one case expert reports prepared for a different case, unless the report is specified as a general one or the author has given his consent.²⁰ Foreign law is a question of fact which should be determined, in the absence of agreement between the parties, by expert evidence,²¹ but in the absence of such evidence the appellate authority may review questions of foreign law for itself.²²

- ¹ UNHCR Handbook paras 42–43; *R v Immigration Appeal Tribunal, ex p Ahmed (Sardar)* [1999] INLR 473 (QBD); *Horvath v Secretary of State for the Home Department* [1999] Imm AR 121, [1999] INLR 7 (IAT); *Suleyman* (16242) (11 February 1998, unreported); *Tharunalingam* (18452); *Gurung v Secretary of State for the Home Department* [2003] EWCA Civ 654, [2003] All ER (D) 14 (May). For an example of the danger of assessing credibility in isolation, see *R v Immigration Appeal Tribunal, ex p Pratheepan* (CO 1102/98) (27 April 1999, unreported), QBD (adjudicator dismissed advocate's letter on basis of ignorance of legal procedures in Sri Lanka). See also *R (on the application of Gulbudek) v Immigration Appeal Tribunal* (CO 2174/2000) (21 November 2000, unreported), where an adjudicator's conclusion that the Turkish authorities would investigate rape and torture allegations was quashed as perverse; and *R (on the application of Vuckovic) v Special Adjudicator* (CO 3021/2000) (18 December 2000, unreported) (adjudicator unfair to determine case without Home Office country assessment which lent support to appellant's case).
- ² *R v Secretary of State for the Home Department, ex p Befekadu* [1999] Imm AR 467, QBD.
- ³ *R (on the application of Shokrollahy) v Immigration Appellate Authority* [2000] Imm AR 580, QBD.
- ⁴ *De Sousa v Secretary of State for the Home Department* [2006] EWCA Civ 183, [2006] All ER (D) 60 (Feb).
- ⁵ *Mario v Secretary of State for the Home Department* [1998] Imm AR 281, [1998] INLR 306, IAT; *Drriias v Secretary of State for the Home Department* [1997] Imm AR 346, CA (value of 'bland' FCO letter questioned); *X* (98/0474/4) 24 July 1998, CA (UNHCR report might deserve more weight than that of a national immigration authority). UNHCR reports have been seen as the most reliable: see *Ragavan* (15350) (21 August 1997, unreported); *Teshome* (15693).
- ⁶ *Hassen* (15558) (3 October 1997, unreported); see also *Lahori* (G0062) (7 October 1998, unreported), IAT.
- ⁷ *Mulumba* (14760) (24 March 1997, unreported).
- ⁸ *Thillarajah* (14606) (10 March 1997, unreported); *Vasikaran* (15241) (4 July 1997, unreported), IAT.
- ⁹ *R v Secretary of State for the Home Department, ex p Khanafer* [1996] Imm AR 212.
- ¹⁰ *Singh (Tarlochan) v Secretary of State for the Home Department* [2000] Imm AR 36. The written evidence of an expert, even if untested in cross-examination, is entitled to the respect due to persons who possess the relevant expertise: *Kilic* [2002] UKIAT 02714. But the testimony of an expert witness who did attend court would be highly important: *Zheng* (20271) (1 April 1999, unreported).
- ¹¹ It is in the nature of an expert report that the expert is the source, although reference to sources would add weight to the expert's opinion: *Secretary of State for the Home Department v Markos* [2002] UKIAT 08313. But see *Slimani* (01TH00092) (12 February 2001, unreported), (starred) IAT.
- ¹² *Karanakaran v Secretary of State for the Home Department* [2000] Imm AR 271, CA. See also *Gomez* [2000] INLR 549; *Kapela v Secretary of State for the Home Department* [1998] Imm AR 294.
- ¹³ *Karanakaran* above; see also the Court of Appeal's observations in granting permission to appeal in *R v Immigration Appeal Tribunal, ex p Es-Eldin* (C/00/2681) (29 November 2000, unreported), subsequently allowing by consent the appeal against the QBD decision reported in [2001] Imm AR 98. See also *Singh (Tarlochan) v Secretary of State for the Home Department* [2000] Imm AR 36. For a recent example, see *SA (Syria) v Secretary of State for the Home Department* [2007] EWCA Civ 1390 where the Court criticised the Tribunal's treatment of a letter from Amnesty International as 'unsourced', contrary to current Tribunal country guidance and therefore entitled to little weight. In the same case, the Tribunal's treatment of the reports of two experts was said to have been so cursory as not to have engaged with them at all.

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- ¹⁴ *S v Secretary of State for the Home Department* [2002] EWCA Civ 539; [2002] INLR 416. The Tribunal has also emphasised the importance of giving proper consideration to expert reports: see eg *Misrak (Habteselassie)* (00308) (28 February 2000, unreported). More recently, in *SI (Iraq)* CG [2008] UKAIT 00094, the Tribunal said: 'In general the Tribunal takes the view that a country expert's opinion is to be given significant weight and if the Tribunal decides to come to a different view from an expert on key matters, proper reasons must be given'.
- ¹⁵ *Cherbal* [2002] UKIAT 02014. The Tribunal would, however, exercise particular care in assessing the weight to be attached to views expressed by an individual whose opinions were adduced on a regular basis in case his or her views were influenced, even unconsciously, by the hope of receiving further, similar instructions: *KA (Somalia) v Secretary of State for the Home Department* [2006] EWCA Civ 1324, approving *AA* [2004] UKIAT 00221.
- ¹⁶ *Djebari v Secretary of State for the Home Department* [2002] EWCA Civ 813, [2002] AIL ER (D) 184 (May). But equally, the Tribunal should not accept expert evidence uncritically, without explaining why it is preferred to a body of reputable evidence which contradicts it: *Djebbar v Secretary of State for the Home Department* [2004] EWCA Civ 804, [2004] 33 LS Gaz R 36.
- ¹⁷ *Thambiah* (01372) (10 May 2000, unreported), IAT. Expert reports should show the status of their author and be specifically relevant to the case: *R v Immigration Appeal Tribunal, ex p Kilinc* [1999] Imm AR 588.
- ¹⁸ *Slimani* (01TH00092) (starred) (12 February 2001, unreported), IAT.
- ¹⁹ *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ('The Ikarian Reefer')* [1993] 2 Lloyd's Rep 68 at 81–2.
- ²⁰ *Slimani* (01TH00092) (starred) (1 February 2001), IAT; *Singh (Armardeep)* (00943) (28 April 2000); *Zheng* (20271) (1 April 1999, unreported), IAT.
- ²¹ *R v Secretary of State for the Home Department, ex p Bradshaw* [1994] Imm AR 359; *Tikhonov* [1998] INLR 737, IAT.
- ²² *R v Special Adjudicator, ex p Turus* [1996] Imm AR 388, QBD.

Evidence of post-decision facts

Evidence of facts found in appeals by family members

18.151 In *Chicaiza*,¹ the Tribunal held that an adjudicator hearing the appeal of one member of a family should in certain circumstances, where their claims are closely associated with each other, take into account the determinations of appeals by other family members, although the weight to be given to the findings of fact made in the other appeals is a matter for the adjudicator. In the same case, the Tribunal pointed out that where one member of a family was granted asylum on the basis of similar considerations to those raised by the appellant, dismissal of the asylum appeal would have to be very carefully reasoned. But it is important that Tribunals do not treat earlier determinations of other family members' appeals as determinative of the particular appeal before them. In *Otshudi*,² Sedley LJ upheld the importance of individual justice over consistency of determinations, and mere disparity of outcomes between family members does not amount to error of law.³ Applying the same principle, the determination of an individual's appeal was not admissible in his brother's appeal for the purpose of destroying the brother's credibility.⁴ Where a family member whose evidence had been disbelieved on his own appeal gave identical evidence in his wife's appeal the immigration judge was entitled not only to have regard to the determination on his appeal but also to treat it as determinative of his credibility, although not determinative of the whole appeal.⁵ The 'Devaseelan guidelines'⁶ are relevant to cases where someone who has had an appeal determined by the Tribunal gives evidence in another

person's appeal. However, they need to be adapted and there may have to be more readiness to revisit factual findings made by the Tribunal that determined the witness' appeal in the light of the totality of the evidence.⁷ However, the applicability of the *Devaseelan* guidelines is limited to cases that arise from the same factual matrix, eg the same relationship or the same events; an 'overlap of evidence' is not sufficient for the guidelines to apply.⁸ Moreover, there should be much more scope for reopening the factual findings of the first Tribunal if the person against whom those findings are relied on was not a party to the proceedings before the first Tribunal.⁹

¹ *Chicaiza* [2002] UKIAT 01200.

² *Otshudi v Secretary of State for the Home Department* [2004] EWCA Civ 893, [2004] All ER (D) 12 (Jul).

³ *S (Sri Lanka)* [2004] UKIAT 00039.

⁴ *MJ (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 564, [2008] All ER (D) 320 (Apr).

⁵ *TK (Georgia)* [2004] UKIAT 00149.

⁶ As to which, see the preceding paragraph.

⁷ *Ocampo v Secretary of State for the Home Department* [2006] EWCA Civ 1276, [2006] 40 LS Gaz R 36.

⁸ *AA (Somalia) v Secretary of State for the Home Department* [2007] EWCA Civ 1040 per Carnwath and Ward LJ (Hooper LJ dissenting).

⁹ *AA (Somalia) v Secretary of State for the Home Department* [2007] EWCA Civ 1040, [2007] All ER (D) 395 (Oct), per Carnwath and Ward LJ (Hooper LJ dissenting).

Burden and standard of proof

18.152 The rules relating to the burden of proof in appeals may be summarised as follows:

- (1) the burden of proving British citizenship or any exemption from statutory provisions is on the person who makes the assertion.¹ Usually this will be the applicant, but not always;²
- (2) in an appeal, an appellant who wishes to assert that he or she has a right of abode or is exempt and, therefore, that the decision or action should not have been taken, must prove it;³
- (3) most claims to enter or remain will depend on the applicant satisfying the entry clearance officer, immigration officer or Home Office of the necessary facts which will qualify them in the appropriate category, and consequently in an appeal the burden of proving such a claim is on the party making it;⁴
- (4) this applies equally to asylum and human rights or discrimination claims, where the burden of proof is on the applicant to make his or her case.⁵
- (5) the Immigration (European Economic Area) Regulations give various rights of residence to a person who is the 'spouse' of another, but define spouse so as to exclude a party to a marriage of convenience. The burden of proof is on the appellant who claims such a right to show that he or she is not party to a marriage of convenience. However, the burden need only be discharged if the respondent adduces evidence capable of supporting a conclusion that the marriage was one of convenience;⁶

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- (6) where it is plain that at the date of flight or the date of the decision an asylum seeker did in fact qualify for refugee status, but the Secretary of State contends that by the date of the hearing the circumstances have changed, then by analogy with Article 1C(5) of the Refugee Convention (where proof that the circumstances of persecution have ceased to exist falls on the receiving state) there is an evidential burden on the Secretary of State to establish that the appellant can safely return home;⁷
- (7) where an internal flight option is alleged by the Secretary of State, no question of burden or standard of proof arises; the question is simply whether, taking all relevant matters into account, it would be unduly harsh to expect the applicant to relocate.⁸ However, internal flight is not a legitimate issue unless proper notice has been given by the Secretary of State that it is to be raised;⁹
- (8) where an applicant falls into a class of persons who are acknowledged to face particular treatment, it is for the respondent to show why the applicant faces no real risk of such treatment;¹⁰
- (9) where the Secretary of State revokes a person's indefinite leave to enter or remain under the NIAA 2002, s 76, it is for the Secretary of State to prove the facts entitling him to make the decision,¹¹ ie that the person is liable to deportation but cannot be deported for legal reasons;¹² that leave was obtained by deception such that the person would have been liable to removal but cannot be removed for legal or practical reasons;¹³ that the person has ceased to be a refugee, having availed him or herself of another country's protection or nationality¹⁴) entitling him to make the decision;
- (10) where the Secretary of State seeks to deport someone under s 3(5) of the IA 1971, the Secretary of State must prove the facts necessary to establish a ground for deporting. This will also be the case where the Home Office are relying on non-disclosure of material facts to justify the refusal of entry,¹⁵ or on any of the general grounds for refusal of entry clearance, leave to enter or remain contained in Part 9 of the Immigration Rules, such as character, conduct, associations, criminal convictions and so forth.¹⁶ It falls on the party who asserts to prove;
- (11) there will also be a heavy burden on the Secretary of State if it is sought to contradict a finding as to relationship made in a previous appeal, although the concept of *res judicata* does not apply to the determination of the immigration appellate authorities;¹⁷
- (12) where the respondent asserts that documents relied on by an appellant are false, it is for him or her to prove it.¹⁸ However, possession of an apparently genuine national passport must raise an inference that the holder possesses the corresponding nationality, which it is for him or her to rebut;¹⁹
- (13) where an appellant establishes that an immigration decision interferes with his or her right to respect for a right protected by Article 8(1) it is for the respondent to justify the decision under Article 8(2).²⁰

¹ IA 1971, s 3(8).

² An example would be where the applicant wishes to rely on a stamp on his or her passport giving indefinite leave, but the Home Office asserts that the stamp does not apply because the applicant had a diplomatic exemption at the time.

- ³ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 53(1), applied to fast track appeals by SI 2005/560, r 27, reflecting the IA 1971, s 3(8). The rule would also include an assertion of exemption from deportation under s 7 of the IA 1971.
- ⁴ SI 2005/230, r 53(2). See *R v Secretary of State for the Home Department, ex p Mughal* [1974] QB 313, [1974] 3 All ER 796, CA. See also *Visa Officer, Islamabad v Bi (Channo)* [1978] Imm AR 182 where, although the appellant had previously been granted entry clearance as the wife of the sponsor, she still had the burden of proving she was his wife on a later occasion when she sought readmission.
- ⁵ *Adebola* (16731) (19 August 1998, unreported), IAT. So in an onward appeal, the fact that the Secretary of State, as the appellant, has to show an error of law in the decision below is quite separate from proof by an asylum seeker of the basic elements needed to satisfy the criteria of a refugee claim: *Tikhonov* [1998] INLR 737, IAT. For burden and standard of proof in asylum appeals see 12.25ff above.
- ⁶ *IS (Serbia)* [2008] UKAIT 00031.
- ⁷ *Arif v Secretary of State for the Home Department* [1999] INLR 327, CA, distinguished in *Salim v Secretary of State for the Home Department* [2000] Imm AR 503, CA and *Dyli v Secretary of State for the Home Department* [2000] Imm AR 652 (starred). In *Sijakovic* (01TH 00632) the Tribunal said it was unhelpful to talk of a burden, whether legal or evidential, on the Secretary of State: the issue was whether there was a well-founded fear of persecution. However, in *Saad v Secretary of State for the Home Department, Diriye v Secretary of State for the Home Department, Osorio v Secretary of State for the Home Department* [2001] EWCA Civ 2008, [2002] Imm AR 471, [2002] INLR 34 the Court of Appeal referred approvingly to *Arif*. In *R v Special Adjudicator, ex p Hoxha* [2005] UKHL 19 the House of Lords approved *Arif* on that point. Where a person has been recognised as a refugee by another government, the burden is on the Secretary of State to show that he is no longer a refugee: *Babela* [2002] UKIAT 06214.
- ⁸ *Karanakaran v Secretary of State for the Home Department* [2000] Imm AR 271 at 305. Previously, the question had been approached on the basis that the Secretary of State must show that it would be reasonable to expect an applicant to go to another part of the country, but that the applicant had an evidential burden to put forward matters indicating that it would be unduly harsh to expect him or her to do so: *R v Immigration Appeal Tribunal, ex p Tharumakulasingham* [1997] Imm AR 550, QBD Jowitt J. But there was some confusion about this; see *R v Secretary of State for the Home Department, ex p Salim* [1999] INLR 628, QBD, where the burden was held to be on the appellant to show that internal flight did not apply.
- ⁹ *Daoud v Secretary of State for the Home Department* [2005] EWCA Civ 755, [2005] All ER (D) 259 (May).
- ¹⁰ Thus, where a Country Assessment produced by the Home Office sets out the penalties that may be imposed for draft evasion, it is for the Secretary of State to show that there was no real risk that they would be enforced against a draft-evading asylum seeker: *Mohammed v Secretary of State for the Home Department* [2003] EWCA Civ 265, [2003] All ER (D) 18 (Mar).
- ¹¹ *RD (Algeria)* [2007] UKAIT 00066.
- ¹² NIAA 2002, s 76(1).
- ¹³ NIAA 2002, s 76(2).
- ¹⁴ NIAA 2002, s 76(3).
- ¹⁵ *Ghati* (19707) (27 July 1999, unreported), IAT.
- ¹⁶ *JC (China)* [2007] UKAIT 00027.
- ¹⁷ *Ali (Momin) v Secretary of State for the Home Department* [1984] 1 All ER 1009, [1984] Imm AR 23, CA; *R v Immigration Appeal Tribunal, ex p Miah (Lulu)* [1987] Imm AR 143; *R v Secretary of State for the Home Department, ex p Danaie* [1998] Imm AR 84; [1998] INLE 124.
- ¹⁸ *R v Immigration Appeal Tribunal, ex p Shen* [2000] INLR 389, QBD; *Makozo* (20033) (12 February 1999, unreported), IAT; *Escobar* (20553) (26 March 1999, unreported), IAT. But since the overall burden of proof is on the appellant, it is not necessary for the Secretary of State to prove forgery in order for a claim resting on documentary evidence to be dismissed: see cases cited at fn 6 above.
- ¹⁹ *MW (Pakistan)* [2004] UKIAT 00136.
- ²⁰ See for example *Miao v Secretary of State for the Home Department* [2006] EWCA Civ 75, [2006] All ER (D) 215 (Feb).

Combined hearings

18.155 The Procedure Rules¹ provide for the possibility of a combined hearing of two or more pending appeals. The Tribunal may hear appeals together if a common question of law or fact arises in them, or they relate to decisions or actions taken against members of the same family,² or for some other reason it is desirable to hear them together.³ The rules no longer require the parties to be given the opportunity to make representations before the Tribunal determines the appeals together.⁴ In hearing a combined appeal, it is crucial that the Tribunal give separate consideration to the case for each appellant.⁵ Appellants' appeals should not fail solely because they differ in their testimony at a combined hearing.⁶ It is inappropriate to exclude any appellant from the hearing room from any part of the combined appeal.⁷ However, where two family members had a choice between separate hearings of their appeals or a combined hearing in which one was directed to leave the hearing room whilst the other gave evidence, the direction was not unlawful.⁸ If two or more appeals are heard together it is preferable to issue separate determinations, unless the appeals are interdependent.⁹ Neither the Procedure Rules nor considerations of fairness require the Tribunal to adjourn the hearing of an appeal pending the determination of a family member's claim, nor is it unfair for a person whose claim has not yet been determined to give evidence in someone else's appeal.¹⁰

¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 20.

² SI 2005/230, r 20(a), (b). It is inappropriate to list the principal's appeal with that of a divorced spouse who had no knowledge of the welfare of the child: *Aderibgebe* (16659) (12 May 1998, unreported), IAT.

³ SI 2005/230, r 20(c). The Tribunal has in the past made use of this power particularly in bringing together cases from a single country displaying a range of facts, in order to issue 'Country Guideline' determinations (see 18.142 above).

⁴ The previous procedure rules, SI 2003/652, made such provision in r 51(2). The Tribunal has power to give directions requiring the parties to take any steps to enable two or more appeals to be heard together: SI 2005/230, r 45(4)(g). An appellant who believed him- or herself prejudiced by a combined hearing would be able to raise this as a preliminary issue under r 45(4)(d)(i).

⁵ *Wah (Yau Yak) v Home Office* [1982] Imm AR 16, CA; *R v Immigration Appeal Tribunal, ex p Begum (Hamida)* [1988] Imm AR 199.

⁶ *Tabores and Munoz* (17819) (24 July 1998, unreported), IAT, where dismissal on the basis that they 'cannot both be telling the truth' was set aside.

⁷ *Tabores and Munoz* (17819) (24 July 1998, unreported), IAT.

⁸ *RS and SS (Pakistan)* [2008] UKAIT 00012.

⁹ *Tuum v Immigration Officer, Heathrow* [1986] Imm AR 316; *Ahmed* (7903), unreported.

¹⁰ *Rajan* (01TH00244) (starred); *S (Sri Lanka)* [2004] UKIAT 00039, declining to follow *R v Secretary of State for the Home Department, ex p Kimbesa* (29 January 1997, unreported). See 18.126 above.

After the hearing

18.159 The Tribunal may indicate during the hearing that it is prepared to receive further evidence and/or submissions within a specified time, in order to do justice between the parties and ensure that all issues are not only ventilated but that all the requisite evidence and arguments are deployed in their support. The first guiding rule is equality of treatment; if an appellant is given extra time to submit a document which has not arrived in time for the hearing,

the respondent must be afforded an opportunity to deal with it, in writing or even, if necessary, by reconvening the hearing. The course to be adopted will depend on the circumstances of the case, the approach of the parties and the Tribunal to the hearing itself.¹ The second guiding rule is that if the Tribunal has allowed time for further submissions, they must not be ignored if they are sent within the specified time.² If the Tribunal gives an indication at the end of the hearing that it intends to allow the appeal, it is obliged to allow further evidence or submissions if it changes its mind.³ The Tribunal remains seised of the appeal, and so able to take account of new evidence, up until the time when its decision is formally notified to the parties.⁴

¹ *Bwamiki* (17710) (10 July 1998, unreported), IAT.

² *Singh (Billa)* (G0071) (21 January 1999, unreported), IAT. The admission of fresh evidence would not depend on an indication by the Tribunal at the hearing, however; if further relevant evidence becomes available between the hearing and the promulgation of the determination, it should be submitted to the Tribunal and to the other party, and if not taken into account could form the basis of an application for appeal or review (see 18.166 below): *E v Secretary of State for the Home Department, R v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] INLR 268.

³ *R v Special Adjudicator, ex p Bashir* [2002] Imm AR 1, AC; *K (Rwanda)* [2003] UKIAT 00047. The same applies where the Tribunal reconsiders a positive finding on credibility which has been communicated to the parties: *Paudel* [2002] UKIAT 06868.

⁴ *E v Secretary of State for the Home Department, R v Secretary of State for the Home Department* (fn 2 above), paras 27, 92 and *SD (Russia)* [2008] UKAIT 00037.

Errors or irregularities in procedure and administrative errors

18.160 An error of procedure such as a failure to comply with a rule does not invalidate any step taken in the proceedings unless the Tribunal so orders.¹ Thus it would be an error of law for the Tribunal to treat the rule requiring the Secretary of State to serve on the appellant a determination relating to an asylum claim no later than she makes an application for reconsideration² as being a precondition for a valid application and failure to comply as automatically invalidating the application.³ Further, prior to determining an appeal, the Tribunal may make an order or take any other step that it considers appropriate to remedy the error.⁴ This would normally be done either by amendment of documents or the giving of any notice, but it is not confined to such steps. The procedure rules specifically provide that determinations retain their validity even if the hearing did not take place within the time specified under the rules, or the determination was not made or served within the specified time.⁵ But this rule cannot be used to extend time limits or to give jurisdiction where none exists.⁶ Procedural irregularities (other than late service of the determination) discovered after the Tribunal's determination can normally only be dealt with by way of an order for reconsideration or appeal.⁷ The Tribunal also has power to correct clerical or other accidental errors, slips and omissions by amendment of orders, notices and determination.⁸ It must serve the amended document on the parties on whom the original document was served,⁹ except in fast track appeals, and if the error was contained in the determination of the appeal, time for appealing or applying for reconsideration runs from the date of service of the amended determination.¹⁰ The President of the Tribunal has the power to review any order, notice of decision or determination made by the Tribunal and may set it

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aside with a direction that the relevant proceedings be dealt with again. This power may be exercised on the ground that the order, notice of decision or determination was wrongly made as a result of an administrative error on the part of the Tribunal or its staff.¹¹ The power may be exercised by the President of his or her own motion or on application of the party made within 10 days (if in the UK) or 28 days (if outside the UK) of being served with the order, notice of decision or determination.¹²

¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 59(1), applied to fast track appeals by SI 2005/560, r 27.

² SI 2005/230, r 23(5)(a)(i).

³ *NB (Guinea) v Secretary of State for the Home Department* [2008] EWCA Civ 1229, [2008] All ER (D) 121 (Nov). Thus, *HH (Iraq)* [2007] UKAIT 00036 and *RN (Zimbabwe)* [2008] UKAIT 0001 were wrongly decided. However, it would be an error of law for the Tribunal to treat an application for reconsideration where there had been non-compliance with the rule as valid without considering its discretion to make an order invalidating the application – *NB (Guinea)*.

⁴ SI 2005/230, r 59(1)(b).

⁵ SI 2005/230, r 59(2).

⁶ *R v Immigration Appeal Tribunal, ex p Secretary of State for the Home Department* [1990] Imm AR 166; *Wa-Selo v Secretary of State for the Home Department* [1990] Imm AR 76, CA.

⁷ *Ie* under the NIAA 2002, s 103A or 103E.

⁸ SI 2005/230, r 60(1), applied to fast-track appeals by SI 2005/560, r 27. See for example *MF (Palestinian Territories)* [2007] UKAIT 00092.

⁹ SI 2005/230, r 60(2), disappplied in respect of fast-track appeals, see SI 2005/560 r 27.

¹⁰ SI 2005/230, r 60(3).

¹¹ SI 2005/230, r 60(1A), as inserted by SI 2006/2788, r 15.

¹² SI 2005/230, r 60(1A) and (1B).

Making a determination

18.162 The determination is the decision by the Tribunal in writing to allow or dismiss the appeal, and does not include a procedural, ancillary or preliminary decision.¹ Written notice of the determination must be sent to every party,² and the appellant's representative, if any,³ in ordinary cases not later than ten days after the hearing finishes or the appeal is determined without a hearing.⁴ This rule does not apply to determinations of in-country appeals relating wholly or partly to an asylum claim and special procedures apply instead; in such cases service of the determination is on the respondent, who then serves it on the appellant.⁵ The Tribunal has held that an appeal relates to an asylum claim only if the immigration decision appealed against follows an asylum claim within the meaning of s 113 of the NIAA 2002, ie a claim made to the Secretary of State at a designated place, whether or not asylum grounds are pursued before the Tribunal; conversely, even if asylum grounds are raised in the appeal, if no such claim was made to the Secretary of State, the appeal does not relate to an asylum claim and the special procedures relating to service do not apply.⁶ In such a case, the time limits for the Tribunal's service on the respondent are the same, but the respondent has 28 days to serve the appellant unless the respondent applies for permission to appeal or for review, in which case the appellant must be served no later than the date of such an application.⁷ The Tribunal must allow or dismiss an appeal,⁸ and cannot allow it on a conditional basis,⁹ but an appeal may be allowed to the extent that the matter is remitted to the Secretary of State for

consideration in accordance with the law and the correct facts as found by the Tribunal.¹⁰ The question as to whether the definition of ‘determination’ in the Procedure Rules excludes a decision that there is no right of appeal or that an appeal had been abandoned has been considered at 18.107 above. The Tribunal is obliged to make a formal determination in every case where he or she purports to dispose of the appeal.¹¹ The Tribunal has indicated in a Practice Direction that where its jurisdiction is exercised by more than one member, there will be no indication whether its decision was unanimous, and dissenting views will not be included in it or otherwise communicated.¹² Although the freedom to express a dissenting view was rarely exercised in the old Immigration Appeal Tribunal, it was not banned, and this direction causes some concern in that it prevents the appellant from knowing what every defendant in a criminal case tried by a jury has the right to know, and offends the principle of open justice.

- ¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 2, applied to fast track appeals by SI 2005/560, r 2.
- ² SI 2005/230, r 22(1). The fact that pages were missing from a determination could not ground an appeal where no steps had been taken to obtain the missing pages: *Secretary of State for the Home Department v W (Ethiopia)* [2004] UKIAT 00074.
- ³ SI 2005/230, r 55(3).
- ⁴ SI 2005/230, r 22(2). The new rules contain no express power to promulgate a determination orally at the end of the hearing, although it would clearly be within the power of the Tribunal to give the decision, while reserving the reasons, and some immigration judges routinely deliver the entire determination orally, sending a copy in writing as required by the rules. Where a written determination contradicted the oral decision to allow the appeal issued at the end of the hearing, the remedy was not a mandatory order to compel a written decision in accordance with the oral one, but an order to quash the written determination for the whole matter to be reconsidered de novo: *R v Special Adjudicator, ex p Bashir* (CO 4643/98) (6 December 1999, unreported), QBD. See also *K (Rwanda)* [2003] UKIAT 00047, and cases cited at 18.153 above.
- ⁵ SI 2005/230, r 22(1), 23(1), (4), (5)(a). The purpose of this provision, introduced by SI 2001/4014 in January 2002, is to prevent unsuccessful claimants from disappearing on receipt of unfavourable determinations. The idea was that they would be detained and removed shortly thereafter. In fact, in most cases nothing further is done to remove unsuccessful claimants, apart from removing entitlement to asylum support: see chapter 13 above. The rule for the service of the decision on the Secretary of State was held not to be *ultra vires* in *R (on the application of Bubaker) v Lord Chancellor* [2002] EWCA Civ 1107, [2002] Imm AR 552 (permission) and in *NB (Guinea) v Secretary of State for the Home Department* [2008] EWCA Civ 1229 the rules were held to be *intra vires*, albeit ‘unpalatable’.
- ⁶ *HH (Iraq)* [2007] UKAIT 00036.
- ⁷ The respondent must notify the Tribunal as soon as practicable of its service of the determination on the appellant, and if the Tribunal has not received notice of service within 29 days, it must serve the determination on the appellant itself, as soon as reasonably practicable: r 23(5)(b), (6).
- ⁸ *Hamdan* (12338) (24 July 1995, unreported), IAT: there is no power to remit to the Secretary of State as an alternative to allowing or dismissing an appeal, although the Tribunal may adjourn to enable the respondent to deal with an issue arising in the course of a hearing: see 18.126 above.
- ⁹ *Secretary of State for the Home Department v Khalil* [1993] Imm AR 481; *Aryee* (8707), IAT.
- ¹⁰ *Kanahalashmi* (10007), IAT.
- ¹¹ *Kouchaliev* (10259) (2 September 1993, unreported), IAT, where the adjudicator on a spouse entry clearance appeal decided that the appellant was a British citizen and made no formal determination.
- ¹² Practice Direction 1/2005, para 10.

ONWARD APPEALS AND REVIEW

Perversity

18.169 Perversity amounting to an error of law can be established if the ‘decision is one to which no reasonable decision maker, properly instructing himself on the law could have come on the evidence before him’.¹ Perversity ‘is a question which has always to be scrupulously disentangled from the question whether the second decision maker simply entertains a strong disagreement with the first’.² It does not require ‘wilful or conscious departure from the rational. A finding of fact which is wholly unsupported by the evidence is capable of amounting to an error of law by this analysis’³ as is a finding of fact that is unfounded or erroneous.⁴ Misunderstanding of evidence by an immigration judge would be an error of fact rather than an error of law. However, were the judge then to rely upon the evidence as misunderstood that would be to make a decision on the basis of no evidence which would amount to an error of law.⁵

¹ Keene LJ in *Miftari v Secretary of State for the Home Department* [2005] EWCA Civ 481, [2005] All ER (D) 279 (May).

² Sedley LJ in *RP (Zimbabwe) v Secretary of State for the Home Department* [2008] EWCA Civ 825, [2008] All ER (D) 135 (Aug).

³ Maurice Kay LJ in *Miftari*.

⁴ *Krasniqi v Secretary of State for the Home Department* [2006] EWCA Civ 391, (2006) Times, 20 April.

⁵ Buxton LJ in *Miftari v Secretary of State for the Home Department*.

Unfairness resulting from a mistake of fact

18.172 The Court of Appeal in *E v Secretary of State for the Home Department*, having acknowledged that unfairness resulting from a mistake of fact would be an error of law held that to establish such an error would normally require the following:

- (i) there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;
- (ii) it must be possible to categorise the relevant fact or evidence as “established” in the sense that it was uncontentious and objectively verifiable;
- (iii) the appellant (or his advisers) must not have been responsible for the mistake;
- (iv) the mistake must have played a material (not necessarily decisive) part in the Tribunal’s reasoning’.¹

An evidential dispute as to the existence of the ‘existing fact’ would remove the matter from the ‘narrowly confined’ scope of the ‘mistake of fact amounting to an error of law’ ground.² The requirement that the appellant’s adviser should not have been responsible for the mistake must now apply with less, if any force in the light of the Court’s subsequent decision in *FP (Iran)*.³ New evidence to establish the existence of such a mistake could be admitted if the ‘*Ladd v Marshall* principles’⁴ were satisfied, although they might be departed from in exceptional circumstances where the interests of justice required.⁵ Those principles are that:

- (a) the new evidence could not with reasonable diligence have been obtained for use at the trial (or hearing);
- (b) the new evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); and
- (c) the new evidence was apparently credible although it need not be incontrovertible.

The Court of Appeal⁶ and the Tribunal⁷ have held that in certain circumstances new evidence undermining the credibility of a successful appellant may be relied on to establish an error of fact amounting to an error of law. However, the Court of Appeal has subsequently indicated that the issue of whether and in what circumstances such an approach may be adopted needs to be revisited.⁸ It would be an error of law for the Tribunal not to have regard to a relevant policy; if it did not consider the policy because it was not before the Tribunal it would still be an error of law owing to the Secretary of State's failure to discharge his duty to place relevant policy material before the Tribunal.⁹

¹ *R (on the application of Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, (2005) Times, 19 August, [2005] All ER (D) 384 (Jul), citing *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, [2004] 2 WLR 1351.

² *R (FD (Zimbabwe)) v Secretary of State for the Home Department* [2007] EWCA Civ 1220.

³ *FP (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ 13.

⁴ A reference to *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, 98 Sol Jo 870, CA.

⁵ *R v Secretary of State for the Home Department* [2005] EWCA Civ 982, (2005) Times, 19 August, [2005] All ER (D) 384 (Jul).

⁶ *Verde v Secretary of State for the Home Department* [2004] EWCA Civ 1726, [2004] All ER (D) 75 (Dec). In *AD (Guinea) v Secretary of State for the Home Department* [2009] EWCA Civ 56 the Court of Appeal admitted new evidence about the appellant's fraudulent conduct and relied on that to dismiss the appeal it would otherwise have allowed.

⁷ *EA (Ghana)* [2005] UKAIT 00108.

⁸ *Shahen v Secretary of State for the Home Department* [2005] EWCA Civ 1294, [2005] All ER (D) 31 (Nov).

⁹ *AA (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 12, (2007) Times, 2 February.

Application for reconsideration

18.173 A party to an appeal under s 82¹ or 83² of the NIAA 2002 may apply to the appropriate court³ for an order requiring the Tribunal to reconsider its decision, on the ground that the Tribunal has made an error of law.⁴ No application for reconsideration can be made where the decision is by a Tribunal of three or more legally qualified members; in such a case, there will be the possibility of an appeal to the Court of Appeal instead.⁵ Only one application for reconsideration may be made; once the Tribunal has reconsidered its decision, only an appeal to the Court of Appeal is possible⁶ The application is on the papers only; the applicant has no right to an oral hearing,⁷ and the statute indicates that the court's decision is final.⁸ This wording does not oust the High Court's inherent jurisdiction in judicial review, but in *G and M*⁹ the Court of Appeal held that the previous statutory

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review procedure provided ‘adequate and proportionate’ protection of the rights of asylum claimants, so that the court may decline to hear an application for judicial review of issues which had been or could have been the subject of statutory review. The same principle applies to the current statutory provisions.¹⁰ However, there are exceptional cases, particularly those involving gross procedural unfairness of a kind which calls into question the objectivity and integrity of the judicial process, where judicial review may be sought.¹¹ The Administrative Court granted judicial review of a decision by a senior immigration judge ordering reconsideration of a Tribunal’s decision in a case where it was agreed between the parties that there were exceptional circumstances so that judicial review was appropriate.¹² Only a substantive decision of the Tribunal can be the subject of an application for reconsideration; the ‘Tribunal’s decision on appeal’ does not include a procedural, ancillary or preliminary decision.¹³ The courts have historically had some difficulty in deciding the limits of a procedural or preliminary decision – is a decision that an appellant has abandoned his or her appeal preliminary or substantive?¹⁴ Or a decision declining jurisdiction?¹⁵ Both these decisions effectively dispose of an appeal, and in *R (Secretary of State for the Home Department) v Immigration Appeal Tribunal*¹⁶ Collins J held that a refusal to extend time was an appealable determination under the now repealed provisions of the NIAA 2002;¹⁷ however, the wording of the new section, with its explicit exclusion of procedural, ancillary and preliminary decisions, indicates that these types of decision would not now be the subject of an application for reconsideration, and so would be challengeable by judicial review.¹⁸ However, a decision by the Tribunal, made after having accepted a notice of appeal, that it does not have jurisdiction should be susceptible to reconsideration or statutory appeal to the Court of Appeal.¹⁹

¹ I.e. an appeal against an immigration decision as there defined.

² I.e. an appeal against the refusal of asylum to a person who has been granted leave to enter or remain for more than one year.

³ Defined as the High Court in respect of an appeal decided in England and Wales, the Outer House of the Court of Session in respect of an appeal decided in Scotland, and the High Court in Northern Ireland, in respect of an appeal decided in Northern Ireland: NIAA 2002, s 103A(9), (10), inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 26. This puts into statutory form the Court of Appeal decision in *R (on the application of Majeed) v Immigration Appeal Tribunal* [2003] EWCA Civ 615, [2003] 23 LS Gaz R 38, which held that a challenge to a decision of the Immigration Appeal Tribunal about an adjudicator’s decision in Scotland should go to the Court of Session, not the Administrative Court, except in a ‘real emergency’. See also *Tehrani v Secretary of State for the Home Department* [2006] UKHL 47. It remains to be seen whether this exception survives the statutory codification.

⁴ NIAA 2002, s 103A(1), as inserted.

⁵ NIAA 2002, s 103A(8) as inserted. For appeals to the Court of Appeal see 18.178 below.

⁶ NIAA 2002, s 103A(2)(b) as inserted. For appeals to the Court of Appeal see 18.178 below.

⁷ NIAA 2002, s 103A(5) as inserted. The requirements of fairness embodied in Article 6 of the ECHR do not necessarily demand an oral hearing: see 8.72 above.

⁸ NIAA 2002, s 103A(6) as inserted.

⁹ *R (on the application of G) v Immigration Appeal Tribunal*, *R (on the application of M) v Immigration Appeal Tribunal* [2004] EWCA Civ 1731, [2005] 2 All ER 165, upholding Collins J at [2004] EWHC 588 (Admin). However, judicial review might be appropriate where, for example, a procedural irregularity constituted a denial of the claimant’s right to a fair hearing below: see also *R (on the application of Sivasubramaniam) v Wandsworth County Court (Lord Chancellor’s Department intervening)* [2002] EWCA Civ 1738, [2003] 2 All ER 160. So for example, where fast-track procedures were inappropriately

used for an asylum claimant, severely prejudicing him in his appeal (as Sedley LJ accepted might be the case in *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [2004] All ER (D) 201 (Nov)), judicial review of the decision to allocate to the fast-track might be brought where an application for reconsideration would not necessarily be appropriate, or even in parallel with such an application.

¹⁰ *Re the NIAA 2002*, s 103A; see *F (Mongolia) v Secretary of State for the Home Department* [2007] EWCA Civ 769, [2007] 1 WLR 2523.

¹¹ *AM (Cameroon) v Secretary of State for the Home Department* [2007] EWCA Civ 131.

¹² *R (on the application of S) v Secretary of State for the Home Department* [2007] EWHC 426 (Admin), [2007] All ER (D) 248 (Feb).

¹³ *NIAA 2002*, s 103A(7)(a) as inserted. Clearly, a Tribunal's ruling allowing amendment of a notice of decision or of grounds of appeal is a procedural decision: *Egbale v Secretary of State for the Home Department* [1997] INLR 88, but the ruling may have rendered the appeal hearing procedurally unfair, which could ground an appeal against the substantive decision on the appeal for error of law. Judicial review was traditionally available for interlocutory decisions: *R v Immigration Appeal Tribunal, ex p Lila* [1978] Imm AR 50, QBD. But see text and fn 9 above. The giving of directions to give effect to the decision is part of the decision on appeal: s 87(4) as substituted and could therefore be the subject of an application for reconsideration.

¹⁴ The Immigration Appeal Tribunal held in the starred case of *Gremesty* [2001] INLR 132 that such a decision was a determination of the appeal for the purposes of IAA 1999 and the 2000 Procedure rules; see also (under earlier provisions) *Akhue monkhan v Secretary of State for the Home Department* [1998] INLR 265, IAT.

¹⁵ The question of jurisdiction is clearly a preliminary issue, see eg *Secretary of State for the Home Department v Khan* [1999] INLR 309 (decided under the IA 1971, s 20). [2004] EWHC (Admin), 15 December 2004.

¹⁷ *NIAA 2002*, s 101, providing that a party to an appeal could appeal to the Immigration Appeal Tribunal against an adjudicator's determination on a point of law. Collins J rejected the Secretary of State's argument that until an extension of time to appeal was granted, the applicant was not a 'party to an appeal', distinguishing *R (on the application of Erdogan) v Secretary of State for the Home Department* [2004] EWCA Civ 1087, [2004] All ER (D) 421 (Jul), which held that where an application for permission to appeal had been made out of time, no second instance appeal was pending until an extension of time had been granted. Note that the Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, now explicitly distinguish between an 'appellant' and a 'person who has lodged notice of appeal (rr 2, 9–11). Thus, someone refused an extension of time is not an appellant and the decision is not a decision on the appeal for the purpose of review or appeal.

¹⁸ *BO (Nigeria)* [2006] UKAIT 00035 confirming that a decision not to extend time for appealing is not susceptible to reconsideration under the *NIAA 2002*, s 103A. See 18.183 below for judicial review.

¹⁹ *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78, [2009] All ER (D) 193 (Feb).

Grounds for reconsideration

18.175 The jurisdiction of the AIT upon reconsidering an appeal is not confined to consideration of what can be found in the grounds on which reconsideration was sought or ordered.¹ The Procedure Rules have been amended so as expressly to confirm that when deciding whether the original Tribunal made a material error of law, the Tribunal must take into account the s 103A application (not just those grounds on which reconsideration was ordered) and any reply to the order for reconsideration and that it may take into account any other matter which it considers relevant.² The Procedure Rules³ originally provided that in 'transitional cases',⁴ the reconsideration was limited to the grounds upon which permission to appeal had been granted

with no scope for the Tribunal to consider additional grounds. The Court of Appeal held that limitation to be irrational, creating an 'unacceptable protection gap'⁵ and the rules were subsequently amended⁶ so that the Tribunal could permit other grounds to be pursued. When an immigration judge makes an order that the Tribunal is to reconsider its decision,⁷ he or she must 'state the grounds on which the Tribunal is ordered to reconsider its decision on the appeal'.⁸ However, there is no rule that prevents the Tribunal from allowing grounds other than those contained in the immigration judge's statement to be argued⁹ and the Tribunal has held that that statement does not have the effect of defining or limiting the issues before the Tribunal when it decides whether the original Tribunal made a material error of law¹⁰ or (if it finds such an error) when it makes its own decision on the appeal.¹¹ The statement of grounds merely explains why the judge ordered that reconsideration take place. Nevertheless, the Tribunal should be rigorous in ensuring that a new decision is made on an appeal (ie that it should go to 'second stage reconsideration') only if there is an issue of law.¹² The Tribunal's jurisdiction is limited (so the Tribunal has held) not by the grounds upon which the application for reconsideration was made, but only by the grounds upon which the appeal against the immigration decision was originally brought.¹³ The Court of Appeal has also held that the grounds on which reconsideration was sought do not conclusively determine the scope of the Tribunal's jurisdiction, but has been more circumspect than the Tribunal saying that on a reconsideration '*depending on the terms on which it was ordered*, the AIT may review the whole case'¹⁴ [emphasis added]. Notwithstanding the scope of the Tribunal's jurisdiction on reconsidering an appeal, it must 'be very much the exception, rather than the rule' that the Tribunal will permit grounds to be argued other than those identified by the judge who made the order for reconsideration.¹⁵ The Court of Appeal permitted an appellant to raise a ground of appeal relating to Article 14 of the ECHR which had not been raised before the Tribunal because Article 8 had been raised and the Strasbourg Court treated article 14 as an integral part of Article 8.¹⁶

¹ *AA v Secretary of State for the Home Department*; *LK v Secretary of State for the Home Department* [2006] EWCA Civ 401, [2006] NLJR 681, (2006) Times, 17 April. Accordingly, the Court of Appeal permitted the Secretary of State to raise an issue in the Court of Appeal that had not been raised in the Tribunal. See also *Hussain v Secretary of State for the Home Department* [2006] EWCA Civ 382 'by virtue of section 103A, the AIT has jurisdiction if there is an error of law. The section does not require the error to be pleaded in the grounds'.

² Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 31(4)(c), inserted by SI 2008/1008.

³ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 62(7).

⁴ Ie those where the Immigration Appeal Tribunal had granted permission to appeal but, by virtue of a transitional provisions the grant of permission was to be treated as an order for reconsideration of the appeal by the Tribunal.

⁵ *AM (Serbia) v Secretary of State for the Home Department* [2007] EWCA Civ 16.

⁶ By SI 2007/835, r 1(2).

⁷ Under the NIAA 2002, s 103A(1).

⁸ SI 2005/230, r 27(2)(a).

⁹ *R (on the application of Wani) v Secretary of State for the Home Department* [2005] EWHC 2815 (Admin), [2005] All ER (D) 279 (Dec).

¹⁰ SI 2005/230, r 31(2)(a).

¹¹ SI 2005/230, r 31(3).

¹² *Krasniqi v Secretary of State for the Home Department* [2006] EWCA Civ 391, (2006) Times, 20 April.

- ¹³ *AH (Sudan)* [2006] UKAIT 00038. The Tribunal's reasoning as to the jurisdictional ambit of a reconsideration was said by the Court of Appeal to be 'essentially sound' – *DK (Serbia) v Secretary of State for the Home Department* [2006] EWCA Civ 1747, [2007] 2 All ER 483.
- ¹⁴ *AA v Secretary of State for the Home Department* (n 1 above), para 82: 'On such a reconsideration, depending on the terms on which it was ordered, the AIT may review the whole case. It is not exercising the confined jurisdiction of the IAT under s 101(1) of the 2002 Act. Accordingly the restricted approach required by *Miftari* and later cases does not apply. That is not to authorise a free for all in this court. All applicable procedural requirements must be respected, and if an appellant seeks to raise a new point here the court will be alert to see that the other side suffers no prejudice. So much is in truth elementary. That said, the court will entertain a new point if it thinks it just and right to do so; that is no less elementary'. See also *GO (Nigeria) v Secretary of State for the Home Department* [2007] EWCA Civ 1163, [2007] All ER (D) 152 (Oct) approving *AH (Sudan)* [2006] UKAIT 00038 but emphasising that if the Tribunal is minded to find an error of law on grounds other than those pleaded it must put the parties on notice and give them an opportunity to make submissions.
- ¹⁵ *DK (Serbia) v Secretary of State for the Home Department* and *AM (Pakistan) v Secretary of State for the Home Department* [2008] EWCA Civ 1064, [2008] All ER (D) 207 (Jun).
- ¹⁶ *EM (Lebanon) v Secretary of State for the Home Department* [2006] EWCA Civ 1531, [2007] 3 FCR 1.

Renewal

18.181 If the Tribunal records that it does not propose to make an order for reconsideration, or to grant permission to apply for reconsideration out of time, the applicant may renew the application to the appropriate court, ie the High Court or the Outer House of the Court of Session (see 18.167 above), and the time limits set out in the Act, and the Civil Procedure Rules 1998 and Practice Directions apply. The court determines the application on the papers, by reference only to the written submissions of the applicant.¹ Whilst the Civil Procedure Rules that regulate the making of such an application do not make provision for different grounds to be advanced before the Court compared with those put before the Tribunal,² they do not preclude reliance on different or additional grounds. There is no distinction here between applications emanating from the normal and fast track, although in the fast track, immigration judges will have considered respondents' submissions too.³ Instead of making an order for reconsideration, the Court may refer the appeal to the appropriate appellate court, ie the Court of Appeal or the Court of Session, if it thinks that the appeal raises a question of law of such importance that it should be decided by that court.⁴ In such a case, the appeal court has all its normal powers (as to which see below), but in addition, if it disagrees, it may restore the application under s 103A to the referring court.⁵ The 2004 Act introduces retrospective public funding of applications for reconsideration. On making an order for reconsideration, or a reference to the appeal court, in England, Wales or Northern Ireland, the Court may order that the appellant's costs be paid out of the Community Legal Service Fund, pursuant to regulations to be made by the Secretary of State.⁶ We consider funding in detail at 18.177 below.

¹ NIAA 2002, s 103A(5), inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 26.

² *AM (Pakistan) v Secretary of State for the Home Department* [2008] EWCA Civ 1064, [2008] All ER (D) 207 (Jun).

³ See 18.169 above.

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⁴ NIAA 2002, s 103C(1) as inserted.

⁵ NIAA 2002, s 103C(2) as inserted.

⁶ NIAA 2002, s 103D(1), (2), (5)–(9); see 18.177 below.

The reconsideration hearing

18.182 How does the Tribunal go about its reconsideration of an appeal? As we have seen, if the immigration judge orders reconsideration, he or she must state the grounds on which the Tribunal is ordered to reconsider, and may make directions under rule 45 at the same time.¹ The rules relating to the method of determining the appeal (ie with or without a hearing), withdrawal, abandonment and hearing the appeal in the absence of a party all apply to a reconsideration, as do the rules on combined appeals, adjournments and the giving of determinations,² and the general provisions (relating to directions, documents, service, representation, evidence, calculation of time etc).³ But there are also special rules relating to reconsideration. First, when the party who did not apply for reconsideration is served with an order for reconsideration, the party must file and serve a reply setting out his or her case if it is contended that there was no error of law in the decision on the appeal or that there was an error of law but it was not material.⁴ The reply has to be filed and served at least 5 working days before the earliest date given for hearing of the reconsideration.⁵ The rule is silent as to what if any consequence is to follow from failure to reply; what such consequences are is a matter for the Tribunal hearing the reconsideration.⁶ There is also provision requiring a party that wishes the Tribunal to consider evidence that was not previously before the Tribunal to give notice to that effect.⁷ Such notice must be filed and served as soon as reasonably practicable after service of the order for reconsideration.⁸ and must indicate the nature of the new evidence and explain why it was not previously adduced.⁹ On reconsideration, which must take place as soon as reasonably practicable after the order has been served on the parties¹⁰ (within two days, if possible, in the fast track),¹¹ the Tribunal must first decide whether the original Tribunal made a material error of law ('the first stage reconsideration'), and if it decides this question in the negative, it must order that the original determination of the appeal stands.¹² If the Tribunal finds that the original Tribunal did make a material error of law, the error must be properly identified and explained in the eventual determination.¹³ Having found an error of law, the Tribunal must substitute a fresh decision to allow or dismiss the appeal¹⁴ ('the second stage reconsideration'). The first and second stages of the reconsideration will be carried out at a single hearing unless the Tribunal is not in a position to make any new factual findings that may be required¹⁵ or the parties cannot fairly be expected to deal immediately with the substance of the reconsideration.¹⁶ In deciding whether adjournment for a further hearing is necessary the Tribunal would have regard to any 'reply' from the respondent¹⁷ and any notice from a party that he or she wishes to rely on evidence that was not before the original Tribunal;¹⁸ in the absence of such a notice or reply, the Tribunal would be entitled to proceed on the basis that no new material or issues were to be considered.¹⁹

¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 27(2)(a) and (b), applied to fast track appeals by SI 2005/560, r 16.

- ² SI 2005/230, r 29, applying rr 15 to 23, save for the special time limits in in-country asylum appeals (r 23(2)). In the fast track, the rules relating to withdrawal, abandonment and hearing the appeal in the absence of a party apply: SI 2005/560, r 20, applying rr 17–19 of the principal rules. In addition, some of the rules on evidence, SI 2005/230, rr 31(2)–(5) and 32(1) (see below), apply to reconsideration in the fast track.
- ³ SI 2005/230, Pt V (rr 43–60), applied with necessary modifications to fast track appeals by SI 2005/560, r 20.
- ⁴ SI 2005/230, r 30 as amended by SI 2008/1088. There is no such provision in the fast track, but the respondent to an application for reconsideration in respect of an appeal in the fast track has already had the opportunity to comment in response to the application itself: SI 2005/560, r 17(b).
- ⁵ SI 2005/230, r 30(2).
- ⁶ *MB (DRC)* [2008] UKAIT 00088.
- ⁷ SI 2005/230, r 32(2).
- ⁸ SI 2005/230, r 32(3).
- ⁹ SI 2005/230, r 32(2).
- ¹⁰ SI 2005/230, r 31(1).
- ¹¹ SI 2005/560, r 21(1). The parties must be served with notice of the date, time and place of the reconsideration hearing no later than noon on the business day before the hearing. It is hard to see how (*pace* the Court of Appeal in *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [2004] All ER (D) 201 (Nov)) these time limits can conceivably allow adequate preparation time for reconsideration. Surely an order for reconsideration ought to merit transfer out of the fast track?
- ¹² SI 2005/230, r 31(2), applied to fast track appeals by SI 2005/560, r 20. A material error is an error of law which affected the Tribunal's decision on the appeal: r 31(5). This provision does not prevent an appeal succeeding on fresh evidence (see discussion of *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] 2 WLR 1351 at 18.166 above) but it does prevent an appeal succeeding on a change of circumstances since the original determination.
- ¹³ *Abdulrahman v Secretary of State for the Home Department* [2005] EWCA Civ 1620, [2005] All ER (D) 263 (Nov).
- ¹⁴ SI 2005/230, r 31(3)(2).
- ¹⁵ AIT PD (30 April 2007), paras 14.1–14.2.
- ¹⁶ *DK (Serbia) v Secretary of State for the Home Department* [2006] EWCA Civ 1747, [2007] 2 All ER 483.
- ¹⁷ Under SI 2005/230, r 30.
- ¹⁸ Under SI 2005/230, r 32(1).
- ¹⁹ *DK (Serbia)*.

The decision

18.185 We have seen above that the Tribunal may not make a fresh decision on the appeal unless it decides that the original Tribunal made an error of law, and that an error of law embraces not only legal misdirection and procedural irregularity but also failure to have regard to, misunderstanding or ignorance of material facts. Once the Tribunal concludes that there has been error of law, it makes a fresh decision of its own, to allow or dismiss the appeal.¹ The reasons for finding an error of law in the original decision are the context in which it makes the new decision so that it would be an error of law not to have proper regard to that reasoning² and not to address the issues identified by the Tribunal at the first stage reconsideration.³ In making a new decision, the Tribunal must proceed on the basis that any factual findings and any conclusions or judgments based on those findings that are not affected by the identified error of law need not be revisited.⁴ Factual findings and judgments unaffected by the error of law may only be revisited on the basis of new

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evidence or material or in exceptional circumstances. The extent to which the Tribunal, in making a fresh decision, may review the facts found by the original Tribunal has been the subject of considerable litigation. The Court of Appeal has ruled in a number of cases that the Tribunal should be most reluctant to interfere with a finding of primary fact which was dependent on an assessment of the credibility of a witness who had given oral evidence,⁵ and in principle there is no reason why credibility findings untouched by the error of law identified by the Tribunal should not stand. However, the Tribunal's Practice Direction indicates that once error of law has been found, it will decide everything *de novo* including credibility issues.⁶ On reconsideration, the Tribunal is in as good a position as the original Tribunal to review documentary evidence of country conditions and draw its own inferences, subject to guidance given in 'country guideline' cases.⁷ It is also open to the Tribunal to reverse the original decision on the basis of further evidence, and the Practice Direction indicates that in most cases it will expect to hear further oral evidence.⁸ On reconsideration, the Tribunal must give sufficient and adequate reasons for its determination.

- ¹ Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 31(3), applied to fast track reconsideration by SI 2005/560, r 20.
- ² *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2006] EWCA Civ 1780, [2006] All ER (D) 91 (Dec).
- ³ *TD (Ivory Coast) v Secretary of State for the Home Department* [2007] EWCA Civ 123, [2007] All ER (D) 80 (Feb).
- ⁴ *HF (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 445, [2007] All ER (D) 302 (May); *DK (Serbia) v Secretary of State for the Home Department* [2006] EWCA Civ 1747, [2007] 2 All ER 483; *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045; *LS (Uzbekistan) v Secretary of State for the Home Department* [2008] EWCA Civ 909, [2008] All ER (D) 413 (Jul); *MQ (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 61, [2009] All ER (D) 96 (Feb).
- ⁵ *Borissov v Secretary of State for the Home Department* [1996] Imm AR 524; *Assah v Immigration Appeal Tribunal* [1994] Imm AR 519; *Ikhlaiq v Secretary of State for the Home Department* [1997] Imm AR 404. The principle was approved in *Subesh v Secretary of State for the Home Department* [2004] EWCA Civ 56, [2004] INLR 417 (although the court was there considering the Tribunal's jurisdiction under IAA 1999, which did not require the 'condition precedent' of error of law in order to reach a fresh decision). The Court of Appeal warned in *Arshad v Secretary of State for the Home Department* [2001] EWCA Civ 587, [2001] All ER (D) 240 (Apr) about the importance of even-handedness in the Tribunal's approach to earlier factual findings.
- ⁶ Practice Direction 1/2005 indicates that the claimant and his or her witnesses should attend, with interpreters, to give oral evidence in the event that the Tribunal is satisfied that an error of law occurs and so needs to redetermine the appeal *de novo*. But this implies a great deal of preparation by claimants and their representatives, on a purely contingent basis, which wastes a great deal of both time and money. It seems to us, with respect, that the reconsideration process requires two distinct stages, so that once error of law has been established, directions can be given for the future conduct of the hearing, including the reception of fresh evidence, along the same lines as the case management review hearings for 'first' appeals.
- ⁷ *R v Immigration Appeal Tribunal, ex p Balendran, Katheeskumaran* [1998] Imm AR 162, QBD; *Sarker v Secretary of State for the Home Department* (9 November 2000), CA. For 'country guidelines' cases see 18.142 above.
- ⁸ In *Sachitananthan* (16860) the Tribunal held that, in an asylum appeal, following *Ravichandran v Secretary of State for the Home Department* [1996] Imm AR 97, CA, it had to look at the position at the date of the appeal before it. Now, the *Ravichandran* rule has been put into statutory form and broadened to all appeals except those relating to entry clearance by the NIAA 2002, s 85(4), and there is nothing limiting the admission of

evidence of post-decision facts in the subsection to first appeals; therefore this provision must apply to reconsideration too. In reconsideration of entry clearance appeals, fresh evidence going to the position at the date of decision would be admissible. See 18.139 above.

Appeal to the Court of Appeal or Court of Session

18.188 An appeal against a reconsidered decision or a decision by a legal panel of the Tribunal may only be brought with the permission of the Tribunal, or if it is refused, with the permission of the appropriate appellate court.¹ An application to the Tribunal for permission to appeal must be made within five days of being served with the Tribunal's written determination, if the applicant is in detention,² and in any other case, within 10 days of service.³ We have dealt with the rules relating to calculation of when service occurs above. The Tribunal has no power to extend the time limit.⁴ If the time limit for applying to the Tribunal for permission to appeal to the Court of Appeal has passed then notwithstanding that the Tribunal may not extend time, an application to the Tribunal must be made and refused before the Court of Appeal can entertain an application for permission. The Court of Appeal will treat the Tribunal's refusal to accept the out of time application as being the refusal of permission by the Tribunal that is required to establish the Court's jurisdiction.⁵ Whilst the Court of Appeal considers the out of time application for permission to appeal it has an inherent jurisdiction to order a stay on removal.⁶

The application to the Tribunal must be on the form approved for the purpose by the President,⁷ ie the form displayed on the Tribunal's website,⁸ and must state the grounds of appeal and must be signed by the appellant or representative, and dated.⁹ The other party to the appeal must be notified as soon as practicable that the application for permission has been filed.¹⁰ The application is determined by a senior immigration judge without a hearing.¹¹ The Tribunal must serve written notice on the parties of its decision, including its reasons (which may be in summary form).¹² The Tribunal has the additional power at this stage of setting aside the determination and directing that the proceedings be reheard by the Tribunal.¹³ However, it may only be exercised by the President or a Deputy President, with the agreement of the parties and where the power has not previously been exercised in the proceedings.¹⁴ It replaces the power contained in the Procedure Rules as originally enacted whereby the Senior Immigration Judge could set aside the Tribunal's determination if he or she thought the Tribunal had made an administrative error in relation to the proceedings and intended to grant permission to appeal.¹⁵ If the Tribunal grants permission to appeal to the Court of Appeal, an appellant's notice must be filed with the Court of Appeal within 14 days of the appellant being served with the Tribunal's decision.¹⁶ The time for filing the appellant's notice may be extended by the Court of Appeal.¹⁷ If permission is refused by the Tribunal, the applicant can apply to the Court of Appeal or Court of Session for permission. In England and Wales the procedure is governed by Civil Procedure Rules, Part 52. The appellant's notice which will include the application for permission must be lodged with the Court of Appeal within 14 days of the appellant being served with the Tribunal's refusal of permission.¹⁸

The court may extend time for the application in its inherent discretion.¹⁹ The appellant's notice must be served on the respondent and the Tribunal within seven days of being filed with the Court.²⁰ The application is dealt with by a single judge on the papers in the first instance, renewable to the full court²¹ upon a request being filed within seven days of service of the refusal of permission²² unless the Court considers the application 'totally without merit' and orders that the application may not be renewed orally.²³ The single judge might issue a preliminary 'minded to refuse' decision and list the matter for hearing before him or herself. If so, the applicant should address the reasons for the judge being 'minded to refuse'.²⁴ The court will only grant permission if it considers that the appeal has a real prospect of success, or there is some other compelling reason for the appeal to be heard.²⁵ It may limit the issues to be argued and impose conditions on the grant of permission.²⁶ Once an appeal to the Court of Appeal is pending, the appellant may not be removed from the UK, but an application for permission lodged out of time would not prevent removal until permission was granted, so in such circumstances a stay should be sought from the court.²⁷ An appeal to the Court of Appeal is not deemed abandoned if the appellant leaves the UK.²⁸

¹ NIAA 2002, ss 103B(3), 103E(3), inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 26(6).

² Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230, r 35(1)(a). For fast track appeals, the time limit is two days after the appellant is served with the Tribunal's determination: SI 2005/560, r 25(1).

³ SI 2005/230, r 35(1)(b). This does not apply in the fast track, since all appellants there are detained.

⁴ SI 2005/230, r 35(2); for fast track appeals, the equivalent provision is SI 2005/560, r 25(2).

⁵ NIAA 2002, ss 103B(3)(b) and 103E(3)(b). See *Yacoubou v Secretary of State for the Home Department* [2005] EWCA Civ 1051 holding that *Ozdemir v Secretary of State for the Home Department* [2003] EWCA Civ 167 applies to appeals under ss 103B and 103E.

⁶ *YD (Turkey) v Secretary of State for the Home Department* [2006] EWCA Civ 52, [2006] 1 WLR 1646, (2006) Times, 28 February.

⁷ SI 2005/230, r 34(2), as amended by SI 2006/2788, r 12.

⁸ AIT PD (30 April 2007), para 2A.

⁹ SI 2005/230, r 34(2), as amended by SI 2006/2788, r 12. If the notice is signed by a representative, he or she must certify in the notice that it has been completed in accordance with the applicant's instructions: r 34(3). These rules are applied to fast track appeals by SI 2005/560, r 24. For the effects of minor non-compliance see *R v Immigration Appeal Tribunal, ex p Jeyanthan*; *Ravichandran v Secretary of State for the Home Department* [2000] 1 WLR 354, [2000] Imm AR 10, [2000] INLR 241; 18.84 above.

¹⁰ SI 2005/230, r 34(4). The fast track rules require the other party to be notified immediately: SI 2005/560, r 25(3).

¹¹ SI 2005/230, r 36(1), applied to the fast track by SI 2005/560, r 24.

¹² SI 2005/230, r 36(4) as applied. In the fast track, the Tribunal must determine the application for permission to appeal, and serve its determination on every party, within a day of receipt of the application: r 26.

¹³ SI 2005/230, r 36(2)(c), as substituted by SI 2008/1088.

¹⁴ SI 2005/230, r 36(3), as substituted by SI 2008/1088.

¹⁵ SI 2005/230, r 36(3) as originally enacted

¹⁶ Civil Procedure Rules (CPR) Practice Direction (PD) 52, para 21.7(3).

¹⁷ *BR (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ 198, [2007] 3 All ER 318.

¹⁸ CPR PD 52, para 21.7(3).

¹⁹ CPR 3.1(2)(a), 52.6; *A v Secretary of State for the Home Department* [2003] EWCA Civ 175, [2003] INLR 249. For an example of refusal to extend, where no good reason was proffered and no extension of time sought before the time limit, see *R v Secretary of State for the Home Department, ex p Harris (Darrel)* [2002] EWCA Civ 100 (appeal in judicial

review). As to the approach the court will take to applications to extend time for applying for permission to appeal, see *YD (Turkey) v Secretary of State for the Home Department* [2006] EWCA Civ 52, [2006] 1 WLR 1646, (2006) Times, 28 February and the observations on the decision in *BR (Iran) v Secretary of State for the Home Department*.

²⁰ CPR 52.4(3) and CPR PD 52, para 21.7(4).

²¹ CPR 52.3(4).

²² CPR 52.3(5).

²³ CPR 52.3(4A).

²⁴ *Sad-Chaouche v Secretary of State for the Home Department* (29 March 2000, CA perm).

²⁵ CPR 52.3(6).

²⁶ CPR 52.3(7).

²⁷ CPR 52.7(b), indicates that an appeal to the Court of Appeal, other than from the AIT does not operate as a stay of the order or decision under appeal, but this wording does not necessarily mean that an out of time appeal from the Tribunal automatically stays the decision. See the NIAA 2002, ss 78, 104 (the latter substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, Sch 2, para 20) (at 18.24 above).

²⁸ *Shirazi v Secretary of State for the Home Department* [2003] EWCA Civ 1562, [2004] INLR 92. Although the case was decided under the IAA 1999 appeals regime, the appeals provisions under the NIAA 2002 are not materially different for these purposes.

18.189 As with reconsideration under s 103A, only the Tribunal's 'decision on an appeal' goes to the Court of Appeal or Court of Session, not a procedural, ancillary or preliminary decision.¹ Thus, a decision to grant or refuse bail, a decision that an appeal is out of time and a refusal to extend time, may not be appealed to the Court of Appeal² but a decision that the Tribunal reconsidering the appeal was without jurisdiction to do so could be appealed to the Court of Appeal.³ Directions to give effect to a decision, which would appear to be ancillary to the decision, are by statute deemed to be part of the decision on the appeal, and so may apparently be the subject of appeal or review.⁴ Where there is doubt as to whether the decision is a 'decision on the appeal' for the purpose of the section, it may be necessary first to renew the application for permission to appeal to the Court of Appeal or the Court of Session before judicial review is taken.⁵ The scope of the court's jurisdiction was said in *E v Secretary of State for the Home Department*⁶ to be the same as that of the Administrative Court in judicial review, and was considered at 18.166 above. The principles governing the admission of fresh evidence on appeal have been considered at 18.171 above. The court may, on agreed facts, decide that an asylum claimant fulfils the criteria for refugee status, as an alternative to remitting a successful appeal to the Tribunal.⁷ The court will not hear academic appeals (ie where a respondent has abandoned a claim, as happened in *Dahir*,⁸ or an appellant cannot be found, having been unlawfully removed from the country, as happened in *Re M*),⁹ unless there is a good reason in the public interest for doing so, for example, the case raises questions of general importance which can be decided irrespective of the facts of individual appeals and would affect a large number of similar cases.¹⁰ Nor will it hear an appeal on a point not argued before the Tribunal by agreement but raised before it in order to obtain a remittal to the Tribunal.¹¹ The doctrine of binding precedent applies to the Court of Appeal.¹² The 'Robinson doctrine' obliges the Court to exercise its powers to ensure the UK's compliance not only with the Refugee Convention but with its international obligations more generally, including those under Community law. Thus it may be required to consider a point that was not raised before the Tribunal once the point has occurred to the Court even if the point is not 'obvious' in the sense of having a strong prospect of success.¹³

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¹ NIAA 2002, ss 103A(7), 103E(7).

² A decision on bail is ancillary, a decision that an appeal is out of time is preliminary, and a refusal to extend time is procedural. The Court of Appeal decided in *Abdi and Dahir* [1995] Imm AR 570 that there was no right of appeal to it against a ruling on a preliminary issue. The Tribunal has however held that decisions as to abandonment are decisions on the appeal, since they put an end to the appeal, and litigation may be necessary on this issue: see 18.96 and 18.167 above.

³ *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78, [2009] All ER (D) 193 (Feb).

⁴ NIAA 2002, s 87(4), amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, Sch 2, para 19.

⁵ *R v Immigration Appeal Tribunal, ex p Mukendi* (CO06694) (1994, unreported), QBD.

⁶ *E v Secretary of State for the Home Department, R v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] INLR 264. The distinction formerly drawn in cases such as *Macharia v Immigration Appeal Tribunal* [2000] Imm AR 190, between administrative law grounds, including procedural impropriety, and questions of law, which were believed to be narrower, has become obsolete, as procedural and evidential matters are seen as errors of law potentially vitiating decisions.

⁷ As the House of Lords did in *Islam v Immigration Appeal Tribunal* [1999] 2 AC 629.

⁸ *Secretary of State for the Home Department v Abdi and Dahir* [1995] Imm AR 570, CA. But an appeal to the Court of Appeal is not deemed abandoned if the appellant leaves the UK: *Shirazi v Secretary of State for the Home Department* [2003] EWCA Civ 1562, [2004] INLR 92, 18.179 fn 17 above.

⁹ *Re M* [1994] 1 AC 377, where the issue was whether the Secretary of State was in contempt of court for removing and failing to return to the jurisdiction an asylum seeker in respect of whom an undertaking had been given not to remove him.

¹⁰ *R v Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450, HL.

¹¹ *Srimanoharan v Secretary of State for the Home Department* (13 June 2000, unreported); *Zaitz v Secretary of State for the Home Department* [2000] INLR 346.

¹² See *HM v Secretary of State for the Home Department* [2003] EWCA Civ 583, [2003] Imm AR 470.

¹³ *Bulale v Secretary of State for the Home Department* [2008] EWCA Civ 806, [2008] 3 CMLR 738, applying *Robinson v Secretary of State for the Home Department* [1997] Imm AR 568.

18.189A In *AH (Sudan) v Secretary of State for the Home Department* Baroness Hale of Richmond said of the Asylum and Immigration Tribunal:¹

‘This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. I cannot believe that this eminent Tribunal had indeed confused the three tests or neglected to apply the correct relocation test.’

These remarks concern the interface between a non-specialist court and a specialist tribunal and so they have no application where one constitution of the tribunal is reconsidering a decision made by another.² They have been cited and followed repeatedly in the context of appeals from the Tribunal to

the Court of Appeal³ dismissed as inappropriate attempts to complain about factual determinations. However, they do not alter the principles governing appeals from the Tribunal on points of law that were comprehensively and authoritatively stated in *R (Iran) v Secretary of State for the Home Department*.⁴ Whilst Baroness Hale says that decisions of the Tribunal should be respected unless 'it is quite clear that they have misdirected themselves in law'⁵ Carnwath LJ has questioned whether she thereby intended to modify the approach of the Court of Appeal: 'If it is "unclear" from a decision whether an error has been made, that is normally taken as an indication of materially defective reasoning which in itself may be a ground for intervention'.⁶ In *NH (India)* Lord Justice Sedley said⁷ that Baroness Hale:

'intended to lay down no new principle of law ...but to ensure that appellate practice is realistic and not zealous to find fault. Their Lordships do not say, and cannot be taken as meaning, that the standards of decision making or the principles of judicial scrutiny which govern immigration and asylum adjudicator differ from those governing other judicial tribunals, especially where for some asylum-seekers adjudication may literally be a matter of life and death. There is no principle that the worse the apparent error is, the less ready an appellate court should be to find that it has occurred.'

Lord Neuberger, whilst recognising the need to be wary of interfering with the conclusions of the fact finding Tribunal nevertheless highlighted the particular difficulties of the fact finding exercise in the asylum context and the 'potentially severe, even catastrophic consequences of a mistaken rejection of an appeal where fear of ill-treatment or worse is alleged' as justifying 'a particularly thorough reading of any decision of the Asylum and Immigration Tribunal'.⁸ In the light of the guidance given in *AH (Sudan)* the Court of Appeal has continued to find material errors of law by the Tribunal in making factual conclusions and judgments. For example, given the objective evidence about the suppression of dissent by the Eritrean authorities, the Tribunal's refusal to accept that they had the means and inclination to monitor opposition activities in the UK without affirmative evidence to that effect risked losing contact with reality;⁹ it was perverse to find that a church would adequately support a returnee to Uganda without evidence about that church and to find that being driven into prostitution did not make internal relocation unduly harsh and to give no weight to a psychiatric report.¹⁰

¹ *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678, para. 30.

² *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 694, [2008] All ER (D) 435 (Apr).

³ *Eg OD (Ivory Coast) v Secretary of State for the Home Department* [2008] EWCA Civ 1299, [2008] All ER (D) 08 (Dec) and *BK (Democratic of Congo) v Secretary of State for the Home Department* [2008] EWCA Civ 1322, [2008] All ER (D) 43 (Dec).

⁴ [2005] EWCA Civ 982, (2005) Times, 19 August. See *SK (Sierra Leone) v Secretary of State for the Home Department* [2008] EWCA Civ 853, [2008] All ER (D) 132 (Aug) and *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, [2008] All ER (D) 300 (May) (per Carnwath LJ).

⁵ And this was said to be the test in *AS and DS (Libya) v Secretary of State for the Home Department* [2008] EWCA Civ 289, (2008) Times, 16 April, albeit without dissent from either party.

⁶ *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, [2008] All ER (D) 300 (May).

⁷ *NH (India) v Entry Clearance Officer* [2007] EWCA Civ 1330, [2007] All ER (D) 199 (Dec), approved in *SK (Sierra Leone)*.

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⁸ *SS (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 310, [2008] All ER (D) 140 (Apr).

⁹ *YB (Eritrea) v Secretary of State for the Home Department* [2008] EWCA Civ 360, [2008] All ER (D) 195 (Apr).

¹⁰ *AA (Uganda) v Secretary of State for the Home Department*.

Statutory appeals, reconsideration and judicial review

18.196 As we have indicated above, the scope of the appellate courts' review of Tribunal decisions has been held to be co-extensive with that of the Administrative Court on judicial review.¹ The issue of whether a challenge may be pursued by way of appeal or review now depends entirely on the availability of a statutory remedy. If such a remedy exists, it must be used. If not, the remedy, if any, lies in judicial review. So for example, a Tribunal's refusal to transfer a fast track appellant to the normal appeal track may ground a statutory reconsideration application if the appellant can show that the refusal prejudiced his or her substantive appeal under the fast track, so judicial review of the decision of the Tribunal would not lie. But the Secretary of State's refusal to transfer the person out of the fast track at the refugee determination stage could ground judicial review proceedings, since no statutory remedy exists except an appeal on asylum grounds, which, as the Court of Appeal recognised in *Refugee Legal Centre*, could be irrevocably flawed from the outset by the unfairness of the circumstances of the initial interview.² Where a statutory right of appeal exists against an immigration decision, judicial review cannot be used instead merely because the right can only be exercised out-of-country or is otherwise less convenient.³ Whether an application for judicial review will be entertained, notwithstanding the existence of a statutory right of appeal, is a matter of judicial discretion. The discretion should be exercised in favour of the claimant if an immigration decision is challenged on the basis that the power to make the decision was not exercisable because of issues of precedent fact relating to the claimant's identity or nationality. Otherwise, save in special or exceptional circumstances, the court would refuse to exercise discretion in the claimant's favour in deference to the Parliamentary intention that the appellant's remedy should generally be exercised out of country.⁴ Where the appeal right is defective, eg a decision that a human rights or asylum claim is clearly unfounded, so that an appeal does not suspend removal to a country alleged by the claimant to be unsafe), judicial review is available.⁵ We list below the main categories of decisions where judicial review is likely to be the appropriate challenge:

- (1) the increased range of 'immigration decisions' against which there is no right of appeal, eg a refusal of entry clearance, leave to enter or remain, unappealable because of the particular ground on which it was taken;
- (2) decisions of the Tribunal which are not 'decisions on the appeal' and are not subsumed in that decision, eg a ruling on a preliminary issue⁶ such as timeliness, or a refusal to extend time;
- (3) decisions of the Tribunal on issues such as whether an appeal has been withdrawn or abandoned;⁷
- (4) decisions of the Secretary of State within the one-stop system that a claim is repetitive or should have been made earlier, with the result that no appeal lies, or an appeal in relation to that claim is to be treated as finally determined;⁸

- (5) decisions of the Secretary of State that an asylum or human rights claim is clearly unfounded;⁹
- (6) other decisions of the Secretary of State which give rise to no appeal rights, such as refusal to accept a fresh human rights claim or asylum claim, refusal to grant a work permit, imposition of conditions on the grant of leave;¹⁰
- (7) decisions of the Secretary of State to detain, or of the Tribunal to refuse bail. But the appropriate course is habeas corpus where it is alleged that the detention is unlawful.¹¹
- (8) removal directions which, not being an immigration decision, cannot be challenged by statutory appeal.

¹ See 18.166 above.

² *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [2004] All ER (D) 580 (Mar); see 18.81 above.

³ *R v Secretary of State for the Home Department, ex p Swati* [1986] 1 All ER 717, [1986] Imm AR 88, *Rehman v Secretary of State for the Home Department* [1987] Imm AR 602, CA; *R v Secretary of State for the Home Department, ex p Ozkurtulus* [1986] Imm AR 80, QBD; *R v Secretary of State for the Home Department, ex p Fernando* [1987] Imm AR 377, QBD; *R (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 2 All ER 160 (perm). But the court held judicial review appropriate to quash a decision to deport a claimant, despite the availability of a statutory appeal, where the decision was reached improperly, without regard to the determination by the Tribunal that the claimant was a refugee, the high threshold required to establish fraud and the absence of cogent evidence of fraud in *R (on the application of Saribal) v Secretary of State for the Home Department* [2002] EWHC 1542 (Admin), [2002] INLR 596.

⁴ *R (on the application of Lim) v Secretary of State for the Home Department* [2007] EWCA Civ 773, [2007] All ER (D) 402 (Jul). However, in *R (on the application of Yu) v Secretary of State for the Home Department* [2008] EWHC 3072 (Admin) the Court applied *Lim* but held that the subject of the decision under Immigration and Asylum Act 1999, s 10 could judicially review the exercise of the power to make the decision as opposed to the decision itself.

⁵ *IR v Secretary of State for the Home Department, ex p Canbolat* [1997] Imm AR 442, CA; *R (on the application of L) v Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] Imm AR 330, [2003] INLR 224.

⁶ See 18.167 and 18.180 above.

⁷ See 18.104–18.106 above.

⁸ By reference to the Immigration Rules, HC 395, para 353 (inserted by HC 1112), and NIAA 2002, s 96 as amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 30 (from 1 October 2004).

⁹ By reference to the NIAA 2002, s 94 as amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 27.

¹⁰ See 18.14 and 18.21 above.

¹¹ It may be an abuse of process to bring two separate proceedings (ie judicial review and *habeas corpus*) directed at the same issue: *R v Secretary of State for the Home Department, ex p Sheikh* [2001] INLR 98, CA.

SPECIAL IMMIGRATION APPEALS COMMISSION

PROCEDURE AND EVIDENCE BEFORE THE SPECIAL IMMIGRATION APPEALS COMMISSION

Closed material and disclosure

19.10 'Closed material' is defined as material upon which the Secretary of State wishes to rely; material which adversely affects her case or supports the appellant's case, or material which she must file pursuant to a direction, but which she objects to being disclosed to the appellant or his representative.¹ The Secretary of State must file with the Commission and serve on the special advocate the closed material and a statement of her reasons for objecting to its disclosure.² The Secretary of State is also required to serve, if and to the extent that it is possible to do so without disclosing information contrary to the public interest, a statement of the closed material in a form which can be served on the appellant.³ Where closed material which has been redacted on grounds other than legal professional privilege is served on the special advocate, the unredacted material must be filed with the Commission together with an explanation of the redactions.⁴ The Commission will then give a direction as to what the Secretary of State may redact.⁵ Where the Secretary of State objects to the disclosure of any material to the appellant or his representatives or objects to a special advocate's request for post 'closed material' communication with the appellant or his representative, the Commission must fix a hearing for the Secretary of State and the special advocate to make oral representations.⁶ Any such hearings are of course held in the absence of the appellant and his representative.⁷ The Commission should test the Secretary of State's assertion that material should not be disclosed. It may uphold or overrule the Secretary of State's objection, but must always uphold the Secretary of State's objection on closed material where it considers that disclosure would be contrary to the public interest.⁸ If the Secretary of State's objection is upheld, the Commission must consider whether to direct the Secretary of State to serve a summary of the closed material on the appellant, and must approve such summary to ensure that disclosure of its contents is not contrary to the public interest.⁹ If the Secretary of State's objection is overruled or service on the appellant of a summary of the closed material is directed, the Secretary of State will not be required to serve the summary or that material.¹⁰ If she chooses not to do so the Commission may, after hearing representations from the Secretary of State and the special advocate, direct that the Secretary of State shall not rely on such points in her case or shall make concessions or take such other steps, as the Commission may specify.¹¹ The Commission has a general power to exclude an appellant and his representative from a hearing or part of the hearing in order to secure that information is not disclosed contrary to the public interest (namely when closed evidence is being heard) or 'for any other good reason'.¹² In *BB v*

Secretary of State for the Home Department,¹³ the Commission held that in theory, as a court of superior record it could regulate its own procedure, and hence it had the general powers of direction which were broad enough to direct that certain hearings be held 'in private', ie including the appellant and his representatives, but excluding the public and press, or that certain material be 'restricted open material', ie disclosed to an appellant's representative with the consent of the appellant not to seek sight of documents or to be present at parts of a hearing when particular matters were discussed. The Commission held however, that the clear terms of Rule 4 of the Procedure Rules and the 'bright line' which existed within the entire structure of the Commission, the special advocate system and the Procedure Rules, between 'open' and 'closed' material meant, that this sharp division had to be observed in practice, that in reality 'restricted open material' and 'in private' hearings were tantamount to making 'closed' material 'open', and hence that there were no circumstances in which these powers could ever be deployed.¹⁴ In *MT (Algeria) v Secretary of State for the Home Department*¹⁵ the Court of Appeal rejected the proposition that the Commission was not entitled to rely on closed material to reach its conclusion on risk on return in the context of diplomatic assurances, on the basis that when passing the statutory scheme 'In creating SIAC and providing for its particular procedure, including the use of special advocates, Parliament did squarely confront what it was doing and accepted the political cost.'¹⁶ The House of Lords rejected the proposition that closed material could only be relied upon where the interests of national security required non-disclosure; it was clear that the Procedure Rules permitted other public interest considerations (eg the interests of relations with another state) to justify non-disclosure of evidence both in relation to any national security case but also in relation to the issue of risk on return.¹⁷ Ironically, given that the principal factual issue before the House of Lords was the reliability of government assurances, the Secretary of State's case that use of closed material need not be limited to situations where it was necessary in the interests of national security breached the assurance to the contrary that she had given to Parliament.¹⁸ The Court declined to interfere with the statutory scheme, and rejected similar arguments to those rejected by the Commission in *BB*.

¹ Special Immigration Commission Appeals (Procedure) Rules 2003, SI 2003/1034, r 37(1).

² SI 2003/1034, r 37(3)(a) and (b).

³ SI 2003/1034, r 37(3)(c).

⁴ SI 2003/1034, r 37(4A)(a).

⁵ SI 2003/1034, r 37(4A)(b).

⁶ SI 2003/1034, r 38(2). The Commission need not hold a hearing if (a) the special advocate does not challenge the objection, (b) the Commission has previously upheld an objection relating to the same or substantially the same material or communication, and is satisfied that it would be just to uphold the objection without a hearing, or (c) the Secretary of State and special advocate consent to the Commission deciding the issue without a hearing. If the special advocate does not challenge the objection, he or she must give notice of that fact to the Commission and the Secretary of State within 14 days after receipt of notice of a post closed material communication objection or receipt of closed material

⁷ SI 2003/1034, r 38(5).

⁸ SI 2003/1034, r 38(6) and (7).

⁹ SI 2003/1034, r 38(8).

¹⁰ SI 2003/1034, r 38(9)(a).

¹¹ SI 2003/1034, r 38(9)(b)(i). Where the Secretary of State defies a Commission ruling on disclosure, the Commission appears to have very broad powers to compel the Secretary of State to act in a certain manner. This provision came into force on 7 May 2007. Its predecessor simply allowed the Secretary of State not to rely on the material in the face of

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an overruled objection therefore not to serve on the appellant notwithstanding a direction to do so. The amendment may have been as a result of the Commission's ruling in *Y and Othman v Secretary of State for the Home Department* (SC/36, 15/2002), Judgment on disclosure following interlocutory application for directions, 12 July 2006: Whilst the Commission was not required to resolve the issue of whether the Secretary of State was permitted to withdraw material in respect of which his objection to open disclosure had been overruled by the Commission, where that material was helpful to the appellant, it stated that there would be strong concerns by the Commission and that adverse inferences could be drawn. It further stated that 'the Commission would be surprised to see its judgment as to what did not constitute a risk to a protected interest overridden, where there is no balance to be struck, particularly over material helpful to an Appellant'.

¹² SI 2003/1034, r 43(1) and (2).

¹³ *BB v Secretary of State for the Home Department* (SC/36, 15/2002), Judgment on closed material following interlocutory application, 14 November 2006.

¹⁴ Similar proposals put forward by Liberty intervening in *RB (Algeria) v Secretary of State for the Home Department*; *OO (Jordan) v Secretary of State* [2009] UKHL 10, 153 Sol Jo (no 7) 32 were rejected in the House of Lords.

¹⁵ *MT (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 808, (2007) Times, 3 August.

¹⁶ Paragraph 17, see fn 14 above.

¹⁷ *RB (Algeria) v Secretary of State for the Home Department*; *OO (Jordan) v Secretary of State* [2009] UKHL 10, 153 Sol Jo (no 7) 32 applying r 4 of the Special Immigration Appeals Commission (Procedure) Rules 2003, SI 2003/1034 and rejecting the argument that the rule was ultra vires the Special Immigration Appeals Commission Act 1997, s 5.

¹⁸ *RB* para 80 for the assurance given by the Minister to Parliament.

'NATIONAL SECURITY' DEPORTATIONS

19.11 Following the expiry of the provisions of the Anti-Terrorism, Crime and Security Act 2001 which allowed for the indefinite detention of foreign nationals, the vast majority of cases before the Commission are national security deportation cases. They begin with the Secretary of State decision to deport the appellant on the grounds that deportation is deemed to be 'conducive to the public good',¹ and then certifying under the NIAA 2002, s 97, that the decision was taken in the interests of national security. Such appeals generally fall into two halves, firstly the 'national security case', and secondly issues relating to safety on return. In *Rehman*² the House of Lords agreed with the Court of Appeal that the Commission had taken too narrow a view of what could constitute a threat to national security. It was held that a global approach had to be taken to the question of what the interests of national security were, that the action did not have to be either directly or immediately against the UK, that action against a foreign state may be capable of indirectly affecting the security of the UK, and that there would be significant deference given to the Secretary of State's view on this.³ Their Lordships further agreed with the Court of Appeal that the concept of a 'standard of proof' was not particularly helpful in the national security deportation concept. Where the focus of the enquiry was the assessment of future risk, proof of past facts to the civil standard was not necessary to reach the conclusion that a person poses a danger to national security, and that the question was to be answered by a cumulative evaluation of all the evidence in relation to the actual and potential activities and connections of the person concerned and the importance of the security interest at stake. The Commission has held that Sedley LJ's approach to evidence in *Karanakaran v Secretary of State for the Home Department*⁴ was of equal force in the assessment of

danger to national security as it was to risk under the Refugee Convention.⁵ However, SIAC has held that where specific acts which have already occurred are relied upon, they should be proved to the civil standard of proof.⁶ In all the post 9/11 deportation appeals heard before the Commission, only one appellant has succeeded in his national security case.⁷

¹ Immigration Act 1971, s 3(5).

² *Secretary of State for the Home Department v Rehman (Shafiq Ur)* [2000] INLR 531, CA, upheld by the House of Lords at [2001] UKHL 47, [2003] 1 AC 153. For the Commission decision, see [1999] INLR 517.

³ Lord Hoffman at paragraph 62: '*Postscript*. I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.'

⁴ *Karanakaran v Secretary of State for the Home Department* [2000] Imm AR 271.

⁵ *Y v Secretary of State for the Home Department* (SC/36/2005), 24 August 2006.

⁶ *ZZ v Secretary of State for the Home Department* (SC/63/2007) 30 July 2008.

⁷ *Moloud Sihali v Secretary of State for the Home Department* (SC/38/2007), 14 May 2007.

19.12 In appeals where the national security case has been made out appellants will invariably be denied the protection, to which they otherwise would have been entitled, under the Refugee Convention.¹ Such appellants therefore only have the safety net of the ECHR. It is often the case that those being deported are at risk of torture and ill-treatment in their home country. However this has not deterred the Secretary of State from seeking to deport such persons. The Secretary of State has attempted to achieve this by seeking assurances, in the form of Memoranda of Understanding (MUMs) with countries such as Algeria,² Jordan³ and Libya⁴. These are assurances from the governments of the receiving state that they will respect the human rights of deportees. The very fact that diplomatic assurances are required amounts to a recognition by the Secretary of State that but for such assurances, the profile of the appellants taken in conjunction with the poor human rights situation in those countries would lead to them being at risk of having their human rights breached, by being seriously ill-treated or tortured. The consensus amongst the leading NGOs, and shared by the UN Special Rapporteur on Torture and the UN High Commissioner for Human Rights,⁵ is that diplomatic assurances cannot be relied on to prevent torture or ill treatment. However, other than in the case of Libya, the Commission has accepted that diplomatic assurances from the Algerian and Jordanian governments mean that there are no substantial grounds for believing that there is a real risk that deportees from those countries will be subjected to treatment contrary to Article 3 ECHR. In *MT (Algeria) and others*⁶ the Court of Appeal held that the legitimacy of diplomatic assurances depended on the facts of each case, rather than upon any legal principle which outlawed reliance on them *per se*. In doing so, the Court relied on the European Court of Human Rights decision in *Chahal v United Kingdom*,⁷ stating that the conclusion on Article 3 ECHR in that case was reached after an analysis of the facts of the case and of the particular

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vulnerability of Mr Chahal, rather than by the application of any rule of law or thumb. Seen within the wider context of the substantial evidence which now exists in relation to the use of ‘extraordinary rendition’⁸ the effectiveness of MUMs must be in some doubt and their use by the Secretary of State and their ratification by the Commission in the case of countries with a proven track record of torture continues to be a matter of considerable concern. Nevertheless, the House of Lords has held that whether assurances could be relied upon was a matter of fact for determination by SIAC and that SIAC had properly concluded that the particular assurances from Algeria and Jordan could be relied upon to obviate the real risk of an Article 3 breach that existed in their absence.⁹

¹ See chapter 12 in relation to exclusion and expulsion of refugees.

² *Y v Secretary of State for the Home Department* (SC/36/2005), 24 August 2006, where the Commission accepted that diplomatic assurances offered by the Algerian government were satisfactory such that the appellant was not at risk. This appeal was subject to an appeal to the Court of Appeal: *MT(Algeria), RB(Algeria) & U(Algeria) Secretary of State for the Home Department* [2007] EWCA Civ 808, and was allowed and was remitted back to the Commission. The appeal was again dismissed by the Commission in the conjoined appeals of *Y, BB & U v Secretary of State for the Home Department* (SC/21/36/39/2005), 2 November 2007. Since the initial decision in *Y*, another six Algerians have had appeals dismissed on the basis of the diplomatic assurances from the Algerian government.

³ *Omar Othman v Secretary of State for the Home Department* (SC/15/2005), 26 February 2007, where the Commission accepted that diplomatic assurances offered by the Jordanian government were satisfactory such that the appellant was not at risk. This decision has been followed in the appeal of another Jordanian national: *VV v Secretary of State for the Home Department* (SC/59/2006), 2 November 2007.

⁴ See paras 292–303 of *Omar Othman*, fn 3 above.

⁵ *DD and AS v Secretary of State for the Home Department* (SC/42, 50/2005), 27 April 2007. In these appeals, the Commission rejected the assurances given by the Libyan government as to the safety of the appellants, and therefore found that the deportations would breach Article 3. The Secretary of State has appealed to the Court of Appeal.

⁶ *MT (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 808, (2007) Times, 3 August.

⁷ *Chahal v United Kingdom* (1996) 23 EHRR 413. See also *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25 in which the ECtHR had regard to diplomatic assurances by the government of Uzbekistan in the context of extradition requests.

⁸ See paras 320–333 of *Omar Othman*, fn 3 above.

⁹ *RB (Algeria) v Secretary of State for the Home Department; OO (Jordan) v Secretary of State* [2009] UKHL 10, 153 Sol Jo (no 7) 32.

FAIRNESS OF PROCEEDINGS BEFORE THE SPECIAL IMMIGRATION APPEALS COMMISSION

19.14 Since its inception, the Commission has been plagued by accusations that its procedures are inherently unfair to appellants who often cannot see the vast bulk of the evidence against them, and that the unfairness is not remedied by the appointment of special advocates who cannot cross-examine or make submissions on instructions, since as soon as the special advocate receives the ‘closed material’ his or her contact with the appellant is at an end. This is a submission which has been roundly rejected in both the Commission itself, the Court of Appeal and the House of Lords.¹ The argument that Article 6 of the ECHR applies to proceedings before the Commission² has been rejected on the basis that deportation proceedings and decisions regarding the entry, stay and deportation of aliens do not concern the determination

of an applicant's civil rights or obligations, even though profoundly affecting rights such as to take up employment, or of a criminal charge against him.³ In maintaining this position in relation to proceedings before SIAC, the House of Lords distinguished them from control order proceedings which, so a majority of the House of Lords held,⁴ were subject to Article 6.

- ¹ *RB (Algeria) v Secretary of State for the Home Department*; *OO (Jordan) v Secretary of State* [2009] UKHL 10, 153 Sol Jo (no 7) 32 and see para 19.10 above.
- ² *PP v Secretary of State for the Home Department* (SC/54/2006), 23 November 2007 at para 4.
- ³ *Maaouia v France* (2000) 33 EHRR 42, para 40 and *RB (Algeria) v Secretary of State for the Home Department*; *OO (Jordan) v Secretary of State* [2009] UKHL 10, 153 Sol Jo (no 7) 32.
- ⁴ *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, [2007] NLJR 1577.

ONWARD APPEALS

19.16 Any party to an appeal before the Commission may bring a further appeal to the appropriate appeal court on any question of law material to the final determination of an appeal.¹ In relation to a determination made by the Commission in England and Wales, the appropriate court is the Court of Appeal, in Scotland the Court of Session and in Northern Ireland to the Court of Appeal in Northern Ireland.² Such an appeal can only be brought with the leave of the Commission or if such leave is refused, with the leave of the appropriate appeal court.³ An application for leave to appeal must be filed with the Commission in writing.⁴ The appellant must file the application, if in detention, within five days of service of the Commission's determination or otherwise within 10 days.⁵ Where the Secretary of State makes an application to amend the determination under r 48 of the Procedure Rules, he must file any application for permission to appeal with the Commission no later than 10 days after the hearing of the amendment application, or where there is no hearing the day on which he received notification of the decision on the application.⁶ Where the Secretary of State does not make such an application, any application for permission to appeal must be filed no later than 15 days after receiving the determination.⁷ The Commission may accept a late application if it is satisfied that by reason of special circumstances, it would be unjust to do so.⁸ The Commission may decide an application for leave without a hearing unless it considers there are special circumstances which make a hearing necessary or desirable.⁹ There was no appeal to the Court of Appeal on a question of fact just because the subject matter of the challenge concerned the appellant's Article 3 rights.¹⁰

¹ Special Immigration Appeals Commission Act 1997, s 7(1).

² SIACA 1997, s 7(3).

³ SIACA 1997, s 7(2).

⁴ Special Immigration Appeals Commission (Procedure) Rules 2003, SI 2003/1034, r 27(1). The application must state the grounds of appeal and be signed by the applicant or his representative and dated: r 27(3). The applicant must serve a copy of the application notice on every other party: r 27(4).

⁵ SI 2003/1034, r 27(2).

⁶ SI 2003/1034, r 27(2A)(a).

⁷ SI 2003/1034, r 27(2A)(b).

⁸ SI 2003/1034, r 27(2B).

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⁹ SI 2003/1034, r 27(5).

¹⁰ *MT (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 808, (2007) Times, 3 August and *RB (Algeria) v Secretary of State for the Home Department; OO (Jordan) v Secretary of State* [2009] UKHL 10, 153 Sol Jo (no 7) 32.

BAIL

19.17 The provisions which govern bail before SIAC are contained in Sch 3 to the SIACA 1997, which modifies the various bail powers contained in Sch 2 to the Immigration Act 1971 (see chapter 17, above) and in Part 6 of the Special Immigration Appeals Commission (Procedure) Rules.¹ The application by someone held under the Immigration Acts must be made in writing to SIAC and in addition to the usual particulars (name, date of birth etc) it should also state the amount of any recognisance the applicant will agree to be bound by and the names and details of any sureties.² On receipt of an application SIAC must 'as soon as reasonably practicable' serve the Secretary of State with a copy and fix a date for a hearing.³ If the application is contested it is then the duty of the Secretary of State to file a written statement of her reasons for contesting the application.⁴ Part of this statement may be open material and part closed. If there is closed material it can only be relied on if a special advocate has been appointed to represent the interests of the bail applicant and he or she has been served with the closed material and a statement by the Secretary of State of her reasons for objecting to its disclosure.⁵ By this time the special advocate is no longer able to communicate or take instructions from the applicant or the applicant's legal advisers without the leave of the Commission,⁶ but must nevertheless decide whether to object to the non-disclosure. If he or she does so there may have to be a secret hearing on this issue, and SIAC must then make a finding.⁷ After any disclosure procedure is concluded the bail application may be heard. Again, there may have to be open and closed sessions before the Commission makes its decision on the bail application. The decision must be in writing and SIAC must give its reasons 'if and to the extent that it is possible to do so without disclosing information contrary to the public interest.'⁸ Although time limits for making bail application are quite tight,⁹ applications tend to be quite drawn out and lengthy, with the bulk of the evidence being given in closed session. Whilst there is no statutory test for granting or withholding bail, SIAC has consistently held that the risk of absconding and the risk to national security, including that posed were the appellant to abscond, are factors of great importance.¹⁰ When bail is granted in an alleged terrorist case it is usually only given with the attachment of the most stringent and strict conditions. If a person on bail is arrested because an immigration officer or police officer anticipates that he or she will break a condition of bail,¹¹ the person must be brought before SIAC which then has to determine whether there are 'reasonable grounds for believing that the person is likely to break any condition on which he was released' in order then to decide whether or not bail is to be revoked.¹² That likelihood is established if there is a real risk or a serious possibility of the person breaching a condition.¹³

¹ Special Immigration Commission Appeals (Procedure) Rules 2003, SI 2003/1034.

² SI 2003/1034, r 29, as modified by r 31 in its application to Scotland.

³ SI 2003/1034, r 30(1).

⁴ SI 2003/1034, r 30 (2).

⁵ SI 2003/1034, r 37(2) and (3).

⁶ SI 2003/1034, r 36.

⁷ SI 2003/1034, r 38.

⁸ SI 2003/1034, r 30(4).

⁹ See SI 2003/1034, r 30.

¹⁰ See for example *Othman v Secretary of State for the Home Department* (SC/15/2005), 2 December 2008 (SIAC).

¹¹ Immigration Act 1971, Sch 2, para 24(1) as applied by the Special Immigration Appeals Act 1997, s 3(1).

¹² Immigration Act 1971, Sch 2, para 24(3)(a) as applied.

¹³ *Othman v Secretary of State for the Home Department* (SC/15/2005), 2 December 2008 (SIAC).

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Please note, underlined text indicates prospective additions and/or substitutions to the text; italicised text indicates prospective repeals.

UK IMMIGRATION STATUTES

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IMMIGRATION ACT 1971

1971 CHAPTER 77

An Act to amend and replace the present immigration laws, to make certain related changes in the citizenship law and enable help to be given to those wishing to return abroad, and for purposes connected therewith

[28th October 1971]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

REGULATION OF ENTRY INTO AND STAY IN UNITED KINGDOM

3 General provisions for regulation and control

(1) Except as otherwise provided by or under this Act, where a person is not [a British citizen]—

- (a) he shall not enter the United Kingdom unless given leave to do so in accordance [the provisions of, or made under,] with this Act;
- (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;
- {(c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely—
 - (i) a condition restricting his employment or occupation in the United Kingdom;
 - (ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds; < ... >
 - (iii) a condition requiring him to register with the police;
 - [(iv) a condition requiring him to report to an immigration officer or the Secretary of State; and
 - (v) a condition about residence].]

(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).

If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid).

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(3) In the case of a limited leave to enter or remain in the United Kingdom,—

- (a) a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply; and
- (b) the limitation on and any conditions attached to a person's leave [(whether imposed originally or on a variation) shall], if not superseded, apply also to any subsequent leave he may obtain after an absence from the United Kingdom within the period limited for the duration of the earlier leave.

(4) A person's leave to enter or remain in the United Kingdom shall lapse on his going to a country or territory outside the common travel area (whether or not he lands there), unless within the period for which he had leave he returns to the United Kingdom in circumstances in which he is not required to obtain leave to enter; but, if he does so return, his previous leave (and any limitation on it or conditions attached to it) shall continue to apply.

[(5) A person who is not a British citizen is liable to deportation from the United Kingdom if—

- (a) the Secretary of State deems his deportation to be conducive to the public good; or
- (b) another person to whose family he belongs is or has been ordered to be deported.]

(6) Without prejudice to the operation of subsection (5) above, a person who is not [a British citizen] shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.

(7) Where it appears to Her Majesty proper so to do by reason of restrictions or conditions imposed on [British citizens, [British overseas territories citizens] or British Overseas citizens] when leaving or seeking to leave any country or the territory subject to the government of any country, Her Majesty may by Order in Council make provision for prohibiting persons who are nationals or citizens of that country and are not [British citizens] from embarking in the United Kingdom, or from doing so elsewhere than at a port of exit, or for imposing restrictions or conditions on them when embarking or about to embark in the United Kingdom; and Her Majesty may also make provision by Order in Council to enable those who are not [British citizens] to be, in such cases as may be prescribed by the Order, prohibited in the interests of safety from so embarking on a ship or aircraft specified or indicated in the prohibition.

Any Order in Council under this subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(8) When any question arises under this Act whether or not a person is [a British citizen], or is entitled to any exemption under this Act, it shall lie on the person asserting it to prove that he is.

[(9) A person seeking to enter the United Kingdom and claiming to have the right of abode there shall prove that he has that right by means of either—

- (a) a United Kingdom passport describing him as a British citizen or as a citizen of the United Kingdom and Colonies having the right of abode in the United Kingdom; or
- (b) a certificate of entitlement ...]

Appointment

Appointment: 1 January 1973: see SI 1972/1514, art 2.

Amendment

Sub-s (1): words “a British citizen” in square brackets substituted by the British Nationality Act 1981, s 39(6), Sch 4, paras 2, 4.

Sub-s (1): in para (a) words “the provisions of, or made under,” in square brackets inserted by the Immigration and Asylum Act 1999, s 169(1), Sch 14, paras 43, 44(1). Date in force: 14 February 2000: see SI 2000/168, art 2, Schedule.

Sub-s (1): para (c) substituted by the Asylum and Immigration Act 1996, s 12(1), Sch 2, para 1(1). Sub-s (1): in para (c)(ii) word omitted repealed by the UK Borders Act 2007, s 58, Schedule. Date in force: 31 January 2008: see SI 2008/99, art 2(n).

Sub-s (1): para (c)(iv), (v) inserted by the UK Borders Act 2007, s 16. Date in force: 31 January 2008: see SI 2008/99, art 2(g); for transitional provisions see art 3 thereof.

Sub-s (3): words in square brackets substituted by the Immigration Act 1988, s 10, Schedule, para 1.

Sub-s (5): substituted by the Immigration and Asylum Act 1999, s 169(1), Sch 14, paras 43, 44(2). Date in force: 2 October 2000: see SI 2000/2444, art 2, Sch 1.

Sub-s (6): words “a British citizen” in square brackets substituted by the British Nationality Act 1981, s 39(6), Sch 4, paras 2, 4.

Sub-s (7): words from “British citizens,” to “British Overseas citizens” in square brackets and words “British citizens” in square brackets in both places they occur substituted by the British Nationality Act 1981, s 39(6), Sch 4, paras 2, 4.

Sub-s (7): words “British overseas territories citizens” in square brackets substituted by virtue of the British Overseas Territories Act 2002, s 2(3). Date in force: this amendment came into force on 26 February 2002 (date of Royal Assent of the British Overseas Territories Act 2002) in the absence of any specific commencement provision.

Sub-s (8): words “a British citizen” in square brackets substituted by the British Nationality Act 1981, s 39(6), Sch 4, paras 2, 4.

Sub-s (9): substituted for existing sub-ss (9), (9A) by the Immigration Act 1988, s 3(1).

Sub-s (9): in para (b) words omitted repealed by the Nationality, Immigration and Asylum Act 2002, ss 10(5)(a), 161, Sch 9. Date in force: 1 April 2003: see SI 2003/754, art 2(1), Sch 1.

Modification

Modified, in relation to its application to frontier controls between the United Kingdom, France and Belgium, by the Channel Tunnel (Miscellaneous Provisions) Order 1994, SI 1994/1405, art 7. Modified, in its application to the Channel Tunnel, by the Channel Tunnel (International Arrangements) Order 1993, SI 1993/1813, art 7(1), Sch 4, para 1(2).

Subordinate Legislation

Immigration (Revocation of Employment Restrictions) Order 1972, SI 1972/1647 (made under sub-s (3)).

Immigration (Variation of Leave) Order 1976, SI 1976/1572 (made under sub-s (3)).

Immigration (Variation of Leave) (Amendment) Order 1989, SI 1989/1005 (made under sub-s (3)(a)).

Immigration (Variation of Leave) (Revocation) Order 1991, SI 1991/980 (made under sub-s (3)(a)).

Immigration (Variation of Leave) (No 2) Order 1991, SI 1991/1083 (made under sub-s (3)(a)).

Immigration (Variation of Leave) (Amendment) Order 1993, SI 1993/1657 (made under sub-s (3)(a)).

Immigration (Variation of Leave) (Amendment) Order 2000, SI 2000/2445 (made under sub-s (3)(a)).

PART III

CRIMINAL PROCEEDINGS

[25 Assisting unlawful immigration to member State]

[(1) A person commits an offence if he—

- (a) does an act which facilitates the commission of a breach of immigration law by an individual who is not a citizen of the European Union,
- (b) knows or has reasonable cause for believing that the act facilitates the commission of a breach of immigration law by the individual, and

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- (c) knows or has reasonable cause for believing that the individual is not a citizen of the European Union.
- (2) In subsection (1) “immigration law” means a law which has effect in a member State and which controls, in respect of some or all persons who are not nationals of the State, entitlement to—
 - (a) enter the State,
 - (b) transit across the State, or
 - (c) be in the State.
- (3) A document issued by the government of a member State certifying a matter of law in that State—
 - (a) shall be admissible in proceedings for an offence under this section, and
 - (b) shall be conclusive as to the matter certified.
- [(4) Subsection (1) applies to things done whether inside or outside the United Kingdom.]
- (6) A person guilty of an offence under this section shall be liable—
 - (a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, to a fine or to both, or
 - (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.
- [(7) In this section—
 - (a) a reference to a member State includes a reference to a State on a list prescribed for the purposes of this section by order of the Secretary of State (to be known as the “Section 25 List of Schengen Acquis States”), and
 - (b) a reference to a citizen of the European Union includes a reference to a person who is a national of a State on that list.
- (8) An order under subsection (7)(a)—
 - (a) may be made only if the Secretary of State thinks it necessary for the purpose of complying with the United Kingdom’s obligations under the Community Treaties,
 - (b) may include transitional, consequential or incidental provision,
 - (c) shall be made by statutory instrument, and
 - (d) shall be subject to annulment in pursuance of a resolution of either House of Parliament.]]

Amendment

Substituted, together with ss 25A–25C for this section as originally enacted, by the Nationality, Immigration and Asylum Act 2002, s 143. Date in force: 10 February 2003: see SI 2003/1, art 2, Schedule.

Sub-s (4): substituted, for sub-ss (4), (5) as originally enacted, by the UK Borders Act 2007, s 30(1). Date in force: 31 January 2008: see SI 2008/99, art 2(1).

Sub-ss (7), (8): inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 1(1). Date in force: 1 October 2004: see SI 2004/2523, art 2, Schedule.

Modification

Modified, in its application to the Channel Tunnel, by the Channel Tunnel (International Arrangements) Order 1993, SI 1993/1813, art 7(1), Sch 4, para 1(8).

Modified, in relation to its application to frontier controls between the United Kingdom, France and Belgium, by the Channel Tunnel (Miscellaneous Provisions) Order 1994, SI 1994/1405, art 7.

Subordinate Legislation

Immigration (Assisting Unlawful Immigration) (Section 25 List of Schengen Acquis States) Order 2004, SI 2004/2877 (made under sub-s (7)(a)).

[25B Assisting entry to United Kingdom in breach of deportation or exclusion order]

[(1) A person commits an offence if he—

- (a) does an act which facilitates a breach of a deportation order in force against an individual who is a citizen of the European Union, and
- (b) knows or has reasonable cause for believing that the act facilitates a breach of the deportation order.

(2) Subsection (3) applies where the Secretary of State personally directs that the exclusion from the United Kingdom of an individual who is a citizen of the European Union is conducive to the public good.

(3) A person commits an offence if he—

- (a) does an act which assists the individual to arrive in, enter or remain in the United Kingdom,
- (b) knows or has reasonable cause for believing that the act assists the individual to arrive in, enter or remain in the United Kingdom, and
- (c) knows or has reasonable cause for believing that the Secretary of State has personally directed that the individual's exclusion from the United Kingdom is conducive to the public good.

(4) [Subsections (4) and (6) of section 25] apply for the purpose of an offence under this section as they apply for the purpose of an offence under that section.]

Amendment

Substituted, together with ss 25, 25A, 25C for s 25 as originally enacted, by the Nationality, Immigration and Asylum Act 2002, s 143. Date in force: 10 February 2003: see SI 2003/1, art 2, Schedule.

Sub-s (4): words "Subsections (4) and (6)" in square brackets substituted by the UK Borders Act 2007, s 30(2). Date in force: 31 January 2008: see SI 2008/99, art 2(l).

[26A Registration card]

[(1) In this section "registration card" means a document which—

- (a) carries information about a person (whether or not wholly or partly electronically), and
- [(b) is issued by the Secretary of State to the person wholly or partly in connection with—
 - (i) a claim for asylum (whether or not made by that person), or
 - (ii) a claim for support under section 4 of the Immigration and Asylum Act 1999 (whether or not made by that person)].

(2) In subsection (1) "claim for asylum" has the meaning given by section 18 of the Nationality, Immigration and Asylum Act 2002.

(3) A person commits an offence if he—

- (a) makes a false registration card,
- (b) alters a registration card with intent to deceive or to enable another to deceive,
- (c) has a false or altered registration card in his possession without reasonable excuse,
- (d) uses or attempts to use a false registration card for a purpose for which a registration card is issued,
- (e) uses or attempts to use an altered registration card with intent to deceive,
- (f) makes an article designed to be used in making a false registration card,
- (g) makes an article designed to be used in altering a registration card with intent to deceive or to enable another to deceive, or

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- (h) has an article within paragraph (f) or (g) in his possession without reasonable excuse.
- (4) In subsection (3) “false registration card” means a document which is designed to appear to be a registration card.
- (5) A person who is guilty of an offence under subsection (3)(a), (b), (d), (e), (f) or (g) shall be liable—
 - (a) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or
 - (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.
- (6) A person who is guilty of an offence under subsection (3)(c) or (h) shall be liable—
 - (a) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both, or
 - (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.
- (7) The Secretary of State may by order—
 - (a) amend the definition of “registration card” in subsection (1);
 - (b) make consequential amendment of this section.
- (8) An order under subsection (7)—
 - (a) must be made by statutory instrument, and
 - (b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.]

Amendment

Inserted by the Nationality, Immigration and Asylum Act 2002, s 148. Date in force: 10 February 2003: see SI 2003/1, art 2, Schedule.

Sub-s (1): para (b) substituted by SI 2008/1693, art 2. Date in force: 27 June 2008: see SI 2008/1693, art 1.

27 Offences by persons connected with ships or aircraft or with ports

A person shall be guilty of an offence punishable on summary conviction with a fine of not more than [[level 5] on the standard scale] or with imprisonment for not more than six months, or with both, in any of the following cases—

- (a) if, being the captain of a ship or aircraft,—
 - (i) he knowingly permits a person to disembark in the United Kingdom when required under Schedule 2 or 3 to this Act to prevent it, or fails without reasonable excuse to take any steps he is required by or under Schedule 2 to take in connection with the disembarkation or examination of passengers or for furnishing a passenger list or particulars of members of the crew; or
 - (ii) he fails, without reasonable excuse, to comply with any directions given him under Schedule 2 or 3 [or under the Immigration and Asylum Act 1999] with respect to the removal of a person from the United Kingdom;
- (b) if, as owner or agent of a ship or aircraft,—
 - (i) he arranges, or is knowingly concerned in any arrangements, for the ship or aircraft to call at a port other than a port of entry contrary to any provision of Schedule 2 to this Act; or

- (ii) he fails, without reasonable excuse, to take any steps required by an order under Schedule 2 for the supply to passengers of landing or embarkation cards; or
- (iii) he fails, without reasonable excuse, to make arrangements for [or in connection with] the removal of a person from the United Kingdom when required to do so by directions given under Schedule 2 or 3 to this Act [or under the Immigration and Asylum Act 1999; or
- (iv) he fails, without reasonable excuse, to comply with [a requirement imposed by or under Schedule 2]];
- (c) if, ... as a person concerned in the management of a port, he fails, without reasonable excuse, to take any steps required by Schedule 2 in relation to the embarkation or disembarkation of passengers where a control area is designated.
- [(d) ...]

Appointment

Appointment: 1 January 1973: see SI 1972/1514, art 2.

Amendment

Words “level 5” in square brackets substituted by the Asylum and Immigration Act 1996, s 6.
Words ending with the words “on the standard scale” in square brackets substituted by virtue of the Criminal Justice Act 1982, ss 37, 38, 46.

Para (a): in sub-para (ii) words “or under the Immigration and Asylum Act 1999” in square brackets inserted by the Immigration and Asylum Act 1999, s 169(1), Sch 14, paras 43, 52(1), (2).
Date in force: 2 October 2000: see SI 2000/2444, art 2, Sch 1.

Para (b): in sub-para (iii) words “or in connection with” in square brackets inserted by the Immigration and Asylum Act 1999, s 169(1), Sch 14, paras 43, 52(1), (3)(a). Date in force: 1 March 2000: see SI 2000/464, art 2, Schedule.

Para (b): words “or under the Immigration and Asylum Act 1999; or” in square brackets and sub-para (iv) inserted by the Immigration and Asylum Act 1999, s 169(1), Sch 14, paras 43, 52(1), (3)(b). Date in force: 3 April 2000: see SI 2000/464, art 2, Schedule.

In para (b)(iv) words “a requirement imposed by or under Schedule 2” in square brackets substituted by the Immigration, Asylum and Nationality Act 2006, s 31(4)(a). Date in force (for certain purposes): 5 November 2007: see SI 2007/3138, art 2(d). Date in force (for remaining purposes): 1 March 2008: see SI 2007/3138, art 3(b) (as amended by SI 2007/3580, art 2).

In para (c) words omitted repealed by the Immigration, Asylum and Nationality Act 2006, ss 31(4)(b), 61, Sch 3. Date in force (for certain purposes): 5 November 2007: see SI 2007/3138, art 2(d). Date in force (for remaining purposes): 1 March 2008: see SI 2007/3138, art 3(b) (as amended by SI 2007/3580, art 2).

Para (d): inserted by SI 1990/2227, art 3, Sch 1, Pt I, para 4, repealed by SI 1993/1813, art 9, Sch 6.

Modification

Modified, in its application to the Channel Tunnel, by the Channel Tunnel (International Arrangements) Order 1993, SI 1993/1813, art 7(1), Sch 4, para 1(9).

Modified, in relation to its application to frontier controls between the United Kingdom, France and Belgium, by the Channel Tunnel (Miscellaneous Provisions) Order 1994, SI 1994/1405, art 7.

[28AA Arrest with warrant]

[(1) This section applies if on an application by an immigration officer a justice of the peace is satisfied that there are reasonable grounds for suspecting that a person has committed an offence under—

(a) section 24(1)(d), or

[(b) section 21(1) of the Immigration, Asylum and Nationality Act 2006].

(2) The justice of the peace may grant a warrant authorising any immigration officer to arrest the person.

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(3) In the application of this section to Scotland a reference to a justice of the peace shall be treated as a reference to the sheriff or a justice of the peace.]

Amendment

Inserted by the Nationality, Immigration and Asylum Act 2002, s 152. Date in force: 8 January 2003: see SI 2002/2811, art 2, Schedule.

Sub-s (1): para (b) substituted by the UK Borders Act 2007, s 27. Date in force: 29 February 2008: see SI 2008/309, art 2(a); for transitional provisions see art 5 thereof.

[28FA Search for personnel records: warrant unnecessary]

[(1) This section applies where—

- (a) a person has been arrested for an offence under section 24(1) or 24A(1),
- (b) a person has been arrested under paragraph 17 of Schedule 2,
- (c) a constable or immigration officer reasonably believes that a person is liable to arrest for an offence under section 24(1) or 24A(1), or
- (d) a constable or immigration officer reasonably believes that a person is liable to arrest under paragraph 17 of Schedule 2.

(2) A constable or immigration officer may search business premises where the arrest was made or where the person liable to arrest is if the constable or immigration officer reasonably believes—

- (a) that a person has committed an immigration employment offence in relation to the person arrested or liable to arrest, and
- (b) that employee records, other than items subject to legal privilege, will be found on the premises and will be of substantial value (whether on their own or together with other material) in the investigation of the immigration employment offence.

(3) A constable or officer searching premises under subsection (2) may seize and retain employee records, other than items subject to legal privilege, which he reasonably suspects will be of substantial value (whether on their own or together with other material) in the investigation of—

- (a) an immigration employment offence, or
- (b) an offence under section 105 or 106 of the Immigration and Asylum Act 1999 (c 33) (support for asylum-seeker: fraud).

(4) The power under subsection (2) may be exercised only—

- (a) to the extent that it is reasonably required for the purpose of discovering employee records other than items subject to legal privilege,
- (b) if the constable or immigration officer produces identification showing his status, and
- (c) if the constable or immigration officer reasonably believes that at least one of the conditions in subsection (5) applies.

(5) Those conditions are—

- (a) that it is not practicable to communicate with a person entitled to grant access to the records,
- (b) that permission to search has been refused,
- (c) that permission to search would be refused if requested, and
- (d) that the purpose of a search may be frustrated or seriously prejudiced if it is not carried out in reliance on subsection (2).

(6) Subsection (4)(b) applies—

- (a) whether or not a constable or immigration officer is asked to produce identification, but

- (b) only where premises are occupied.

(7) In this section “immigration employment offence” means [an offence under section 21 of the Immigration, Asylum and Nationality Act 2006] (employment).]

Amendment

Inserted by the Nationality, Immigration and Asylum Act 2002, s 154. Date in force: 8 January 2003: see SI 2002/2811, art 2, Schedule.

Sub-s (7): words “an offence under section 21 of the Immigration, Asylum and Nationality Act 2006” in square brackets substituted by the UK Borders Act 2007, s 28. Date in force: 29 February 2008: see SI 2008/309, art 2(b); for transitional provisions see art 5 thereof.

SCHEDULE 2

ADMINISTRATIVE PROVISIONS AS TO CONTROL ON ENTRY ETC

Section 4

PART I
GENERAL PROVISIONS

Supplementary duties of those connected with ships or aircraft or with ports

27 (1) The captain of a ship or aircraft arriving in the United Kingdom—

- (a) shall take such steps as may be necessary to secure that persons on board do not disembark there unless either they have been examined by an immigration officer, or they disembark in accordance with arrangements approved by an immigration officer, or they are members of the crew who may lawfully enter the United Kingdom without leave by virtue of section 8(1) of this Act; and
- (b) where the examination of persons on board is to be carried out on the ship or aircraft, shall take such steps as may be necessary to secure that those to be examined are presented for the purpose in an orderly manner.

[(2) The Secretary of State may by order require, or enable an immigration officer to require, a responsible person in respect of a ship or aircraft to supply—

- (a) a passenger list showing the names and nationality or citizenship of passengers arriving or leaving on board the ship or aircraft;
- (b) particulars of members of the crew of the ship or aircraft.

(3) An order under sub-paragraph (2) may relate—

- (a) to all ships or aircraft arriving or expected to arrive in the United Kingdom;
- (b) to all ships or aircraft leaving or expected to leave the United Kingdom;
- (c) to ships or aircraft arriving or expected to arrive in the United Kingdom from or by way of a specified country;
- (d) to ships or aircraft leaving or expected to leave the United Kingdom to travel to or by way of a specified country;
- (e) to specified ships or specified aircraft.

(4) For the purposes of sub-paragraph (2) the following are responsible persons in respect of a ship or aircraft—

- (a) the owner or agent, and
- (b) the captain.

(5) An order under sub-paragraph (2)—

- (a) may specify the time at which or period during which information is to be provided,
- (b) may specify the form and manner in which information is to be provided,
- (c) shall be made by statutory instrument, and

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- (d) shall be subject to annulment in pursuance of a resolution of either House of Parliament.]

[27A ...]

[Passenger information[or service information]

27B (1) This paragraph applies to ships or aircraft—

- (a) which have arrived, or are expected to arrive, in the United Kingdom; or
- (b) which have left, or are expected to leave, the United Kingdom.

(2) If an immigration officer asks the owner or agent (“the carrier”) of a ship or aircraft for passenger information [or service information], the carrier must provide that information to the officer.

(3) The officer may ask for passenger information [or service information] relating to—

- (a) a particular ship or particular aircraft of the carrier;
- (b) particular ships or aircraft (however described) of the carrier; or
- (c) all of the carrier’s ships or aircraft.

(4) The officer may ask for—

- (a) all passenger information [or service information] in relation to the ship or aircraft concerned; or
- (b) particular passenger information [or service information] in relation to that ship or aircraft.

[(4A) The officer may ask the carrier to provide a copy of all or part of a document that relates to a passenger and contains passenger information [or service information].]

(5) A request under sub-paragraph (2)—

- (a) must be in writing;
- (b) must state the date on which it ceases to have effect; and
- (c) continues in force until that date, unless withdrawn earlier by written notice by an immigration officer.

(6) The date may not be later than six months after the request is made.

(7) The fact that a request under sub-paragraph (2) has ceased to have effect as a result of sub-paragraph (5) does not prevent the request from being renewed.

(8) The information must be provided—

- (a) in such form and manner as the Secretary of State may direct; and
- (b) at such time as may be stated in the request.

(9) “Passenger information” means such information relating to the passengers carried, or expected to be carried, by the ship or aircraft as may be specified.

[(9A) “Service information” means such information relating to the voyage or flight undertaken by the ship or aircraft as may be specified.]

(10) “Specified” means specified in an order made by statutory instrument by the Secretary of State.

(11) Such an instrument shall be subject to annulment in pursuance of a resolution of either House of Parliament.]

Appointment

Appointment: 1 January 1973: see SI 1972/1514, art 2.

Amendment

Para 27: sub-paras (2)–(5) substituted, for sub-para (2) as originally enacted, by the Immigration, Asylum and Nationality Act 2006, s 31(1), (2). Date in force (for certain purposes): 5 November 2007: see SI 2007/3138, art 2(d). Date in force (for remaining purposes): 1 March 2008: see SI 2007/3138, art 3(b) (as amended by SI 2007/3580, art 2).

Para 27B heading: words “or service information” in square brackets inserted by the Immigration, Asylum and Nationality Act 2006, s 31(1), (3)(a). Date in force (for certain purposes): 5 November 2007: see SI 2007/3138, art 2(d). Date in force (for remaining purposes): 1 March 2008: see SI 2007/3138, art 3(b) (as amended by SI 2007/3580, art 2).

Para 27B: in sub-paras (2)–(4), (4A) words “or service information” in square brackets in each place they occur inserted by the Immigration, Asylum and Nationality Act 2006, s 31(1), (3)(a). Date in force (for certain purposes): 5 November 2007: see SI 2007/3138, art 2(d). Date in force (for remaining purposes): 1 March 2008: see SI 2007/3138, art 3(b) (as amended by SI 2007/3580, art 2).

Para 27B: sub-para (9A) inserted by the Immigration, Asylum and Nationality Act 2006, s 31(1), (3)(b). Date in force (for certain purposes): 5 November 2007: see SI 2007/3138, art 2(d). Date in force (for remaining purposes): 1 March 2008: see SI 2007/3138, art 3(b) (as amended by SI 2007/3580, art 2).

Modification

Modified, in its application to the Channel Tunnel, by the Channel Tunnel (International Arrangements) Order 1993, SI 1993/1813, art 7(1), Sch 4, para 1(11).

Modified, in relation to its application to frontier controls between the United Kingdom, France and Belgium, by the Channel Tunnel (Miscellaneous Provisions) Order 1994, SI 1994/1405, art 7. Paras 22–24 modified, in relation to a person detained on certain grounds relating to national security, by the Special Immigration Appeals Commission Act 1997, Sch 3, paras 1–3 (as amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 26, Sch 2, Pt I, paras 10, 13).

The Northern Ireland Act 1998 makes new provision for the government of Northern Ireland for the purpose of implementing the Belfast Agreement (the agreement reached at multi-party talks on Northern Ireland and set out in Command Paper 3883). As a consequence of that Act, any reference in this Schedule to the Parliament of Northern Ireland or the Assembly established under the Northern Ireland Assembly Act 1973, s 1, certain office-holders and Ministers, and any legislative act and certain financial dealings thereof, shall, for the period specified, be construed in accordance with Sch 12, paras 1–11 to the 1998 Act.

Transfer of Functions

Functions under this section: certain functions under para 1 are transferred, in so far as they are exercisable in or as regards Scotland, to the Scottish Ministers, by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999, SI 1999/1750, art 2, Sch 1.

Subordinate Legislation

Immigration (Particulars of Passengers and Crew) Order 1972, SI 1972/1667 (made under para 27(2)).

Immigration (Landing and Embarkation Cards) Order 1975, SI 1975/65 (made under para 5).

Immigration (Passenger Information) Order 2000, SI 2000/912 (made under para 27B(9), (10)).

SPECIAL IMMIGRATION APPEALS COMMISSION ACT 1997

1997 CHAPTER 68

An Act to establish the Special Immigration Appeals Commission; to make provision with respect to its jurisdiction; and for connected purposes.

[17th December 1997]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

6 Appointment of person to represent the appellant's interests

- (1) The relevant law officer may appoint a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded.
- (2) For the purposes of subsection (1) above, the relevant law officer is—
 - (a) in relation to proceedings before the Commission in England and Wales, the Attorney General,
 - (b) in relation to proceedings before the Commission in Scotland, the Lord Advocate, and
 - (c) in relation to proceedings before the Commission in Northern Ireland, the *Attorney General for Northern Ireland* [Advocate General for Northern Ireland].
- (3) A person appointed under subsection (1) above—
 - (a) if appointed for the purposes of proceedings in England and Wales, shall have a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990,
 - (b) if appointed for the purposes of proceedings in Scotland, shall be—
 - (i) an advocate, or
 - (ii) a solicitor who has by virtue of section 25A of the Solicitors (Scotland) Act 1980 rights of audience in the Court of Session and the High Court of Justiciary, and
 - (c) if appointed for the purposes of proceedings in Northern Ireland, shall be a member of the Bar of Northern Ireland.
- (4) A person appointed under subsection (1) above shall not be responsible to the person whose interests he is appointed to represent.

Appointment

Appointment: 3 August 1998: see SI 1998/1892, art 2.

Amendment

Sub-s (2): in para (c) words “Attorney General for Northern Ireland” in italics repealed and subsequent words in square brackets substituted by the Counter-Terrorism Act 2008, s 91(1), (2). Date in force: this amendment shall come into force on the date on which the Justice (Northern Ireland) Act 2002, s 27 comes into force: see the Counter-Terrorism Act 2008, ss 91(3), 100(4).

Transfer of Functions

By virtue of the Scotland Act 1998, s 44(1)(c), the Lord Advocate ceased, on 20 May 1999 (see SI 1998/3178), to be a Minister of the Crown and became a member of the Scottish Executive.

Accordingly, certain functions of the Lord Advocate are transferred to the Secretary of State (or as the case may be the Secretary of State for Scotland), or the Advocate General for Scotland: see the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999, SI 1999/678 and the Transfer of Functions (Lord Advocate and Advocate General for Scotland) Order 1999, SI 1999/679.

IMMIGRATION AND ASYLUM ACT 1999

1999 CHAPTER 33

An Act to make provision about immigration and asylum; to make provision about procedures in connection with marriage on superintendent registrar's certificate; and for connected purposes.

[11th November 1999]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

IMMIGRATION: GENERAL

Monitoring entry clearance

23 Monitoring refusals of entry clearance

[(1) The Secretary of State must appoint a person to monitor, in such manner as the Secretary of State may determine, refusals of entry clearance in cases where, as a result of section 88A of the Nationality, Immigration and Asylum Act 2002 (c 41) (entry clearance: non-family visitors and students), an appeal under section 82(1) of that Act may be brought only on the grounds referred to in section 84(1)(b) and (c) of that Act (racial discrimination and human rights).]

(2) But the Secretary of State may not appoint a member of his staff.

(3) The monitor must make an annual report on the discharge of his functions to the Secretary of State.

(4) The Secretary of State must lay a copy of any report made to him under subsection (3) before each House of Parliament.

(5) The Secretary of State may pay to the monitor such fees and allowances as he may determine.

Appointment

Appointment: 2 October 2000: see SI 2000/2444, art 2, Sch 1.

Amendment

Sub-s (1): substituted by the Immigration, Asylum and Nationality Act 2006, s 4(2). Date in force: 1 April 2008: see SI 2008/310, art 3(a); for savings see art 4 thereof.

Sub-s (1): words "section 90 or 91 of the Nationality, Immigration and Asylum Act 2002" in square brackets substituted by the Nationality, Immigration and Asylum Act 2002, s 114(3), Sch 7, para 27. Date in force: 1 April 2003 (except in relation to events which took place before that date): see SI 2003/754, arts 2(1), 3(1), Sch 1.

Reporting suspicious marriages

24 Duty to report suspicious marriages

(1) Subsection (3) applies if—

- (a) a superintendent registrar to whom a notice of marriage has been given under section 27 of the Marriage Act 1949,
- (b) any other person who, under section 28(2) of that Act, has attested a declaration accompanying such a notice,
- (c) a district registrar to whom a marriage notice or an approved certificate has been submitted under section 3 of the Marriage (Scotland) Act 1977, or
- (d) a registrar or deputy registrar to whom notice has been given under section 13 of the Marriages (Ireland) Act 1844 or section 4 of the Marriage Law (Ireland) Amendment Act 1863,

has reasonable grounds for suspecting that the marriage will be a sham marriage.

(2) Subsection (3) also applies if—

- (a) a marriage is solemnized in the presence of a registrar of marriages or, in relation to Scotland, an authorised registrar (within the meaning of the Act of 1977); and
- (b) before, during or immediately after solemnization of the marriage, the registrar has reasonable grounds for suspecting that the marriage will be, or is, a sham marriage.

(3) The person concerned must report his suspicion to the Secretary of State without delay and in such form and manner as may be prescribed by regulations.

(4) The regulations are to be made—

- (a) in relation to England and Wales, by the Registrar General for England and Wales with the approval of [the Secretary of State];
- (b) in relation to Scotland, by the Secretary of State after consulting the Registrar General of Births, Deaths and Marriages for Scotland;
- (c) in relation to Northern Ireland, by the Secretary of State after consulting the Registrar General in Northern Ireland.

(5) “Sham marriage” means a marriage (whether or not void)—

- (a) entered into between a person (“A”) who is neither a British citizen nor a national of an EEA State other than the United Kingdom and another person (whether or not such a citizen or such a national); and
- (b) entered into by A for the purpose of avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules.

Appointment

Appointment: 1 January 2001: see SI 2000/2698, art 2, Schedule.

Amendment

Sub-s (4): in para (a) words “the Secretary of State” in square brackets substituted by SI 2008/678, arts 3(1), 5, Sch 1, para 11(a), Sch 2, para 11(a). Date in force: 3 April 2008: see SI 2008/678, art 1(2); for transitional provisions see art 4 thereof.

Subordinate Legislation

Reporting of Suspicious Marriages and Registration of Marriages (Miscellaneous Amendments) Regulations 2000, SI 2000/3164 (made under sub-s (3)).

Reporting of Suspicious Marriages (Northern Ireland) Regulations 2000, SI 2000/3233 (made under sub-s (3)).

[24A Duty to report suspicious civil partnerships]

[(1) Subsection (3) applies if—

- (a) a registration authority to whom a notice of proposed civil partnership has been given under section 8 of the Civil Partnership Act 2004,
- (b) any person who, under section 8 of the 2004 Act, has attested a declaration accompanying such a notice,
- (c) a district registrar to whom a notice of proposed civil partnership has been given under section 88 of the 2004 Act, or
- (d) a registrar to whom a civil partnership notice has been given under section 139 of the 2004 Act,

has reasonable grounds for suspecting that the civil partnership will be a sham civil partnership.

(2) Subsection (3) also applies if—

- (a) two people register as civil partners of each other under Part 2, 3 or 4 of the 2004 Act in the presence of the registrar, and
- (b) before, during or immediately after they do so, the registrar has reasonable grounds for suspecting that the civil partnership will be, or is, a sham civil partnership.

(3) The person concerned must report his suspicion to the Secretary of State without delay and in such form and manner as may be prescribed by regulations.

(4) The regulations are to be made—

- (a) in relation to England and Wales, by the Registrar General for England and Wales with the approval of [the Secretary of State];
- (b) in relation to Scotland, by the Secretary of State after consulting the Registrar General of Births, Deaths and Marriages for Scotland;
- (c) in relation to Northern Ireland, by the Secretary of State after consulting the Registrar General in Northern Ireland.

(5) “Sham civil partnership” means a civil partnership (whether or not void)—

- (a) formed between a person (“A”) who is neither a British citizen nor a national of an EEA State other than the United Kingdom and another person (whether or not such a citizen or such a national), and
- (b) formed by A for the purpose of avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules.

(6) “The registrar” means—

- (a) in relation to England and Wales, the civil partnership registrar acting under Part 2 of the 2004 Act;
- (b) in relation to Scotland, the authorised registrar acting under Part 3 of the 2004 Act;
- (c) in relation to Northern Ireland, the registrar acting under Part 4 of the 2004 Act.]

Amendment

Inserted by the Civil Partnership Act 2004, s 261(1), Sch 27, para 162. Date in force (for the purpose of the power to make regulations): 15 April 2005: see SI 2005/1112, art 2, Sch 1. Date in force (for remaining purposes): to be appointed: see the Civil Partnership Act 2004, s 263(10)(b). Sub-s (4): in para (a) words “the Secretary of State” in square brackets substituted by SI 2008/678, arts 3(1), 5, Sch 1, para 11(b), Sch 2, para 11(b). Date in force: 3 April 2008: see SI 2008/678, art 1(2); for transitional provisions see art 4 thereof.

PART V
IMMIGRATION ADVISERS AND IMMIGRATION SERVICE PROVIDERS

The general prohibition

86 Designated professional bodies

(1) "Designated professional body" means—

- (a) *The Law Society*;
- (b) The Law Society of Scotland;
- (c) The Law Society of Northern Ireland;
- (d) *The Institute of Legal Executives*;
- (e) *The General Council of the Bar*;
- (f) The Faculty of Advocates; or
- (g) The General Council of the Bar of Northern Ireland.

[(2) The Secretary of State may by order remove a body from the list in subsection (1) if he considers that the body—

- (a) has failed to provide effective regulation of its members in their provision of immigration advice or immigration services, or
- (b) has failed to comply with a request of the Commissioner for the provision of information (whether general or in relation to a particular case or matter).]

(3) If a designated professional body asks the Secretary of State to amend subsection (1) so as to remove its name, the Secretary of State may by order do so.

(4) If the Secretary of State is proposing to act under subsection (2) he must, before doing so—

- (a) consult the Commissioner;
- (b) *consult the Legal Services Ombudsman, if the proposed order would affect a designated professional body in England and Wales*;
- (c) consult the [Scottish Legal Complaints Commission], if the proposed order would affect a designated professional body in Scotland;
- (d) consult the lay observers appointed under Article 42 of the Solicitors (Northern Ireland) Order 1976, if the proposed order would affect a designated professional body in Northern Ireland;
- (e) notify the body concerned of his proposal and give it a reasonable period within which to make representations; and
- (f) consider any representations so made.

(5) An order under subsection (2) requires the approval of—

- (a) the Lord Chancellor, if it affects a designated professional body in *England and Wales or Northern Ireland*;
- (b) the Scottish Ministers, if it affects a designated professional body in Scotland.

(6) Before deciding whether or not to give his approval under subsection (5)(a), the Lord Chancellor must consult—

- (a) *the designated judges, if the order affects a designated professional body in England and Wales*;
- (b) the Lord Chief Justice of Northern Ireland, if it [the order] affects a designated professional body in Northern Ireland.

(7) Before deciding whether or not to give their approval under subsection (5)(b), the Scottish Ministers must consult the Lord President of the Court of Session.

(8) If the Secretary of State considers that a body [(other than a body in England and Wales)] which—

- (a) is concerned (whether wholly or in part) with regulating the legal profession, or a branch of it, in an EEA State,
- (b) is not a designated professional body, and
- (c) is capable of providing effective regulation of its members in their provision of immigration advice or immigration services,

ought to be designated, he may by order amend subsection (1) to include the name of that body.

(9) The Commissioner must—

- (a) keep under review the list of designated professional bodies set out in subsection (1); and
- [(b) report to the Secretary of State if the Commissioner considers that a designated professional body—
 - (i) is failing to provide effective regulation of its members in their provision of immigration advice or immigration services, or
 - (ii) has failed to comply with a request of the Commissioner for the provision of information (whether general or in relation to a particular case or matter)].

[(9A) A designated professional body shall comply with a request of the Commissioner for the provision of information (whether general or in relation to a specified case or matter).]

(10) For the purpose of meeting the costs incurred by the Commissioner in discharging his functions under this Part, each designated professional body must pay to the Commissioner, in each year and on such date as may be specified, such fee as may be specified.

(11) Any unpaid fee for which a designated professional body is liable under subsection (10) may be recovered from that body as a debt due to the Commissioner.

(12) “Specified” means specified by an order made by the Secretary of State.

Appointment

Sub-ss (1)–(9): Appointment: 22 May 2000: see SI 2000/1282, art 2, Schedule.

Sub-ss (10)–(12): Appointment (for remaining purposes): 30 April 2001: see SI 2001/1394, art 2, Schedule.

Sub-ss (10)–(12): Appointment (for the purposes of enabling subordinate legislation to be made): 30 October 2000: see SI 2000/1985, art 2, Schedule.

Amendment

Sub-s (1): para (a) repealed by the Legal Services Act 2007, ss 186, 210, Sch 18, Pt 2, paras 9, 13(1), (2), Sch 23. Date in force: to be appointed: see the Legal Services Act 2007, s 211(2).

Sub-s (1): para (d) repealed by the Legal Services Act 2007, ss 186, 210, Sch 18, Pt 2, paras 9, 13(1), (2), Sch 23. Date in force: to be appointed: see the Legal Services Act 2007, s 211(2).

Sub-s (1): para (e) repealed by the Legal Services Act 2007, ss 186, 210, Sch 18, Pt 2, paras 9, 13(1), (2), Sch 23. Date in force: to be appointed: see the Legal Services Act 2007, s 211(2).

Sub-s (2): substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 41(1), (2). Date in force: 1 October 2004: see SI 2004/2523, art 2, Schedule.

Sub-s (4): para (b) repealed by the Legal Services Act 2007, ss 186, 210, Sch 18, Pt 2, paras 9, 13(1), (2), Sch 23. Date in force: to be appointed: see the Legal Services Act 2007, s 211(2).

Sub-s (4): in para (c) words “Scottish Legal Complaints Commission” in square brackets substituted by the Legal Services Act 2007, s 196(2)(a). Date in force: 1 October 2008: see SI 2008/1436, art 3(a).

Sub-s (5): in para (a) words “England and Wales or” in italics repealed by the Legal Services Act 2007, ss 186, 210, Sch 18, Pt 2, paras 9, 13(1), (3), Sch 23. Date in force: to be appointed: see the Legal Services Act 2007, s 211(2).

Sub-s (6): para (a) repealed by the Legal Services Act 2007, ss 186, 210, Sch 18, Pt 2, paras 9, 13(1), (4)(a), Sch 23. Date in force: to be appointed: see the Legal Services Act 2007, s 211(2).

Appendix 1 Legislation and materials

Sub-s (6): in para (b) word “it” in italics repealed and subsequent words in square brackets substituted by the Legal Services Act 2007, s 186, Sch 18, Pt 2, paras 9, 13(1), (4)(b). Date in force: to be appointed: see the Legal Services Act 2007, s 211(2).

Sub-s (8): words “(other than a body in England and Wales)” in square brackets inserted by the Legal Services Act 2007, s 186, Sch 18, Pt 2, paras 9, 13(1), (5). Date in force: to be appointed: see the Legal Services Act 2007, s 211(2).

Sub-s (9): para (b) substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 41(1), (3). Date in force: 1 October 2004: see SI 2004/2523, art 2, Schedule.

Sub-s (9A): inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 41(1), (4). Date in force: 1 October 2004: see SI 2004/2523, art 2, Schedule.

Subordinate Legislation

Immigration Services Commissioner (Designated Professional Body) (Fees) Order 2004, SI 2004/801 (made under sub-ss (10), (12)).

Immigration Services Commissioner (Designated Professional Body) (Fees) Order 2005, SI 2005/348 (made under sub-ss (10), (12)).

PART VI

SUPPORT FOR ASYLUM-SEEKERS

Interpretation

94 Interpretation of Part VI

(1) In this Part—

...
“*asylum-seeker*” means a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determined;

[“*asylum-seeker*” means a person—

- (a) who is at least 18 years old,
- (b) who is in the United Kingdom,
- (c) who has made a claim for asylum at a place designated by the Secretary of State,
- (d) whose claim has been recorded by the Secretary of State, and
- (e) whose claim has not been determined;]

“claim for asylum” means a claim that it would be contrary to the United Kingdom’s obligations under the Refugee Convention, or under Article 3 of the Human Rights Convention, for the claimant to be removed from, or required to leave, the United Kingdom;

“the Department” means the Department of Health and Social Services for Northern Ireland;

“*dependant*”, in relation to an *asylum-seeker* or a supported person, means a person in the United Kingdom who—

- (a) is his spouse;
- (b) is a child of his, or of his spouse, who is under 18 and dependent on him; or
- (c) falls within such additional category, if any, as may be prescribed;

[“*dependant*” in relation to an *asylum-seeker* or a supported person means a person who—

- (a) is in the United Kingdom, and
- (b) is within a prescribed class;]

“the Executive” means the Northern Ireland Housing Executive;

“housing accommodation” includes flats, lodging houses and hostels;

“local authority” means—

- (a) in England and Wales, a county council, a county borough council, a district council, a London borough council, the Common Council of the City of London or the Council of the Isles of Scilly;

(b) in Scotland, a council constituted under section 2 of the Local Government etc (Scotland) Act 1994;

["Northern Ireland authority" has the meaning given by section 110(9);]

"supported person" means—

(a) an asylum-seeker, or

(b) a dependant of an asylum-seeker,

who has applied for support and for whom support is provided under section 95.

(2) References in this Part to support provided under section 95 include references to support which is provided under arrangements made by the Secretary of State under that section.

(3) *For the purposes of this Part, a claim for asylum is determined at the end of such period beginning—*

(a) *on the day on which the Secretary of State notifies the claimant of his decision on the claim, or*

(b) *if the claimant has appealed against the Secretary of State's decision, on the day on which the appeal is disposed of,*

as may be prescribed.

[(3) A claim for asylum shall be treated as determined for the purposes of subsection (1) at the end of such period as may be prescribed beginning with—

(a) the date on which the Secretary of State notifies the claimant of his decision on the claim, or

(b) if the claimant appeals against the Secretary of State's decision, the date on which the appeal is disposed of.

(3A) A person shall continue to be treated as an asylum-seeker despite paragraph (e) of the definition of "asylum-seeker" in subsection (1) while—

(a) his household includes a dependant child who is under 18, and

(b) he does not have leave to enter or remain in the United Kingdom.]

(4) An appeal is disposed of when it is no longer pending for the purposes of the Immigration Acts or the Special Immigration Appeals Commission Act 1997.

(5) *If an asylum-seeker's household includes a child who is under 18 and a dependant of his, he is to be treated (for the purposes of this Part) as continuing to be an asylum-seeker while—*

(a) *the child is under 18; and*

(b) *he and the child remain in the United Kingdom.*

(6) *Subsection (5) does not apply if, on or after the determination of his claim for asylum, the asylum-seeker is granted leave to enter or remain in the United Kingdom (whether or not as a result of that claim).*

(7) For the purposes of this Part, the Secretary of State may inquire into, and decide, the age of any person.

(8) A notice under subsection (3) must be given in writing.

(9) If such a notice is sent by the Secretary of State by first class post, addressed—

(a) to the asylum-seeker's representative, or

(b) to the asylum-seeker's last known address,

it is to be taken to have been received by the asylum-seeker on the second day after the day on which it was posted.

Appendix 1 *Legislation and materials*

Initial Commencement

Royal Assent: 11 November 1999: see s 170(3)(f).

Amendment

Sub-s (1): definition “adjudicator” (omitted) repealed by SI 2008/2833, art 9(1), Sch 3, paras 179, 180. Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (1): definition “asylum-seeker” substituted by the Nationality, Immigration and Asylum Act 2002, s 44(1), (2). Date in force: to be appointed: see the Nationality, Immigration and Asylum Act 2002, s 162(1).

Sub-s (1): definition “dependant” substituted by the Nationality, Immigration and Asylum Act 2002, s 44(1), (3). Date in force: to be appointed: see the Nationality, Immigration and Asylum Act 2002, s 162(1).

Sub-s (1): definition “Northern Ireland authority” inserted by the Nationality, Immigration and Asylum Act 2002, s 60(2). Date in force: 10 February 2003: see SI 2003/1, art 2, Schedule.

Sub-s (3): substituted, by subsequent sub-ss (3), (3A), by the Nationality, Immigration and Asylum Act 2002, s 44(1), (4). Date in force: to be appointed: see the Nationality, Immigration and Asylum Act 2002, s 162(1).

Sub-ss (5), (6): repealed by the Nationality, Immigration and Asylum Act 2002, ss 44(1), (5), 161, Sch 9. Date in force: to be appointed: see the Nationality, Immigration and Asylum Act 2002, s 162(1).

Subordinate Legislation

Asylum Support (Interim Provisions) Regulations 1999, SI 1999/3056.

Asylum Support Regulations 2000, SI 2000/704.

Asylum Support (Interim Provisions) (Amendment) Regulations 2002, SI 2002/471 (made under sub-s (3)).

Asylum Support (Amendment) Regulations 2002, SI 2002/472 (made under sub-s (3)).

Appeals

102 ...

...

Appointment

Appointment: 3 April 2000: see SI 2000/464, art 2, Schedule.

Amendment

Repealed by SI 2008/2833, art 9(1), Sch 3, paras 179, 181. Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

103 *Appeals* [103 *Appeals: general*]

(1) *If, on an application for support under section 95, the Secretary of State decides that the applicant does not qualify for support under that section, the applicant may appeal to [the First-tier Tribunal].*

(2) *If the Secretary of State decides to stop providing support for a person under section 95 before that support would otherwise have come to an end, that person may appeal to [the First-tier Tribunal].*

[*(2A) If the Secretary of State decides not to provide accommodation for a person under section 4, or not to continue to provide accommodation for a person under section 4, the person may appeal to [the First-tier Tribunal].*]

(3) *On an appeal under this section, the [First-tier Tribunal] may—*

(a) *require the Secretary of State to reconsider the matter;*

(b) *substitute [its] decision for the decision appealed against; or*

(c) *dismiss the appeal.*

(4) ...

- (5) *The decision of the [First-tier Tribunal] is final.*
- (6) *If an appeal is dismissed, no further application by the appellant for support under [section 4 or 95] is to be entertained unless the Secretary of State is satisfied that there has been a material change in the circumstances.*
- (7) *The Secretary of State may by regulations provide for decisions as to where support provided under [section 4 or 95] is to be provided to be appealable to [the First-tier Tribunal] under this Part.*
- (8) *Regulations under subsection (7) may provide for any provision of this section to have effect, in relation to an appeal brought by virtue of the regulations, subject to such modifications as may be prescribed.*
- (9) *The Secretary of State may pay any reasonable travelling expenses incurred by an appellant in connection with attendance at any place for the purposes of an appeal under this section.*
- [[(1) This section applies where a person has applied for support under all or any of the following provisions—

- (a) section 4,
- (b) section 95, and
- (c) section 17 of the Nationality, Immigration and Asylum Act 2002.]

(2) The person may appeal to [the First-tier Tribunal] against a decision that the person is not qualified to receive the support for which he has applied.

(3) The person may also appeal to [the First-tier Tribunal] against a decision to stop providing support under a provision mentioned in subsection (1).

(4) But subsection (3) does not apply—

- (a) to a decision to stop providing support under one of the provisions mentioned in subsection (1) if it is to be replaced immediately by support under [another of those provisions], or
- (b) to a decision taken on the ground that the person is no longer an asylum-seeker or the dependant of an asylum-seeker.

(5) On an appeal under this section [the First-tier Tribunal] may—

- (a) require the Secretary of State to reconsider a matter;
- (b) substitute [its] decision for the decision against which the appeal is brought;
- (c) dismiss the appeal.

(6) ...

(7) If an appeal under this section is dismissed the Secretary of State shall not consider any further application by the appellant for support under a provision mentioned in [subsection (1)] unless the Secretary of State thinks there has been a material change in circumstances.

(8) An appeal under this section may not be brought or continued by a person who is outside the United Kingdom.]

Appointment

Appointment: 3 April 2000: see SI 2000/464, art 2, Schedule.

Amendment

Substituted, together with ss 103A, 103B for this section as originally enacted, by the Nationality, Immigration and Asylum Act 2002, s 53. Date in force: to be appointed: see the Nationality, Immigration and Asylum Act 2002, s 162(1).

Sub-s (1): words “the First-tier Tribunal” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, paras 179, 182(a). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Appendix 1 Legislation and materials

Sub-s (2): words “the First-tier Tribunal” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, paras 179, 182(a). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (2A): inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 10(3)(a), (6). Date in force: 31 March 2005: see SI 2005/372, art 2.

Sub-s (2A): words “the First-tier Tribunal” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, paras 179, 182(a). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (3): words “First-tier Tribunal” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, paras 179, 182(b). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (3): in para (b) word “its” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, paras 179, 182(c). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (4): repealed by SI 2008/2833, art 9(1), Sch 3, paras 179, 182(d). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (5): words “First-tier Tribunal” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, paras 179, 182(b). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-ss (6), (7): words “section 4 or 95” in square brackets substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 10(3)(b), (6). Date in force: 31 March 2005: see SI 2005/372, art 2.

Sub-s (7): words “the First-tier Tribunal” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, paras 179, 182(a). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (1) (as substituted by the Nationality, Immigration and Asylum Act 2002, s 53): substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 10(4)(a), (6). Date in force: 31 March 2005: see SI 2005/372, art 2.

Sub-s (2) (as substituted by the Nationality Immigration and Asylum Act 2002, s 53): words “the First-tier Tribunal” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, paras 179, 183(i). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (3) (as substituted by the Nationality Immigration and Asylum Act 2002, s 53): words “the First-tier Tribunal” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, paras 179, 183(i). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (4) (as substituted by the Nationality, Immigration and Asylum Act 2002, s 53): in para (a) words “another of those provisions” in square brackets substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 10(b), (6). Date in force: 31 March 2005: see SI 2005/372, art 2.

Sub-s (5) (as substituted by the Nationality Immigration and Asylum Act 2002, s 53): words “the First-tier Tribunal” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, paras 179, 183(i). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (5) (as substituted by the Nationality Immigration and Asylum Act 2002, s 53): in para (b) word “its” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, paras 179, 183(ii). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (6) (as substituted by the Nationality Immigration and Asylum Act 2002, s 53): repealed by SI 2008/2833, art 9(1), Sch 3, paras 179, 183(iii). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (7) (as substituted by the Nationality, Immigration and Asylum Act 2002, s 53): words “subsection (1)” in square brackets substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 10(4)(c), (6). Date in force: 31 March 2005: see SI 2005/372, art 2.

[103A Appeals: location of support under] [section 4 or 95]

[(1) The Secretary of State may by regulations provide for a decision as to where support provided under [section 4 or 95] is to be provided to be appealable to [the First-tier Tribunal] under this Part.

(2) Regulations under this section may provide for a provision of section 103 to have effect in relation to an appeal under the regulations with specified modifications.]

Amendment

Substituted, together with ss 103, 103B for s 103 as originally enacted, by the Nationality, Immigration and Asylum Act 2002, s 53. Date in force: to be appointed: see the Nationality, Immigration and Asylum Act 2002, s 162(1).

Section heading: words “section 4 or 95” in square brackets substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 10(5), (6). Date in force: 31 March 2005: see SI 2005/372, art 2.

Sub-s (1): words “section 4 or 95” in square brackets substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 10(5), (6). Date in force: 31 March 2005: see SI 2005/372, art 2.

Sub-s (1): words “the First-tier Tribunal” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, paras 179, 184. Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

104 ...

...

Amendment

Repealed by SI 2008/2833, art 9(1), Sch 3, paras 179, 185. Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

■

Exclusions

115 Exclusion from benefits

(1) No person is entitled to income-based jobseeker's allowance under the Jobseekers Act 1995 [or to state pension credit under the State Pension Credit Act 2002] [or to income-related allowance under Part 1 of the Welfare Reform Act 2007 (employment and support allowance)] or to—

- (a) attendance allowance,
- (b) severe disablement allowance,
- (c) [carer's allowance],
- (d) disability living allowance,
- (e) income support,
- (f) ...
- (g) ...
- (h) a social fund payment,
- [(ha) health in pregnancy grant,]
- (i) child benefit,
- (j) housing benefit, or
- (k) council tax benefit,

under the Social Security Contributions and Benefits Act 1992 while he is a person to whom this section applies.

(2) No person in Northern Ireland is entitled to—

- (a) income-based jobseeker's allowance under the Jobseekers (Northern Ireland) Order 1995, or
- (b) any of the benefits mentioned in paragraphs (a) to (j) of subsection (1),

under the Social Security Contributions and Benefits (Northern Ireland) Act 1992 while he is a person to whom this section applies.

(3) This section applies to a person subject to immigration control unless he falls within such category or description, or satisfies such conditions, as may be prescribed.

(4) Regulations under subsection (3) may provide for a person to be treated for prescribed purposes only as not being a person to whom this section applies.

(5) In relation to [health in pregnancy grant or] [child benefit], “prescribed” means prescribed by regulations made by the Treasury.

(6) In relation to the matters mentioned in subsection (2) (except so far as it relates to [health in pregnancy grant or] [child benefit]), “prescribed” means prescribed by regulations made by the Department.

Appendix 1 Legislation and materials

(7) Section 175(3) to (5) of the Social Security Contributions and Benefits Act 1992 (supplemental powers in relation to regulations) applies to regulations made by the Secretary of State or the Treasury under subsection (3) as it applies to regulations made under that Act.

(8) Sections 133(2), 171(2) and 172(4) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 apply to regulations made by the Department under subsection (3) as they apply to regulations made by the Department under that Act.

(9) “A person subject to immigration control” means a person who is not a national of an EEA State and who—

- (a) requires leave to enter or remain in the United Kingdom but does not have it;
- (b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds;
- (c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or
- (d) has leave to enter or remain in the United Kingdom only as a result of paragraph 17 of Schedule 4.

(10) “Maintenance undertaking”, in relation to any person, means a written undertaking given by another person in pursuance of the immigration rules to be responsible for that person’s maintenance and accommodation.

Initial Commencement

Sub-ss (1), (2): To be appointed (in accordance with the first regulations made under Sch 8): see s 170(2), (4).

Sub-ss (3)–(10): To be appointed: see s 170(4).

Appointment

Sub-ss (1), (2): Appointment: 3 April 2000 (in accordance with SI 2000/704, the first regulations made under Sch 8): see s 170(2), (4).

Sub-ss (3)–(10): Appointment (for the purpose of enabling subordinate legislation to be made): 1 January 2000: see SI 1999/3190, art 2, Schedule.

Sub-ss (3)–(10): Appointment (for remaining purposes): 3 April 2000: see SI 2000/464, art 2, Schedule.

Amendment

Sub-s (1): words “or to state pension credit under the State Pension Credit Act 2002” in square brackets inserted by the State Pension Credit Act 2002, s 4(2). Date in force (for the purpose only of exercising any power to make regulations or orders): 2 July 2002: see SI 2002/1691, art 2(d). Date in force (for remaining purposes): 6 October 2003: see SI 2003/1766, art 2(a).

Sub-s (1): words from “or to income-related” to “(and support allowance)” in square brackets inserted by the Welfare Reform Act 2007, s 28(1), Sch 3, para 19. Date in force: 27 October 2008: see SI 2008/787, art 2(4)(b), (f).

Sub-s (1): in para (c) words “carer’s allowance” in square brackets substituted by SI 2002/1457, art 2, Schedule, paras 1, 3(c). Date in force (for certain purposes): 1 September 2002: see SI 2002/1457, art 1(1)(b)(i). Date in force (for remaining purposes): 1 April 2003: see SI 2002/1457, art 1(1)(b)(ii).

Sub-s (1): paras (f), (g) repealed by the Tax Credits Act 2002, s 60, Sch 6. Date in force: 8 April 2003: see SI 2003/962, art 2(1), (4)(c), (e), Sch 2; for savings and transitional provisions see arts 3–5 thereof.

Sub-s (1): para (ha) inserted by the Health and Social Care Act 2008, s 138(2). Date in force: 1 January 2009: see SI 2008/3137, art 2.

Sub-s (5): words “health in pregnancy grant or” in square brackets inserted by the Health and Social Care Act 2008, s 138(3). Date in force: 1 January 2009: see SI 2008/3137, art 2.

Sub-s (5): words “child benefit” in square brackets substituted by the Tax Credits Act 2002, s 51, Sch 4, paras 20, 21. Date in force (for the purpose of making regulations): 26 February 2003: see

SI 2003/392, art 2. Date in force (for the purpose of transfer of functions etc and minor amendments): 1 April 2003; see SI 2003/392, art 2. Date in force (for remaining purposes): 7 April 2003; see SI 2003/392, art 2.

Sub-s (6): words “health in pregnancy grant or” in square brackets inserted by the Health and Social Care Act 2008, s 138(3). Date in force: 1 January 2009; see SI 2008/3137, art 2.

Sub-s (6): words “child benefit” in square brackets substituted by the Tax Credits Act 2002, s 51, Sch 4, paras 20, 21. Date in force (for the purpose of making regulations): 26 February 2003; see SI 2003/392, art 2. Date in force (for the purpose of transfer of functions etc and minor amendments): 1 April 2003; see SI 2003/392, art 2. Date in force (for remaining purposes): 7 April 2003; see SI 2003/392, art 2.

Subordinate Legislation

Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636 (made under sub-ss (3), (4), (7)).

Immigration (Eligibility for Assistance) (Scotland and Northern Ireland) Regulations 2000, SI 2000/705 (made under sub-ss (3), (4)).

Social Security Amendment (Carer's Allowance) Regulations 2002, SI 2002/2497 (made under sub-ss (3)–(5)).

State Pension Credit (Transitional and Miscellaneous Provisions) Amendment Regulations 2003, SI 2003/2274 (made under sub-ss (3), (4)).

119 Homelessness: Scotland and Northern Ireland

(1) A person subject to immigration control—

- (a) is not eligible for accommodation or assistance under the homelessness provisions, and
- (b) is to be disregarded in determining for the purposes of those provisions, whether *another person* [a person falling within subsection (1A)]—
 - (i) is homeless or is threatened with homelessness, or
 - (ii) has a priority need for accommodation,

unless he is of a class specified in an order made by the Secretary of State.

[(1A) A person falls within this subsection if the person—

- (a) falls within a class specified in an order under subsection (1); but
- (b) is not a national of an EEA State or Switzerland.]

(2) An order under subsection (1) may not be made so as to include in a specified class any person to whom section 115 applies.

(3) “The homelessness provisions” means—

- (a) in relation to Scotland, Part II of the Housing (Scotland) Act 1987; and
- (b) in relation to Northern Ireland, Part II of the Housing (Northern Ireland) Order 1988.

(4) “Person subject to immigration control” has the same meaning as in section 118.

Appointment

Appointment (for the purpose of enabling subordinate legislation to be made): 1 January 2000; see SI 1999/3190, art 2, Schedule.

Appointment (for remaining purposes): 1 March 2000; see SI 2000/464, art 2, Schedule.

Amendment

Sub-s (1): in para (b) words “another person” in italics repealed and subsequent words in square brackets substituted by the Housing and Regeneration Act 2008, s 314, Sch 15, Pt 2, para 22(1), (2). Date in force: to be appointed: see the Housing and Regeneration Act 2008, s 325(1).

Sub-s (1A): inserted by the Housing and Regeneration Act 2008, s 314, Sch 15, Pt 2, para 22(1), (3). Date in force: to be appointed: see the Housing and Regeneration Act 2008, s 325(1).

Appendix 1 Legislation and materials

Subordinate Legislation

Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000, SI 2000/706.

SCHEDULE 5

THE IMMIGRATION SERVICES COMMISSIONER

Section 83

PART I

REGULATORY FUNCTIONS

Extension of scope of the Code

- 4 (1) The Secretary of State may by order provide for the provisions of the Code, or such provisions of the Code as may be specified by the order, to apply to—
- (a) persons authorised by any designated professional body to practise as a member of the profession whose members are regulated by that body; and
 - [(b) persons acting on behalf of persons who are within paragraph (a)].
- (2) If the Secretary of State is proposing to act under sub-paragraph (1) he must, before doing so, consult—
- (a) the Commissioner;
 - (b) *the Legal Services Ombudsman, if the proposed order would affect a designated professional body in England and Wales;*
 - (c) the [Scottish Legal Complaints Commission], if the proposed order would affect a designated professional body in Scotland;
 - (d) the lay observers appointed under Article 42 of the Solicitors (Northern Ireland) Order 1976, if the proposed order would affect a designated professional body in Northern Ireland.
- (3) An order under sub-paragraph (1) requires the approval of—
- (a) the Lord Chancellor, if it affects a designated professional body in *England and Wales or Northern Ireland;*
 - (b) the Scottish Ministers, if it affects a designated professional body in Scotland.
- (4) Before deciding whether or not to give his approval under sub-paragraph (3)(a), the Lord Chancellor must consult—
- (a) *the designated judges, if the order affects a designated professional body in England and Wales;*
 - (b) the Lord Chief Justice of Northern Ireland, if it affects a designated professional body in Northern Ireland.
- (5) Before deciding whether or not to give their approval under sub-paragraph (3)(b), the Scottish Ministers must consult the Lord President of the Court of Session.

Amendment

Para 4: in sub para (2)(c) words “Scottish Legal Complaints Commission” in square brackets substituted by the Legal Services Act 2007, s 196(2)(b). Date in force: 1 October 2008: see SI 2008/1436, art 3(a).

SCHEDULE 7

THE IMMIGRATION SERVICES TRIBUNAL

Section 87(5)

Meaning of “legally qualified”

- 11 A person is legally qualified for the purposes of this Schedule if—

- [(a) he satisfies the judicial-appointment eligibility condition on a 5-year basis;]
- (b) he is an advocate or solicitor in Scotland of at least [5] years' standing; or
- (c) he is a member of the Bar of Northern Ireland or *solicitor of the Supreme Court of Northern Ireland* [solicitor of the Court of Judicature of Northern Ireland] of at least [5] years' standing.

Amendment

Para 11: sub-para (a) substituted by the Tribunals, Courts and Enforcement Act 2007, s 50, Sch 10, Pt 1, para 32(1), (2). Date in force: 21 July 2008: see SI 2008/1653, art 2(d); for transitional provisions see arts 3, 4 thereof.

Para 11: in sub-para (b) reference to "5" in square brackets substituted by the Tribunals, Courts and Enforcement Act 2007, s 50, Sch 10, Pt 1, para 32(1), (3). Date in force: 21 July 2008: see SI 2008/1653, art 2(d); for transitional provisions see arts 3, 4 thereof.

Para 11: in sub-para (c) words "solicitor of the Supreme Court of Northern Ireland" in italics repealed and subsequent words in square brackets substituted by the Constitutional Reform Act 2005, s 59(5), Sch 11, Pt 3, para 5. Date in force: to be appointed: see the Constitutional Reform Act 2005, s 148(1).

Para 11: in sub-para (c) reference to "5" in square brackets substituted by the Tribunals, Courts and Enforcement Act 2007, s 50, Sch 10, Pt 1, para 32(1), (3). Date in force: 21 July 2008: see SI 2008/1653, art 2(d); for transitional provisions see arts 3, 4 thereof.

SCHEDULE 10

...

...

Amendment

Repealed by SI 2008/2833, art 9(1), Sch 3, paras 179, 186. Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

SCHEDULE 14

CONSEQUENTIAL AMENDMENTS

Section 169(1)

...

The House of Commons Disqualification Act 1975 (c 24)

71 In Part III of Schedule 1 to the House of Commons Disqualification Act 1975 (disqualifying offices)—

(a) omit—

"Adjudicator appointed for the purposes of the Immigration Act 1971";

and

(b) ...

"Adjudicator appointed for the purposes of the Immigration and Asylum Act 1999";

and

"Asylum Support Adjudicator".

The Northern Ireland Assembly Disqualification Act 1975 (c 25)

72 In Part III of Schedule 1 to the Northern Ireland Assembly Disqualification Act 1975 (disqualifying offices)—

(a) omit—

"Adjudicator appointed for the purposes of the Immigration Act 1971";

and

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(b) ...

“Adjudicator appointed for the purposes of the Immigration and Asylum Act 1999”;
and

“Asylum Support Adjudicator”.

The Tribunals and Inquiries Act 1992 (c 53)

95 ..

Amendment

Para 71: sub-para (b) repealed by SI 2008/2833, art 9(1), Sch 3, para 228(f). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Para 72: sub-para (b) repealed by SI 2008/2833, art 9(1), Sch 3, para 228(f). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Para 95: repealed by SI 2008/2833, art 9(1), Sch 3, para 228(f). Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002

2002 CHAPTER 41

An Act to make provision about nationality, immigration and asylum; to create offences in connection with international traffic in prostitution; to make provision about international projects connected with migration; and for connected purposes.

[7th November 2002]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART 1 NATIONALITY

General

34 ...

...

Initial Commencement

To be appointed: see s 162(1).

Amendment

Repealed by the UK Borders Act 2007, ss 54(b), 58, Schedule. Date in force: 1 April 2008: see SI 2008/309, art 4(e), (h).

36 Education: general

(1) For the purposes of section 13 of the Education Act 1996 (c 56) (general responsibility of local education authority) a resident of an accommodation centre shall not be treated as part of the population of a local education authority's area.

- (2) A child who is a resident of an accommodation centre may not be admitted to a maintained school or a maintained nursery (subject to section 37).
- (3) But subsection (2) does not prevent a child's admission to a school which is—
- (a) a community special school or a foundation special school, and
 - (b) named in a statement in respect of the child under section 324 of the Education Act 1996 (c 56) (special educational needs).
- (4) In subsections (2) and (3)—
- (a) “maintained school” means a maintained school within the meaning of section 20(7) of the School Standards and Framework Act 1998 (c 31) (definition), and
 - (b) “maintained nursery” means a facility for nursery education, within the meaning of section 117 of that Act, provided by a local education authority.
- (5) The following shall not apply in relation to a child who is a resident of an accommodation centre (subject to section 37)—
- (a) section 86(1) and (2) of the School Standards and Framework Act 1998 (parental preference),
 - (b) section 94 of that Act (appeal),
 - (c) section 19 of the Education Act 1996 (education out of school),
 - (d) section 316(2) and (3) of that Act (child with special educational needs to be educated in mainstream school), and
 - (e) paragraphs 3 and 8 of Schedule 27 to that Act (special education needs: making of statement: parental preference).
- (6) The power of the [First-tier Tribunal or the Special Educational Needs Tribunal for Wales] under section 326(3) of the Education Act 1996 (appeal against content of statement) is subject to subsection (2) above.
- (7) A person exercising a function under this Act or the Education Act 1996 shall (subject to section 37) secure that a child who is a resident of an accommodation centre and who has special educational needs shall be educated by way of facilities provided under section 29(1)(f) of this Act unless that is incompatible with—
- (a) his receiving the special educational provision which his learning difficulty calls for,
 - (b) the provision of efficient education for other children who are residents of the centre, or
 - (c) the efficient use of resources.
- (8) A person may rely on subsection (7)(b) only where there is no action—
- (a) which could reasonably be taken by that person or by another person who exercises functions, or could exercise functions, in respect of the accommodation centre concerned, and
 - (b) as a result of which subsection (7)(b) would not apply.
- (9) An accommodation centre is not a school within the meaning of section 4 of the Education Act 1996 (definition); but—
- (a) [Part 1 of the Education Act 2005 (school inspections)] shall apply to educational facilities provided at an accommodation centre as if the centre were a school (for which purpose a reference to the appropriate authority shall be taken as a reference to the person (or persons) responsible for the provision of education at the accommodation centre),
 - (b) section 329A of the Education Act 1996 (review or assessment of educational needs at request of responsible body) shall have effect as if—

Appendix 1 Legislation and materials

- (i) an accommodation centre were a relevant school for the purposes of that section,
 - (ii) a child for whom education is provided at an accommodation centre under section 29(1)(f) were a registered pupil at the centre, and
 - (iii) a reference in section 329A to the responsible body in relation to an accommodation centre were a reference to any person providing education at the centre under section 29(1)(f), and
- (c) section 140 of the Learning and Skills Act 2000 (c 21) (learning difficulties: assessment of post-16 needs) shall have effect as if an accommodation centre were a school.

(10) Subsections (1), (2) and (5) shall not apply in relation to an accommodation centre if education is not provided for children who are residents of the centre under section 29(1)(f).

(11) An expression used in this section and in the Education Act 1996 (c 56) shall have the same meaning in this section as in that Act.

Initial Commencement

To be appointed: see s 162(1).

Amendment

Sub-s (6): words “First-tier Tribunal or the Special Educational Needs Tribunal for Wales” in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, para 197. Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

Sub-s (9): in para (a) words “Part 1 of the Education Act 2005 (school inspections)” in square brackets substituted by the Education Act 2005, s 61, Sch 9, para 30. Date in force (in relation to England): 1 September 2005: see SI 2005/2034, art 4. Date in force (in relation to Wales): 1 September 2006: see SI 2006/1338, art 3, Sch 1.

PART 4 DETENTION AND REMOVAL

Removal

79 Deportation order: appeal

(1) A deportation order may not be made in respect of a person while an appeal under section 82(1) against the decision to make the order—

- (a) could be brought (ignoring any possibility of an appeal out of time with permission), or
- (b) is pending.

(2) In this section “pending” has the meaning given by section 104.

[(3) This section does not apply to a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007.

(4) But a deportation order made in reliance on subsection (3) does not invalidate leave to enter or remain, in accordance with section 5(1) of the Immigration Act 1971, if and for so long as section 78 above applies.]

Appointment

Appointment: 1 April 2003: see SI 2003/754, art 2(1), Sch 1; for transitional provisions see art 3(2), Sch 2, para 1(4) thereto.

Amendment

Sub-ss (3), (4): inserted by the UK Borders Act 2007, s 35(1), (2). Date in force (for certain purposes): 1 August 2008: see SI 2008/1818, art 2(a), Schedule. Date in force (for remaining purposes): to be appointed: see the UK Borders Act 2007, s 59(2).

PART 5
IMMIGRATION AND ASYLUM APPEALS

[Appeal to Tribunal]

82 Right of appeal: general

(1) Where an immigration decision is made in respect of a person he may appeal [to the Tribunal].

(2) In this Part “immigration decision” means—

- (a) refusal of leave to enter the United Kingdom,
- (b) refusal of entry clearance,
- (c) refusal of a certificate of entitlement under section 10 of this Act,
- (d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,
- (e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,
- (f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,
- (g) a decision that a person is to be removed from the United Kingdom by way of directions under [section 10(1)(a), (b), (ba) or (c)] of the Immigration and Asylum Act 1999 (c 33) (removal of person unlawfully in United Kingdom),
- (h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c 77) (control of entry: removal),
- [(ha) a decision that a person is to be removed from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 (removal: persons with statutorily extended leave),]
- (i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),
- [(ia) a decision that a person is to be removed from the United Kingdom by way of directions under paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (c 77) (seamen and aircrews),]
- [(ib) a decision to make an order under section 2A of that Act (deprivation of right of abode),]
- (j) a decision to make a deportation order under section 5(1) of that Act, and
- (k) refusal to revoke a deportation order under section 5(2) of that Act.

(3) < ... >

[(3A) Subsection (2)(j) does not apply to a decision to make a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007; but—

- (a) a decision that section 32(5) applies is an immigration decision for the purposes of this Part, and
- (b) a reference in this Part to an appeal against an automatic deportation order is a reference to an appeal against a decision of the Secretary of State that section 32(5) applies.]

(4) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part.

Appointment

Appointment: 1 April 2003: see SI 2003/754, art 2(1), Sch 1; for transitional provisions see art 3(1) thereof.

Appendix 1 Legislation and materials

Amendment

Sub-s (1): words “to the Tribunal” in square brackets substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 26(2). Date in force: 4 April 2005: see SI 2005/565, art 2(a); for transitional provisions in relation to pending appeals which were made to an adjudicator before 4 April 2005 and in relation to further appeals and applications in such cases see arts 3–9 thereof.

Sub-s (2): in para (g) words “section 10(1)(a), (b), (ba) or (c)” in square brackets substituted by the Immigration, Asylum and Nationality Act 2006, s 2. Date in force: 31 August 2006 (in relation to a decision made on or after that date): see SI 2006/2226, arts 3, 4(1), Sch 1.

Sub-s (2): para (ha) inserted by the Immigration, Asylum and Nationality Act 2006, s 47(6). Date in force: 1 April 2008: see SI 2008/310, art 3(c).

Sub-s (2): para (ia) inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 31. Date in force: 1 October 2004: see SI 2004/2523, art 2, Schedule.

Sub-s (2): para (ib) inserted by the Immigration, Asylum and Nationality Act 2006, s 57(2). Date in force: 16 June 2006: see SI 2006/1497, art 3, Schedule.

Sub-s (3): repealed by the Immigration, Asylum and Nationality Act 2006, ss 11(6), 61, Sch 3. Date in force: 31 August 2006 (except in relation to a decision made before that date): see SI 2006/2226, arts 3, 4(5), Sch 1, Sch 2.

Sub-s (3A): inserted by the UK Borders Act 2007, s 35(1), (3). Date in force (for certain purposes): 1 August 2008: see SI 2008/1818, art 2(a), Schedule. Date in force (for remaining purposes): to be appointed: see the UK Borders Act 2007, s 59(2).

Exceptions and limitations

[88A Entry clearance]

[(1) A person may not appeal under section 82(1) against refusal of an application for entry clearance unless the application was made for the purpose of—

- (a) visiting a person of a class or description prescribed by regulations for the purpose of this subsection, or
- (b) entering as the dependant of a person in circumstances prescribed by regulations for the purpose of this subsection.

(2) Regulations under subsection (1) may, in particular—

- (a) make provision by reference to whether the applicant is a member of the family (within such meaning as the regulations may assign) of the person he seeks to visit;
- (b) provide for the determination of whether one person is dependent on another;
- (c) make provision by reference to the circumstances of the applicant, of the person whom the applicant seeks to visit or on whom he depends, or of both (and the regulations may, in particular, include provision by reference to—
 - (i) whether or not a person is lawfully settled in the United Kingdom within such meaning as the regulations may assign;
 - (ii) the duration of two individuals' residence together);
- (d) make provision by reference to an applicant's purpose in entering as a dependant;
- (e) make provision by reference to immigration rules;
- (f) confer a discretion.

(3) Subsection (1)—

- (a) does not prevent the bringing of an appeal on either or both of the grounds referred to in section 84(1)(b) and (c), and
- (b) is without prejudice to the effect of section 88 in relation to an appeal under section 82(1) against refusal of entry clearance.]

Amendment

Substituted, together with ss 90, 91, by the Immigration, Asylum and Nationality Act 2006, s 4(1); for effect see s 4(3) thereof. Date in force: to be appointed: see the Immigration, Asylum and Nationality Act 2006, s 62(1).

Inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 29(1). Date in force: 1 April 2008: see SI 2008/310, art 3(a); for savings see art 4 thereof.

90 ...

...

Appointment

Appointment: 1 April 2003: see SI 2003/754, art 2(1), Sch 1; for transitional provisions see art 3(1) thereof.

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Amendment

Substituted, together with ss 88A, 91, by the Immigration, Asylum and Nationality Act 2006, s 4(1); for effect see s 4(3) thereof. Date in force: 1 April 2008: see SI 2008/310, art 3(a); for savings see art 4 thereof.

91 ...

...

Appointment

Appointment: 1 April 2003: see SI 2003/754, art 2(1), Sch 1; for transitional provisions see art 3(1) thereof.

Amendment

Substituted, together with ss 88A, 90, by the Immigration, Asylum and Nationality Act 2006, s 4(1); for effect see s 4(3) thereof. Date in force: 1 April 2008: see SI 2008/310, art 3(a); for savings see art 4 thereof.

92 Appeal from within United Kingdom: general

(1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.

(2) This section applies to an appeal against an immigration decision of a kind specified in section 82(2)(c), (d), (e), (f)[, (ha)] and (j).

[(3) This section also applies to an appeal against refusal of leave to enter the United Kingdom if—

- (a) at the time of the refusal the appellant is in the United Kingdom, and
- (b) on his arrival in the United Kingdom the appellant had entry clearance.

(3A) But this section does not apply by virtue of subsection (3) if subsection (3B) or (3C) applies to the refusal of leave to enter.

(3B) This subsection applies to a refusal of leave to enter which is a deemed refusal under paragraph 2A(9) of Schedule 2 to the Immigration Act 1971 (c 77) resulting from cancellation of leave to enter by an immigration officer—

- (a) under paragraph 2A(8) of that Schedule, and
- (b) on the grounds specified in paragraph 2A(2A) of that Schedule.

(3C) This subsection applies to a refusal of leave to enter which specifies that the grounds for refusal are that the leave is sought for a purpose other than that specified in the entry clearance.

(3D) This section also applies to an appeal against refusal of leave to enter the United Kingdom if at the time of the refusal the appellant—

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- (a) is in the United Kingdom,
- (b) has a work permit, and
- (c) is any of the following (within the meaning of the British Nationality Act 1981 (c 61))—
 - (i) a British overseas territories citizen,
 - (ii) a British Overseas citizen,
 - (iii) a British National (Overseas),
 - (iv) a British protected person, or
 - (v) a British subject.]
- (4) This section also applies to an appeal against an immigration decision if the appellant—
 - (a) has made an asylum claim, or a human rights claim, while in the United Kingdom, or
 - (b) is an EEA national or a member of the family of an EEA national and makes a claim to the Secretary of State that the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom.

Appointment

Appointment: 1 April 2003: see SI 2003/754, art 2(1), Sch 1; for transitional provisions see art 3(1) thereof.

Amendment

Sub-s (2): reference to “, (ha)” in square brackets inserted by the Immigration, Asylum and Nationality Act 2006, s 47(7). Date in force: 1 April 2008: see SI 2008/310, art 3(c).

Sub-ss (3), (3A)–(3D): substituted, for sub-s (3) as originally enacted, by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 28. Date in force: 1 October 2004: see SI 2004/2523, art 2, Schedule.

94 Appeal from within United Kingdom: unfounded human rights or asylum claim

(1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).

[[1A) A person may not bring an appeal against an immigration decision of a kind specified in section 82(2)(c), (d) or (e)[, (e) or (ha)] in reliance on section 92(2) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) above is or are clearly unfounded.]

(2) A person may not bring an appeal to which this section applies [in reliance on section 92(4)(a)] if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded.

(3) If the Secretary of State is satisfied that an asylum claimant or human rights claimant is entitled to reside in a State listed in subsection (4) he shall certify the claim under subsection (2) unless satisfied that it is not clearly unfounded.

(4) Those States are—

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) ...
- (h) ...

- (i) ...
- (j) ...
- [(k) the Republic of Albania,
- (l) Bulgaria,
- (m) Serbia and Montenegro,
- (n) Jamaica,
- (o) Macedonia,
- (p) the Republic of Moldova, ...
- (q) Romania],
- [(r) ...
- (s) Bolivia,
- (t) Brazil,
- (u) Ecuador,
- (v) Sri Lanka,
- (w) South Africa, and
- (x) Ukraine],
- [(y) India],
- [(z) Mongolia,
- (aa) Ghana (in respect of men),
- (bb) Nigeria (in respect of men)],
- [(cc) Bosnia-Herzegovina,
- (dd) Gambia (in respect of men),
- (ee) Kenya (in respect of men),
- (ff) Liberia (in respect of men),
- (gg) Malawi (in respect of men),
- (hh) Mali (in respect of men),
- (ii) Mauritius,
- (jj) Montenegro,
- (kk) Peru,
- (ll) Serbia,
- (mm) Sierra Leone (in respect of men)].

(5) The Secretary of State may by order add a State, or part of a State, to the list in subsection (4) if satisfied that—

- (a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
- (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention.

[(5A) If the Secretary of State is satisfied that the statements in subsection (5) (a) and (b) are true of a State or part of a State in relation to a description of person, an order under subsection (5) may add the State or part to the list in subsection (4) in respect of that description of person.

(5B) Where a State or part of a State is added to the list in subsection (4) in respect of a description of person, subsection (3) shall have effect in relation to a claimant only if the Secretary of State is satisfied that he is within that description (as well as being satisfied that he is entitled to reside in the State or part).

(5C) A description for the purposes of subsection (5A) may refer to—

- (a) gender,
- (b) language,
- (c) race,
- (d) religion,
- (e) nationality,

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- (f) membership of a social or other group,
- (g) political opinion, or
- (h) any other attribute or circumstance that the Secretary of State thinks appropriate.]

[(5D) In deciding whether the statements in subsection (5) (a) and (b) are true of a State or part of a State, the Secretary of State—

- (a) shall have regard to all the circumstances of the State or part (including its laws and how they are applied), and
- (b) shall have regard to information from any appropriate source (including other member States and international organisations).]

[(6) The Secretary of State may by order amend the list in subsection (4) so as to omit a State or part added under subsection (5); and the omission may be—

- (a) general, or
- (b) effected so that the State or part remains listed in respect of a description of person.]

[(6A) Subsection (3) shall not apply in relation to an asylum claimant or human rights claimant who—

- (a) is the subject of a certificate under section 2 or 70 of the Extradition Act 2003 (c 41),
- (b) is in custody pursuant to arrest under section 5 of that Act,
- (c) is the subject of a provisional warrant under section 73 of that Act,
- (d) is the subject of an authority to proceed under section 7 of the Extradition Act 1989 (c 33) or an order under paragraph 4(2) of Schedule 1 to that Act, or
- (e) is the subject of a provisional warrant under section 8 of that Act or of a warrant under paragraph 5(1)(b) of Schedule 1 to that Act.]

[(6B) A certificate under subsection (1A) or (2) may not be issued (and subsection (3) shall not apply) in relation to an appeal under section 82(2)(d) or (e) against a decision relating to leave to enter or remain in the United Kingdom, where the leave was given in circumstances specified for the purposes of this subsection by order of the Secretary of State.]

(7) A person may not bring an appeal to which this section applies in reliance on section 92(4) if the Secretary of State certifies that—

- (a) it is proposed to remove the person to a country of which he is not a national or citizen, and
- (b) there is no reason to believe that the person's rights under the Human Rights Convention will be breached in that country.

(8) In determining whether a person in relation to whom a certificate has been issued under subsection (7) may be removed from the United Kingdom, the country specified in the certificate is to be regarded as—

- (a) a place where a person's life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion, and
- (b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention.

(9) Where a person in relation to whom a certificate is issued under this section subsequently brings an appeal under section 82(1) while outside the United Kingdom, the appeal shall be considered as if he had not been removed from the United Kingdom.

Appointment

Sub-ss (1)–(4), (6)–(9): Appointment: 1 April 2003: see SI 2003/754, art 2(1), Sch 1; for transitional provisions see art 3(1) thereof.

Sub-s (5): Appointment (for the purpose of enabling the Secretary of State to exercise the power to make subordinate legislation): 10 February 2003: see SI 2003/249, art 2, Schedule.

Sub-s (5): Appointment (for remaining purposes): 1 April 2003: see SI 2003/754, art 2(1), Sch 1; for transitional provisions see art 3(1) thereof.

Amendment

Sub-s (1A): inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 27(1), (2). Date in force: 1 October 2004: see SI 2004/2523, art 2, Schedule.

Sub-s (1A): words “, (e) or (ha)” in square brackets substituted by the Immigration, Asylum and Nationality Act 2006, s 47(8). Date in force: 1 April 2008: see SI 2008/310, art 3(c).

Sub-s (2): words “in reliance on section 92(4)(a)” in square brackets substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 27(1), (3). Date in force: 1 October 2004: see SI 2004/2523, art 2, Schedule.

Sub-s (4): paras (a)–(j) repealed by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, ss 27(1), (4), 47, Sch 4. Date in force: 1 October 2004: see SI 2004/2523, art 2, Schedule.

Sub-s (4): paras (k)–(q) inserted by SI 2003/970, art 3. Date in force: 1 April 2003 (being the date on which sub-s (4) above came into force): see SI 2003/754, art 2, Sch 1 and SI 2003/970, art 2.

Sub-s (4): para (l) repealed by SI 2006/3215, art 2. Date in force: 1 January 2007: see SI 2006/3215, art 1.

Sub-s (4): para (m) repealed by SI 2007/2221, art 3. Date in force: 27 July 2007 (except in relation to an asylum claim or human rights claim made before that date): see SI 2007/2221, art 1.

Sub-s (4): in para (p) word omitted repealed by virtue of SI 2003/1919, art 2. Date in force: 23 July 2003 (except in relation to an asylum claim or human rights claim made before that date): see SI 2003/1919, art 1.

Sub-s (4): para (q) repealed by SI 2006/3215, art 2. Date in force: 1 January 2007: see SI 2006/3215, art 1.

Sub-s (4): paras (r)–(x) inserted by SI 2003/1919, art 2. Date in force: 23 July 2003 (except in relation to an asylum claim or human rights claim made before that date): see SI 2003/1919, art 1.

Sub-s (4): para (r) repealed by SI 2005/1016, art 2. Date in force: 22 April 2005: see SI 2005/1016, art 1.

Sub-s (4): para (v) repealed by SI 2006/3275, art 2. Date in force: 13 December 2006: see SI 2006/3275, art 1.

Sub-s (4): para (y) inserted by SI 2005/330, art 2. Date in force: 15 February 2005 (except in relation to an asylum claim or human rights claim made before that date): see SI 2005/330, art 1.

Sub-s (4): paras (z), (aa), (bb) inserted by SI 2005/3306, art 2. Date in force: 2 December 2005 (except in relation to an asylum or human rights claim made before that date): see SI 2005/3306, art 1.

Sub-s (4): paras (cc)–(mm) inserted by SI 2007/2221, art 2. Date in force: 27 July 2007 (except in relation to an asylum claim or human rights claim made before that date): see SI 2007/2221, art 1.

Sub-ss (5A)–(5C): inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 27(1), (5). Date in force: 1 October 2004: see SI 2004/2523, art 2, Schedule.

Sub-s (5D): inserted by SI 2007/3187, reg 3. Date in force: 1 December 2007: see SI 2007/3187, reg 1.

Sub-s (6): substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 27(1), (6). Date in force: 1 October 2004: see SI 2004/2523, art 2, Schedule.

Sub-s (6A): inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 27(1), (7). Date in force: 1 October 2004: see SI 2004/2523, art 2, Schedule.

Sub-s (6B): inserted by the Immigration, Asylum and Nationality Act 2006, s 13. Date in force: to be appointed: see the Immigration, Asylum and Nationality Act 2006, s 62(1).

Subordinate Legislation

Asylum (Designated States) Order 2003, SI 2003/970 (made under sub-s (5)).

Asylum (Designated States) (No 2) Order 2003, SI 2003/1919 (made under sub-s (5)).

Asylum (Designated States) Order 2005, SI 2005/330 (made under sub-s (5)).

Asylum (Designated States) (Amendment) Order 2005, SI 2005/1016 (made under sub-s (6)).

107 Practice directions

(1) The President of [the Tribunal] may give directions as to the practice to be followed by the Tribunal.

[(1A) The Senior President of Tribunals may give directions as to the practice to be followed by the Tribunal.]

(2) < ... >

[(3) A practice direction may, in particular, require the Tribunal to treat a specified decision of the Tribunal as authoritative in respect of a particular matter.]

[(4) Directions under subsection (1) may not be given without the approval of—

- (a) the Senior President of Tribunals, and
- (b) the Lord Chancellor.

(5) Directions under subsection (1A) may not be given without the approval of the Lord Chancellor.

(6) Subsections (4)(b) and (5) do not apply to directions to the extent that they consist of guidance about any of the following—

- (a) the application or interpretation of the law;
- (b) the making of decisions by members of the Tribunal.

(7) Subsections (4)(b) and (5) do not apply to directions to the extent that they consist of criteria for determining which members of the Tribunal may be chosen to decide particular categories of matter; but the directions may, to that extent, be given only after consulting the Lord Chancellor.]

Appointment

Appointment: 1 April 2003: see SI 2003/754, art 2(1), Sch 1.

Amendment

Sub-s (1): words “the Tribunal” in square brackets substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 26(7), Sch 2, Pt 1, paras 16, 22(1)(a); for transitional provisions see s 26(7), Sch 2, Pt 2 thereto. Date in force: 4 April 2005: see SI 2005/565, art 2(d); for transitional provisions in relation to pending appeals which were made to an adjudicator before 4 April 2005 and in relation to further appeals and applications in such cases see arts 3–9 thereof.

Sub-s (1A): inserted by the Tribunals, Courts and Enforcement Act 2007, s 48(1), Sch 8, para 54(1), (2). Date in force: 3 November 2008: see SI 2008/2696, art 5(c)(i); for transitional provisions in respect of existing tribunal staff see art 3 thereof.

Sub-s (2): repealed by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, ss 26(7), 47, Sch 2, Pt 1, paras 16, 22(1)(b), Sch 4. Date in force: 4 April 2005: see SI 2005/565, art 2(d); for transitional provisions in relation to pending appeals which were made to an adjudicator before 4 April 2005 and in relation to further appeals and applications in such cases see arts 3–9 thereof.

Sub-s (3): inserted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 26(7), Sch 2, Pt 1, paras 16, 21(1)(c), (2); for transitional provisions see s 26(7), Sch 2, Pt 2 thereto. Date in force: 4 April 2005: see SI 2005/565, art 2(d); for transitional provisions in relation to pending appeals which were made to an adjudicator before 4 April 2005 and in relation to further appeals and applications in such cases see arts 3–9 thereof.

Sub-ss (4)–(7): inserted by the Tribunals, Courts and Enforcement Act 2007, s 48(1), Sch 8, para 54(1), (3). Date in force: 3 November 2008: see SI 2008/2696, art 5(c)(i); for transitional provisions in respect of existing tribunal staff see art 3 thereof.

General

111 ... Monitor of certification of claims as unfounded

...

Appointment

Appointment: 1 April 2003: see SI 2003/754, art 2(1), Sch 1.

Amendment

Repealed by the UK Borders Act 2007, ss 54(c), 58, Schedule. Date in force: 1 April 2008: see SI 2008/309, art 4(e), (h).

PART 6
IMMIGRATION PROCEDURE

...

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...

Appointment

Appointment: 1 April 2003: see SI 2003/754, art 2(1), Sch 1.

Amendment

Repealed by the UK Borders Act 2007, ss 54(d), 58, Schedule. Date in force: to be appointed: see the UK Borders Act 2007, s 59(2).

SCHEDULE 3
WITHHOLDING AND WITHDRAWAL OF SUPPORT

Section 54

Ineligibility for support

1 (1) A person to whom this paragraph applies shall not be eligible for support or assistance under—

- (a) section 21 or 29 of the National Assistance Act 1948 (c 29) (local authority: accommodation and welfare),
- (b) section 45 of the Health Services and Public Health Act 1968 (c 46) (local authority: welfare of elderly),
- (c) section 12 or 13A of the Social Work (Scotland) Act 1968 (c 49) (social welfare services),
- (d) Article 7 or 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 (SI 1972/1265 (NI 14)) (prevention of illness, social welfare, &c),
- [(e) section 254 of, and Schedule 20 to, the National Health Service Act 2006, or section 192 of, and Schedule 15 to, the National Health Service (Wales) Act 2006 (social services),]
- (f) section 29(1)(b) of the Housing (Scotland) Act 1987 (c 26) (interim duty to accommodate in case of apparent priority need where review of a local authority decision has been requested),
- (g) section 17, 23C, [23CA,] 224A or 24B of the Children Act 1989 (c 41) (welfare and other powers which can be exercised in relation to adults),
- (h) Article 18, 35 or 36 of the Children (Northern Ireland) Order 1995 (SI 1995/755 (NI 2)) (welfare and other powers which can be exercised in relation to adults),

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- (i) sections 22, 29 and 30 of the Children (Scotland) Act 1995 (c 36) (provisions analogous to those mentioned in paragraph (g)),
- (j) section 188(3) or 204(4) of the Housing Act 1996 (c 52) (accommodation pending review or appeal),
- (k) section 2 of the Local Government Act 2000 (c 22) (promotion of well-being),
- (l) a provision of the Immigration and Asylum Act 1999 (c 33), or
- (m) a provision of this Act.

(2) A power or duty under a provision referred to in sub-paragraph (1) may not be exercised or performed in respect of a person to whom this paragraph applies (whether or not the person has previously been in receipt of support or assistance under the provision).

(3) An approval or directions given under or in relation to a provision referred to in sub-paragraph (1) shall be taken to be subject to sub-paragraph (2).

Appointment

Paras 1, 3–7, 13, 14, 17: Appointment: 8 January 2003: see SI 2002/2811, art 2, Schedule.

Paras 2, 8–12, 15, 16: Appointment (for the purpose of enabling the Secretary of State to exercise the power to make subordinate legislation): 8 December 2002: see SI 2002/2811, art 2, Schedule.

Paras 2, 8–12, 15, 16: Appointment (for remaining purposes): 8 January 2003: see SI 2002/2811, art 2, Schedule.

Amendment

Para 1: in sub-para (1)(g) reference to “23CA,” in square brackets inserted by the Children and Young Persons Act 2008, s 22(6). Date in force: to be appointed: see the Children and Young Persons Act 2008, s 44(3), (4), (5)(a).

See Further

By virtue of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Commencement No 2) Order 2004, SI 2004/2999, art 3, reference to “section 94(3A)” in para 7A(1)(a)(i) above shall be construed as a reference to “section 94(5)” until s 44 to this Act comes into force.

Subordinate Legislation

Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002, SI 2002/3078 (made under paras 8–12, 16(2), 17).

[SCHEDULE 4 THE ASYLUM AND IMMIGRATION TRIBUNAL]

[Section 81]

[Membership]

3 (1) A member—

- (a) may resign by notice in writing to the Lord Chancellor,
- (b) shall cease to be a member on reaching the age of 70, and
- (c) otherwise, shall hold and vacate office in accordance with the terms of his appointment (which may include provision—
 - (i) about the training, appraisal and mentoring of members of the Tribunal by other members, and
 - (ii) for removal).

(2) Sub-paragraph (1)(b) is subject to section 26(4) to (6) of the Judicial Pensions and Retirement Act 1993 (c 8) (extension to age 75).

[(3) Any power by which a person may be removed from membership of the Tribunal—

- (a) may, if the person exercises functions wholly or mainly in Scotland, be exercised only with the concurrence of the Lord President of the Court of Session;
- (b) may, if the person exercises functions wholly or mainly in Northern Ireland, be exercised only with the concurrence of the Lord Chief Justice of Northern Ireland;
- (c) may, if neither of paragraphs (a) and (b) applies, be exercised only with the concurrence of the Lord Chief Justice of England and Wales.]

[Judicial assistance]

5A (1) The Senior President of Tribunals, with the consent of the President of the Tribunal, may assign—

- (a) a relevant tribunal judge to act as a legally qualified member of the Tribunal;
- (b) a relevant other tribunal member to act as a member of the Tribunal who is not a legally qualified member.

(2) In this paragraph—

- (a) “relevant tribunal judge” means—
 - (i) a person who is a judge of the First-tier Tribunal by virtue of appointment under paragraph 1(1) of Schedule 2 to the Tribunals, Courts and Enforcement Act 2007,
 - (ii) a transferred-in judge of the First-tier Tribunal,
 - (iii) a person who is a judge of the Upper Tribunal by virtue of appointment under paragraph 1(1) of Schedule 3 to that Act,
 - (iv) a transferred-in judge of the Upper Tribunal,
 - (v) a deputy judge of the Upper Tribunal, or
 - (vi) a person who is the Chamber President of a chamber of the First-tier Tribunal, or of a chamber of the Upper Tribunal, and does not fall within any of sub-paragraphs (i) to (v);
- (b) “relevant other tribunal member” means—
 - (i) a person who is a member of the First-tier Tribunal by virtue of appointment under paragraph 2(1) of Schedule 2 to the Tribunals, Courts and Enforcement Act 2007,
 - (ii) a transferred-in other member of the First-tier Tribunal,
 - (iii) a person who is a member of the Upper Tribunal by virtue of appointment under paragraph 2(1) of Schedule 3 to that Act, or
 - (iv) a transferred-in other member of the Upper Tribunal.

(3) A relevant tribunal judge within sub-paragraph (2)(a)(i) or (ii) who is assigned under sub-paragraph (1) may, when acting under his assignment, exercise any function or jurisdiction which is exercisable by a legally qualified member of the Tribunal who—

- (a) has the title of Immigration Judge, and
- (b) is neither the President, nor a Deputy President, of the Tribunal.

(4) A relevant tribunal judge within sub-paragraph (2)(a)(iii), (iv) or (v) who is assigned under sub-paragraph (1) may, when acting under his assignment, exercise—

- (a) any function or jurisdiction which is exercisable by a legally qualified member of the Tribunal who—
 - (i) has the title of Immigration Judge, and
 - (ii) is neither the President, nor a Deputy President, of the Tribunal, and
- (b) any function or jurisdiction which is exercisable by a legally qualified member of the Tribunal who—
 - (i) has the title of Senior Immigration Judge, and

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(ii) is neither the President, nor a Deputy President, of the Tribunal.

(5) A relevant other tribunal member who is assigned under sub-paragraph (1) may, when acting under his assignment, exercise any function or jurisdiction which is exercisable by a member of the Tribunal who—

- (a) is appointed under paragraph 2(1)(e), and
- (b) is neither the President, nor a Deputy President, of the Tribunal.

5B (1) The Senior President of Tribunals may—

- (a) with the consent of the President of the Tribunal,
- (b) with the consent required by sub-paragraph (4), and
- (c) with the consent of the relevant judge concerned,

assign a relevant judge to act as a Senior Immigration Judge.

(2) In this paragraph “relevant judge” means a person who—

- (a) is an ordinary judge of the Court of Appeal in England and Wales (including the vice-president, if any, of either division of that Court),
- (b) is a Lord Justice of Appeal in Northern Ireland,
- (c) is a judge of the Court of Session,
- (d) is a puisne judge of the High Court in England and Wales or Northern Ireland,
- (e) is a circuit judge,
- (f) is a sheriff in Scotland,
- (g) is a county court judge in Northern Ireland,
- (h) is a district judge in England and Wales or Northern Ireland, or
- (i) is a District Judge (Magistrates’ Courts).

(3) References in sub-paragraph (2)(c) to (i) to office-holders do not include deputies or temporary office-holders.

(4) The consent required by this sub-paragraph is—

- (a) the consent of the Lord Chief Justice of England and Wales where the relevant judge is—
 - (i) an ordinary judge of the Court of Appeal in England and Wales,
 - (ii) a puisne judge of the High Court in England and Wales,
 - (iii) a circuit judge,
 - (iv) a district judge in England and Wales, or
 - (v) a District Judge (Magistrates’ Courts);
- (b) the consent of the Lord President of the Court of Session where the relevant judge is—
 - (i) a judge of the Court of Session, or
 - (ii) a sheriff;
- (c) the consent of the Lord Chief Justice of Northern Ireland where the relevant judge is—
 - (i) a Lord Justice of Appeal in Northern Ireland,
 - (ii) a puisne judge of the High Court in Northern Ireland,
 - (iii) a county court judge in Northern Ireland, or
 - (iv) a district judge in Northern Ireland.

(5) A relevant judge who is assigned under sub-paragraph (1) may, when acting under his assignment, exercise—

- (a) any function or jurisdiction which is exercisable by a legally qualified member of the Tribunal who—
 - (i) has the title of Immigration Judge, and
 - (ii) is neither the President, nor a Deputy President, of the Tribunal, and

- (b) any function or jurisdiction which is exercisable by a legally qualified member of the Tribunal who—
 - (i) has the title of Senior Immigration Judge, and
 - (ii) is neither the President, nor a Deputy President, of the Tribunal.]

Proceedings

8 (1) The [Senior President of Tribunals] may make arrangements for the allocation of proceedings to members of the Tribunal.

(2) Arrangements under this paragraph—

- (a) may permit allocation by the [Senior President of Tribunals or a] member of the Tribunal,
- (b) may permit the allocation of a case to a specified member or to a specified class of member,
- (c) may include provision for transfer, and
- (d) are subject to rules under section 106.

...

9 ...

...

10 The Lord Chancellor—

- (a) may pay remuneration and allowances to members of the Tribunal,
- (b) ...
- (c) ...

[Training etc

13 The Senior President of Tribunals is responsible, within the resources made available by the Lord Chancellor, for the maintenance of appropriate arrangements for the training, guidance and welfare of members of the Tribunal (in their capacities as such members).

Oaths

14 (1) Sub-paragraph (2) applies to a person (“the appointee”)—

- (a) who is appointed under paragraph 1, and
- (b) who has not previously taken the required oaths after accepting another office.

(2) The appointee must take the required oaths before—

- (a) the Senior President of Tribunals, or
- (b) an eligible person who is nominated by the Senior President of Tribunals for the purpose of taking the oaths from the appointee.

(3) A person is eligible for the purposes of sub-paragraph (2)(b) if one or more of the following paragraphs applies to him—

- (a) he holds high judicial office (as defined in section 60(2) of the Constitutional Reform Act 2005);
- (b) he holds judicial office (as defined in section 109(4) of that Act);
- (c) he holds (in Scotland) the office of sheriff.

(4) In this paragraph “the required oaths” means (subject to sub-paragraph (5))—

- (a) the oath of allegiance, and

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- (b) the judicial oath,

as set out in the Promissory Oaths Act 1868.

(5) Where it appears to the Lord Chancellor that the appointee will carry out functions as a member of the Tribunal wholly or mainly in Northern Ireland, he may direct that in relation to the appointee “the required oaths” means—

- (a) the oath as set out in section 19(2) of the Justice (Northern Ireland) Act 2002, or
(b) the affirmation and declaration as set out in section 19(3) of that Act.

(6) If the appointee is a member of the Tribunal appointed before the coming into force of this paragraph, the requirement in sub-paragraph (2) applies in relation to the appointee from the coming into force of this paragraph.]

Amendment

Substituted by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 26(4), Sch 1; for transitional provisions see s 26(7), Sch 2, Pt 2 thereto. Date in force: 4 April 2005: see SI 2005/565, art 2(c); for transitional provisions in relation to pending appeals which were made to an adjudicator before 4 April 2005 and in relation to further appeals and applications in such cases see arts 3–9 thereof.

Para 2: sub-para (1)(a) substituted by the Tribunals, Courts and Enforcement Act 2007, s 50, Sch 10, Pt 1, para 37(1), (2). Date in force: to be appointed: see the Tribunals, Courts and Enforcement Act 2007, s 148(5).

Para 2: in sub-para (1)(b) word “seven” in italics repealed and subsequent reference in square brackets substituted by the Tribunals, Courts and Enforcement Act 2007, s 50, Sch 10, Pt 1, para 37(1), (3). Date in force: to be appointed: see the Tribunals, Courts and Enforcement Act 2007, s 148(5).

Para 2: in sub-para (1)(c) words “solicitor of the Supreme Court of Northern Ireland” in italics repealed and subsequent words in square brackets substituted by the Constitutional Reform Act 2005, s 59(5), Sch 11, Pt 3, para 5. Date in force: to be appointed: see the Constitutional Reform Act 2005, s 148(1).

Para 2: in sub-para (1)(c) word “seven” in italics repealed and subsequent reference in square brackets substituted by the Tribunals, Courts and Enforcement Act 2007, s 50, Sch 10, Pt 1, para 37(1), (3). Date in force: to be appointed: see the Tribunals, Courts and Enforcement Act 2007, s 148(5).

Para 3: sub-para (3) inserted by the Tribunals, Courts and Enforcement Act 2007, s 48(1), Sch 8, para 54(1), (4). Date in force: 3 November 2008: see SI 2008/2696, art 5(c)(i); for transitional provisions in respect of existing tribunal staff see art 3 thereof.

Para 4: sub-para (1) numbered as such by SI 2006/1016, art 2, Sch 1, paras 8, 9(1), (2). Date in force: 3 April 2006: see SI 2006/1016, art 1.

Para 4: sub-paras (2)–(4) inserted by SI 2006/1016, art 2, Sch 1, paras 8, 9(1), (3). Date in force: 3 April 2006: see SI 2006/1016, art 1.

Para 5: in sub-para (1)(a) words “the Appellate Jurisdiction Act 1876 (c 59)” in italics repealed and subsequent words in square brackets substituted by the Constitutional Reform Act 2005, s 145, Sch 17, Pt 2, para 34. Date in force: to be appointed: see the Constitutional Reform Act 2005, s 148(1).

Para 5: sub-para (3) inserted by SI 2006/1016, art 2, Sch 1, paras 8, 10. Date in force: 3 April 2006: see SI 2006/1016, art 1.

Paras 5A, 5B: inserted by the Tribunals, Courts and Enforcement Act 2007, s 48(1), Sch 8, para 54(1), (5). Date in force: 3 November 2008: see SI 2008/2696, art 5(c)(i); for transitional provisions in respect of existing tribunal staff see art 3 thereof.

Para 8: in sub-para (1) words “Senior President of Tribunals” in square brackets substituted by the Tribunals, Courts and Enforcement Act 2007, s 48(1), Sch 8, para 54(1), (6)(a). Date in force: 3 November 2008: see SI 2008/2696, art 5(c)(i); for transitional provisions in respect of existing tribunal staff see art 3 thereof.

Para 8: in sub-para (2)(a) words “Senior President of Tribunals or a” in square brackets substituted by the Tribunals, Courts and Enforcement Act 2007, s 48(1), Sch 8, paras 54(1), (6)(b). Date in force: 3 November 2008: see SI 2008/2696, art 5(c)(i); for transitional provisions in respect of existing tribunal staff see art 3 thereof.

Para 9: repealed by the Tribunals, Courts and Enforcement Act 2007, s 146, Sch 23, Pt 1. Date in force: 3 November 2008: see SI 2008/2696, art 5(i)(v); for transitional provisions in respect of existing tribunal staff see art 3 thereof.

Para 10: sub-paras (b), (c) repealed by the Tribunals, Courts and Enforcement Act 2007, s 146, Sch 23, Pt 1. Date in force: 3 November 2008: see SI 2008/2696, art 5(i)(v); for transitional provisions in respect of existing tribunal staff see art 3 thereof.

Para 12: inserted by SI 2006/1016, art 2, Sch 1, paras 8, 11. Date in force: 3 April 2006: see SI 2006/1016, art 1.

Paras 13, 14: inserted by the Tribunals, Courts and Enforcement Act 2007, s 48(1), Sch 8, paras 54(1), (7). Date in force: 3 November 2008: see SI 2008/2696, art 5(c)(i); for transitional provisions in respect of existing tribunal staff see art 3 thereof.

Subordinate Legislation

Asylum and Immigration Tribunal (Judicial Titles) Order 2005, SI 2005/227 (made under para 4).

ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC) ACT 2004

2004 CHAPTER 19

An Act to make provision about asylum and immigration.

[22nd July 2004]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Offences

4 Trafficking people for exploitation

(1) A person commits an offence if he arranges or facilitates the arrival in[, or the entry into,] the United Kingdom of an individual (the “passenger”) and—

- (a) he intends to exploit the passenger in the United Kingdom or elsewhere, or
- (b) he believes that another person is likely to exploit the passenger in the United Kingdom or elsewhere.

(2) A person commits an offence if he arranges or facilitates travel within the United Kingdom by an individual (the “passenger”) in respect of whom he believes that an offence under subsection (1) may have been committed and—

- (a) he intends to exploit the passenger in the United Kingdom or elsewhere, or
- (b) he believes that another person is likely to exploit the passenger in the United Kingdom or elsewhere.

(3) A person commits an offence if he arranges or facilitates the departure from the United Kingdom of an individual (the “passenger”) and—

- (a) he intends to exploit the passenger outside the United Kingdom, or
- (b) he believes that another person is likely to exploit the passenger outside the United Kingdom.

(4) For the purposes of this section a person is exploited if (and only if)—

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- (a) he is the victim of behaviour that contravenes Article 4 of the Human Rights Convention (slavery and forced labour),
 - (b) he is encouraged, required or expected to do anything as a result of which he or another person would commit an offence under *the Human Organ Transplants Act 1989* (c 31) [Part 1 of the Human Tissue (Scotland) Act 2006 (asp 4)] or [under section 32 or 33 of the Human Tissue Act 2004],
 - (c) he is subjected to force, threats or deception designed to induce him—
 - (i) to provide services of any kind,
 - (ii) to provide another person with benefits of any kind, or
 - (iii) to enable another person to acquire benefits of any kind, or
 - (d) he is requested or induced to undertake any activity, having been chosen as the subject of the request or inducement on the grounds that—
 - (i) he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and
 - (ii) a person without the illness, disability, youth or family relationship would be likely to refuse the request or resist the inducement.
- (5) A person guilty of an offence under this section shall be liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, to a fine or to both, or
 - (b) on summary conviction, to imprisonment for a term not exceeding twelve months, to a fine not exceeding the statutory maximum or to both.

Appointment

Appointment (in relation to Scotland): 1 December 2004: see SSI 2004/494, art 2.

Appointment (in relation to England, Wales and Northern Ireland): 1 December 2004: see SI 2004/2999, art 2, Schedule.

Amendment

Sub-s (1): words “, or the entry into,” in square brackets inserted by the UK Borders Act 2007, s 31(1). Date in force: 31 January 2008: see SI 2008/99, art 2(1).

Sub-s (4): in para (b) words “the Human Organ Transplants Act 1989 (c 31)” in italics repealed and subsequent words in square brackets substituted, in relation to Scotland, by SSI 2008/259, art 2. Date in force: 24 June 2008: see SSI 2008/259, art 1(1).

Sub-s (4): in para (b) words “under section 32 or 33 of the Human Tissue Act 2004” in square brackets substituted by the Human Tissue Act 2004, s 56, Sch 6, para 7. Date in force: 20 October 2005: see SI 2005/2792, art 2(1), (2)(i).

See Further

By virtue of s 5(11)–(13) to this Act, reference to “twelve months” in sub-s (5)(b) above shall be construed as a reference to “six months” in relation to England and Wales until the Criminal Justice Act 2003, s 154 comes into force and in relation to Scotland and Northern Ireland.

Treatment of claimants

9 Failed asylum seekers: withdrawal of support

(1) In Schedule 3 to the Nationality, Immigration and Asylum Act 2002 (withholding and withdrawal of support) after paragraph 7 insert—

“7A Fifth class of ineligible person: failed asylum-seeker with family

(1) Paragraph 1 applies to a person if—

- (a) he—
 - (i) is treated as an asylum-seeker for the purposes of Part VI of the Immigration and Asylum Act 1999 (c 33) (support) by virtue only of section 94(3A) (failed asylum-seeker with dependent child), or

- (ii) is treated as an asylum-seeker for the purposes of Part 2 of this Act by virtue only of section 18(2),
 - (b) the Secretary of State has certified that in his opinion the person has failed without reasonable excuse to take reasonable steps—
 - (i) to leave the United Kingdom voluntarily, or
 - (ii) to place himself in a position in which he is able to leave the United Kingdom voluntarily,
 - (c) the person has received a copy of the Secretary of State's certificate, and
 - (d) the period of 14 days, beginning with the date on which the person receives the copy of the certificate, has elapsed.
- (2) Paragraph 1 also applies to a dependant of a person to whom that paragraph applies by virtue of sub-paragraph (1).
- (3) For the purpose of sub-paragraph (1)(d) if the Secretary of State sends a copy of a certificate by first class post to a person's last known address, the person shall be treated as receiving the copy on the second day after the day on which it was posted.
- (4) The Secretary of State may by regulations vary the period specified in sub-paragraph (1)(d).".
- (2) In paragraph 14(1) and (2) of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 (local authority to notify Secretary of State) for "paragraph 6 or 7" substitute "paragraph 6, 7 or 7A".
- (3) No appeal may be brought under section 103 of the Immigration and Asylum Act 1999 (asylum support appeal) against a decision—
- (a) that by virtue of a provision of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 (c 41) other than paragraph 7A a person is not qualified to receive support, or
 - (b) on the grounds of the application of a provision of that Schedule other than paragraph 7A, to stop providing support to a person.
- (4) On an appeal under section 103 of the Immigration and Asylum Act 1999 (c 33) against a decision made by virtue of paragraph 7A of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 the [First-tier Tribunal] may, in particular—
- (a) annul a certificate of the Secretary of State issued for the purposes of that paragraph;
 - (b) require the Secretary of State to reconsider the matters certified.
- (5) An order under section 48 providing for this section to come into force may, in particular, provide for this section to have effect with specified modifications before the coming into force of a provision of the Nationality, Immigration and Asylum Act 2002.

Appointment

Appointment: 1 December 2004: see SI 2004/2999, art 2, Schedule; for transitional provision see art 4 thereof.

Amendment

Sub-s (4): words "First-tier Tribunal" in square brackets substituted by SI 2008/2833, art 9(1), Sch 3, para 203. Date in force: 3 November 2008: see SI 2008/2833, art 1(1).

See Further

By virtue of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Commencement No 2) Order 2004, SI 2004/2999, art 3, reference to "section 94(3A)" in sub-s (1) above shall be construed as a reference to "section 94(5)" until the Nationality, Immigration and Asylum Act 2002, s 44 comes into force.

Subordinate Legislation

Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Commencement No 2) Order 2004, SI 2004/2999 (made under sub-s (5)).

IMMIGRATION, ASYLUM AND NATIONALITY ACT 2006

2006 CHAPTER 13

An Act to make provision about immigration, asylum and nationality; and for connected purposes.

[30th March 2006]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Information

38 ...

...

Appointment

To be appointed: see s 62(1).

Amendment

Repealed by the Counter-Terrorism Act 2008, ss 20(4), 99, Sch 1, para 4, Sch 9, Pt 2. Date in force: 27 November 2008: see SI 2008/3296, art 2.

UK BORDERS ACT 2007

2007 CHAPTER 30

An Act to make provision about immigration and asylum; and for connected purposes.

[30th October 2007]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Deportation of criminals

33 **Exceptions**

(1) Section 32(4) and (5)—

- (a) do not apply where an exception in this section applies (subject to subsection (7) below), and
 - (b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).
- (2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—
- (a) a person's Convention rights, or
 - (b) the United Kingdom's obligations under the Refugee Convention.
- (3) Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.
- (4) Exception 3 is where the removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the Community treaties.
- (5) Exception 4 is where the foreign criminal—
- (a) is the subject of a certificate under section 2 or 70 of the Extradition Act 2003 (c 41),
 - (b) is in custody pursuant to arrest under section 5 of that Act,
 - (c) is the subject of a provisional warrant under section 73 of that Act,
 - (d) is the subject of an authority to proceed under section 7 of the Extradition Act 1989 (c 33) or an order under paragraph 4(2) of Schedule 1 to that Act, or
 - (e) is the subject of a provisional warrant under section 8 of that Act or of a warrant under paragraph 5(1)(b) of Schedule 1 to that Act.
- (6) Exception 5 is where any of the following has effect in respect of the foreign criminal—
- (a) a hospital order or guardianship order under section 37 of the Mental Health Act 1983 (c 20),
 - (b) a hospital direction under section 45A of that Act,
 - (c) a transfer direction under section 47 of that Act,
 - (d) a compulsion order under section 57A of the Criminal Procedure (Scotland) Act 1995 (c 46),
 - (e) a guardianship order under section 58 of that Act,
 - (f) a hospital direction under section 59A of that Act,
 - (g) a transfer for treatment direction under section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13), or
 - (h) an order or direction under a provision which corresponds to a provision specified in paragraphs (a) to (g) and which has effect in relation to Northern Ireland.

[(6A) Exception 6 is where the Secretary of State thinks that the application of section 32(4) and (5) would contravene the United Kingdom's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (done at Warsaw on 16th May 2005).]

(7) The application of an exception—

- (a) does not prevent the making of a deportation order;
- (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;

but section 32(4) applies despite the application of Exception 1 or 4.

Initial Commencement

To be appointed: see s 59(2).

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Amendment

Sub-s (6A): inserted by the Criminal Justice and Immigration Act 2008, s 146. Date in force: to be appointed: see the Criminal Justice and Immigration Act 2008, s 153(7).

OTHER RELEVANT LEGISLATION

.

NATIONAL ASSISTANCE ACT 1948

1948 CHAPTER 29

An Act to terminate the existing poor law and to provide in lieu thereof for the assistance of persons in need by the National Assistance Board and by local authorities; to make further provision for the welfare of disabled, sick, aged and other persons and for regulating homes for disabled and aged persons and charities for disabled persons; to amend the law relating to non-contributory old age pensions; to make provision as to the burial or cremation of deceased persons; and for purposes connected with the matters aforesaid

[13th May 1948]

PART III LOCAL AUTHORITY SERVICES

Welfare Services

29 Welfare arrangements for blind, deaf, dumb and crippled persons, etc

(1) A local authority [may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority shall] make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons [aged eighteen or over] who are blind, deaf or dumb [or who suffer from mental disorder of any description], and other persons [aged eighteen or over] who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister.

(2), (3) ...

(4) Without prejudice to the generality of the provisions of subsection (1) of this section, arrangements may be made thereunder—

- (a) for informing persons to whom arrangements under that subsection relate of the services available for them thereunder;
- (b) for giving such persons instruction in their own homes or elsewhere in methods of overcoming the effects of their disabilities;
- (c) for providing workshops where such persons may be engaged (whether under a contract of service or otherwise) in suitable work, and hostels where persons engaged in the workshops, and other persons to whom arrangements under subsection (1) of this section relate and for whom work or training is being provided in pursuance of the Disabled Persons (Employment) Act 1944 [or the Employment and Training Act 1973] may live;
- (d) for providing persons to whom arrangements under subsection (1) of this section relate with suitable work (whether under a contract of service or otherwise) in their own homes or elsewhere;
- (e) for helping such persons in disposing of the produce of their work;
- (f) for providing such persons with recreational facilities in their own homes or elsewhere;
- (g) for compiling and maintaining classified registers of the persons to whom arrangements under subsection (1) of this section relate.

[(4A) Where accommodation in a hostel is provided under paragraph (c) of subsection (4) of this section—

- (a) if the hostel is managed by a local authority, section 22 of this Act shall apply as it applies where accommodation is provided under section 21;

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- (b) if the accommodation is provided in a hostel managed by a person other than a local authority under arrangements made with that person, subsections (2) to (4A) of section 26 of this Act shall apply as they apply where accommodation is provided under arrangements made by virtue of that section; and
- (c) *sections 32 and 43 of this Act shall apply as they apply* [section 32 shall apply as it applies] where accommodation is provided under sections 21 to 26;

and in this subsection references to “accommodation” include references to board and other services, amenities and requisites provided in connection with the accommodation, except where in the opinion of the authority managing the premises or, in the case mentioned in paragraph (b) above, the authority making the arrangements their provision is unnecessary.]

(5) ...

(6) Nothing in the foregoing provisions of this section shall authorise or require—

- (a) the payment of money to persons to whom this section applies, other than persons for whom work is provided under arrangements made by virtue of paragraph (c) or paragraph (d) of subsection (4) of this section or who are engaged in work which they are enabled to perform in consequence of anything done in pursuance of arrangements made under this section; or
- (b) the provision of any accommodation or services required to be provided under [the National Health Service Act 2006 or the National Health Service (Wales) Act 2006] < ... >

(7) A person engaged in work in a workshop provided under paragraph (c) of subsection (4) of this section, or a person in receipt of a superannuation allowance granted on his retirement from engagement in any such workshop, shall be deemed for the purposes of this Act to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before he [was accepted for work in that workshop; and for the purposes of this subsection a course of training in such a workshop shall be deemed to be work in that workshop].

Appointment

Appointment (in relation to England and Wales): 5 July 1948: see SI 1948/1218, art 2.

Amendment

Repealed in relation to Scotland by the Social Work (Scotland) Act 1968, s 95(2), Sch 9, Part I. Sub-s (1): first words in square brackets substituted by the Local Government Act 1972, s 195, Sch 23, para 2; second and final words in square brackets inserted by the Children Act 1989, s 108(5), (6), Sch 13, para 11(2), Sch 14, para 1; third words in square brackets substituted by the Mental Health (Scotland) Act 1960, ss 113(1), 114, Sch 4.

Sub-ss (2), (3): repealed by the Local Government Act 1972, ss 195, 272(1), Sch 23, para 2, Sch 30.

Sub-s (4): words in square brackets inserted by the Employment and Training Act 1973, s 14(1), Sch 3, para 3.

Sub-s (4A): inserted by the National Health Service and Community Care Act 1990, s 44(7).

Sub-s (4A): in para (c) words “sections 32 and 43 of this Act shall apply as they apply” in italics repealed and subsequent words in square brackets substituted by the Health and Social Care Act 2008, s 147(2). Date in force: to be appointed: see the Health and Social Care Act 2008, s 170(3).

Sub-s (5): repealed by the Health and Social Services and Social Security Adjudications Act 1983, s 30, Sch 10, Part I.

Sub-s (6): words in square brackets substituted by the National Health Service Act 1977, s 129, Sch 15, para 6; words omitted repealed by the Social Work (Scotland) Act 1968, s 95(2), Sch 9, Part I. Para (b) words “the National Health Service Act 2006 or the National Health Service (Wales) Act 2006” in square brackets substituted by the National Health Service (Consequential Provisions) Act 2006, s 2, Sch 1, paras 5, 8. Date in force: 1 March 2007: see the National Health Service (Consequential Provisions) Act 2006, s 8(2).

Sub-s (7): words in square brackets substituted retrospectively by the National Assistance (Amendment) Act 1959, s 1(2).

Transfer of Functions

Functions of the Minister of Health transferred to the Secretary of State for Health by virtue of the Secretary of State for Social Services Order 1968, SI 1968/1699, and the Transfer of Functions (Health and Social Services) Order 1988, SI 1988/1843.

Functions under this section, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales, by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1.

CHILDREN ACT 1989

1989 CHAPTER 41

An Act to reform the law relating to children; to provide for local authority services for children in need and others; to amend the law with respect to children's homes, community homes, voluntary homes and voluntary organisations; to make provision with respect to fostering, child minding and day care for young children and adoption; and for connected purposes

[16th November 1989]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART III

LOCAL AUTHORITY SUPPORT FOR CHILDREN AND FAMILIES

Provision of services for children and their families

17 Provision of services for children in need, their families and others

(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—

- (a) to safeguard and promote the welfare of children within their area who are in need; and
- (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

by providing a range and level of services appropriate to those children's needs.

(2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part I of Schedule 2.

(3) Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.

(4) The [appropriate national authority] may by order amend any provision of Part I of Schedule 2 or add any further duty or power to those for the time being mentioned there.

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[(4A) Before determining what (if any) services to provide for a particular child in need in the exercise of functions conferred on them by this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—

- (a) ascertain the child's wishes and feelings regarding the provision of those services; and
- (b) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain.]

(5) Every local authority—

- (a) shall facilitate the provision by others (including in particular voluntary organisations) of services which *the authority have power* [it is a function of the authority] to provide by virtue of this section, or section 18, 20, [23 [22A to 22C], 23B to 23D, 24A or 24B]; and
- (b) may make such arrangements as they see fit for any person to act on their behalf in the provision of any such service.

(6) The services provided by a local authority in the exercise of functions conferred on them by this section may include [providing accommodation and] giving assistance in kind or, *in exceptional circumstances*, in cash.

(7) Assistance may be unconditional or subject to conditions as to the repayment of the assistance or of its value (in whole or in part).

(8) Before giving any assistance or imposing any conditions, a local authority shall have regard to the means of the child concerned and of each of his parents.

(9) No person shall be liable to make any repayment of assistance or of its value at any time when he is in receipt of income support [under] [Part VII of the Social Security Contributions and Benefits Act 1992][, of any element of child tax credit other than the family element, of working tax credit][, of an income-based jobseeker's allowance or of an income-related employment and support allowance].

(10) For the purposes of this Part a child shall be taken to be in need if—

- (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
- (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
- (c) he is disabled,

and “family”, in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.

(11) For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed; and in this Part—

“development” means physical, intellectual, emotional, social or behavioural development; and

“health” means physical or mental health.

[(12) The Treasury may by regulations prescribe circumstances in which a person is to be treated for the purposes of this Part (or for such of those purposes as are prescribed) as in receipt of any element of child tax credit other than the family element or of working tax credit.]

Appointment

Appointment: 14 October 1991: see SI 1991/828, art 3(2).

Amendment

Sub-s (4): words “appropriate national authority” in square brackets substituted by the Children and Young Persons Act 2008, s 39, Sch 3, paras 1, 2. Date in force: 13 November 2008: see the Children and Young Persons Act 2008, s 44(1).

Sub-s (4A): inserted by the Children Act 2004, s 53(1). Date in force (in relation to England): 1 March 2005: see SI 2005/394, art 2(1)(g). Date in force (in relation to Wales): to be appointed: see the Children Act 2004, s 67(7)(e).

Sub-s (5): in para (a) words “the authority have power” in italics repealed and subsequent words in square brackets substituted by the Children and Young Persons Act 2008, s 8(2), Sch 1, para 1(a). Date in force: to be appointed: see the Children and Young Persons Act 2008, s 44(3), (4), (5)(a).

Sub-s (5): in para (a) words “23, 23B to 23D, 24A or 24B” in square brackets substituted by the Children (Leaving Care) Act 2000, s 7(1), (2). Date in force (in relation to England): 1 October 2001: see SI 2001/2878, art 2. Date in force (in relation to Wales): 1 October 2001: see SI 2001/2191, art 2.

Sub-s (5): in para (a) reference to “23” in italics repealed and subsequent words in square brackets substituted by the Children and Young Persons Act 2008, s 8(2), Sch 1, para 1(b). Date in force: to be appointed: see the Children and Young Persons Act 2008, s 44(3), (4), (5)(a).

Sub-s (6): words “providing accommodation and” in square brackets inserted by the Adoption and Children Act 2002, s 116(1). Date in force: this amendment came into force on 7 November 2002 (date of Royal Assent of the Adoption and Children Act 2002) in the absence of any specific commencement provision.

Sub-s (6): words “, in exceptional circumstances,” in italics repealed by the Children and Young Persons Act 2008, ss 24, 42, Sch 4. Date in force: to be appointed: see the Children and Young Persons Act 2008, s 44(3), (4), (5)(a).

Sub-s (9): word “under” in square brackets substituted by the Tax Credits Act 2002, s 47, Sch 3, paras 15, 16(1), (2)(a). Date in force: 6 April 2003: see SI 2003/962, art 2(1), (3)(b), (d)(iii); for savings and transitional provisions see arts 3–5 thereof.

Sub-s (9): words “Part VII of the Social Security Contributions and Benefits Act 1992” in square brackets substituted by the Social Security (Consequential Provisions) Act 1992, s 4, Sch 2, para 108(a).

Sub-s (9): words from “, of any element” to “working tax credit” in square brackets inserted by the Tax Credits Act 2002, s 47, Sch 3, paras 15, 16(1), (2)(b). Date in force: 6 April 2003: see SI 2003/962, art 2(1), (3)(b), (d)(iii); for savings and transitional provisions see arts 3–5 thereof.

Sub-s (9): words from “, of an income-based” to “and support allowance” in square brackets substituted by the Welfare Reform Act 2007, s 28(1), Sch 3, para 6(1), (2). Date in force: 27 October 2008: see SI 2008/787, art 2(4)(b), (f).

Sub-s (12): inserted by the Tax Credits Act 2002, s 47, Sch 3, paras 15, 16(1), (3). Date in force: 6 April 2003: see SI 2003/962, art 2(1), (3)(b), (d)(iii); for savings and transitional provisions see arts 3–5 thereof.

Transfer of Functions

Functions of the Secretary of State, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales, by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1.

Subordinate Legislation

Children Act 1989 (Amendment) (Children’s Services Planning) Order 1996, SI 1996/785 (made under sub-s (4)).

Children Act 1989, Section 17(12) Regulations 2003, SI 2003/2077 (made under sub-s (2)).

Extent

This section does not extend to Scotland: see s 108(11).

Duties of local authorities in relation to children looked after by them

22 General duty of local authority in relation to children looked after by them

(1) In this Act, any reference to a child who is looked after by a local authority is a reference to a child who is—

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- (a) in their care; or
 - (b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which [are social services functions within the meaning of] the Local Authority Social Services Act 1970[, apart from functions under sections [17], 23B and 24B].
- (2) In subsection (1) “accommodation” means accommodation which is provided for a continuous period of more than 24 hours.
- (3) It shall be the duty of a local authority looking after any child—
- (a) to safeguard and promote his welfare; and
 - (b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case.
- [(3A) The duty of a local authority under subsection (3)(a) to safeguard and promote the welfare of a child looked after by them includes in particular a duty to promote the child’s educational achievement.]
- (4) Before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the wishes and feelings of—
- (a) the child;
 - (b) his parents;
 - (c) any person who is not a parent of his but who has parental responsibility for him; and
 - (d) any other person whose wishes and feelings the authority consider to be relevant,
- regarding the matter to be decided.
- (5) In making any such decision a local authority shall give due consideration—
- (a) having regard to his age and understanding, to such wishes and feelings of the child as they have been able to ascertain;
 - (b) to such wishes and feelings of any person mentioned in subsection (4)(b) to (d) as they have been able to ascertain; and
 - (c) to the child’s religious persuasion, racial origin and cultural and linguistic background.
- (6) If it appears to a local authority that it is necessary, for the purpose of protecting members of the public from serious injury, to exercise their powers with respect to a child whom they are looking after in a manner which may not be consistent with their duties under this section, they may do so.
- (7) If the [appropriate national authority] considers it necessary, for the purpose of protecting members of the public from serious injury, to give directions to a local authority with respect to the exercise of their powers with respect to a child whom they are looking after, [the appropriate national authority] may give such directions to [the local authority].
- (8) Where any such directions are given to an authority they shall comply with them even though doing so is inconsistent with their duties under this section.

Appointment

Appointment: 14 October 1991: see SI 1991/828, art 3(2).

Amendment

Sub-s (1): in para (b) words “are social services functions within the meaning of” in square brackets substituted by the Local Government Act 2000, s 107, Sch 5, para 19. Date in force (in relation to England): 26 October 2000: see SI 2000/2849, art 2(f). Date in force (in relation to

Wales): 28 July 2001 (unless the National Assembly for Wales by order provides for this amendment to come into force before that date): see the Local Government Act 2000, s 108(4), (6)(b).

Sub-s (1): in para (b) words “, apart from functions under sections 23B and 24B” in square brackets inserted by the Children (Leaving Care) Act 2000, s 2(1), (2). Date in force (in relation to England): 1 October 2001: see SI 2001/2878, art 2. Date in force (in relation to Wales): 1 October 2001: see SI 2001/2191, art 2.

Sub-s (1): in para (b) reference to “17” in square brackets inserted by the Adoption and Children Act 2002, s 116(2). Date in force: this amendment came into force on 7 November 2002 (date of Royal Assent of the Adoption and Children Act 2002) in the absence of any specific commencement provision.

Sub-s (3A): inserted by the Children Act 2004, s 52. Date in force (in relation to England): 1 July 2005: see SI 2005/394, art 2(3)(b). Date in force (in relation to Wales): 1 October 2006: see SI 2006/885, art 2(4)(f).

Sub-s (7): words “appropriate national authority” in square brackets substituted by the Children and Young Persons Act 2008, s 39, Sch 3, paras 1, 6(a). Date in force: 13 November 2008: see the Children and Young Persons Act 2008, s 44(1).

Sub-s (7): words “the appropriate national authority” in square brackets substituted by the Children and Young Persons Act 2008, s 39, Sch 3, paras 1, 6(b). Date in force: 13 November 2008: see the Children and Young Persons Act 2008, s 44(1).

Sub-s (7): words “the local authority” in square brackets substituted by the Children and Young Persons Act 2008, s 39, Sch 3, paras 1, 6(c). Date in force: 13 November 2008: see the Children and Young Persons Act 2008, s 44(1).

Modification

Sub-ss (4)(b), (c), (5)(b): modified, in relation to England, in so far as relating to adoption, by the Adoption Agencies Regulations 2005, SI 2005/389, reg 45(1), (2)(a)–(c).

Sub-ss (4)(b), (c), (5)(b): modified, in relation to Wales, in so far as relating to adoption, by the Adoption Agencies (Wales) Regulations 2005, SI 2005/1313, reg 46(1), (2)(a)–(c).

Transfer of Functions

Functions of the Secretary of State, so far as exercisable in relation to Wales, transferred to the National Assembly for Wales, by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1.

Extent

This section does not extend to Scotland: see s 108(11).

[22A Provision of accommodation for children in care]

[When a child is in the care of a local authority, it is their duty to provide the child with accommodation.]

Amendment

Substituted, together with ss 22B–22F, for s 23 as originally enacted, by the Children and Young Persons Act 2008, s 8(1). Date in force: to be appointed: see the Children and Young Persons Act 2008, s 44(3), (4), (5)(a).

Extent

This section does not extend to Scotland: see s 108(11).

[22B Maintenance of looked after children]

[It is the duty of a local authority to maintain a child they are looking after in other respects apart from the provision of accommodation.]

Amendment

Substituted, together with ss 22A, 22C–22F, for s 23 as originally enacted, by the Children and Young Persons Act 2008, s 8(1). Date in force: to be appointed: see the Children and Young Persons Act 2008, s 44(3), (4), (5)(a).

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Extent

This section does not extend to Scotland: see s 108(11).

[22C Ways in which looked after children are to be accommodated and maintained]

[(1) This section applies where a local authority are looking after a child (“C”).

(2) The local authority must make arrangements for C to live with a person who falls within subsection (3) (but subject to subsection (4)).

(3) A person (“P”) falls within this subsection if—

- (a) P is a parent of C;
- (b) P is not a parent of C but has parental responsibility for C; or
- (c) in a case where C is in the care of the local authority and there was a residence order in force with respect to C immediately before the care order was made, P was a person in whose favour the residence order was made.

(4) Subsection (2) does not require the local authority to make arrangements of the kind mentioned in that subsection if doing so—

- (a) would not be consistent with C’s welfare; or
- (b) would not be reasonably practicable.

(5) If the local authority are unable to make arrangements under subsection (2), they must place C in the placement which is, in their opinion, the most appropriate placement available.

(6) In subsection (5) “placement” means—

- (a) placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;
- (b) placement with a local authority foster parent who does not fall within paragraph (a);
- (c) placement in a children’s home in respect of which a person is registered under Part 2 of the Care Standards Act 2000; or
- (d) subject to section 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section.

(7) In determining the most appropriate placement for C, the local authority must, subject to the other provisions of this Part (in particular, to their duties under section 22)—

- (a) give preference to a placement falling within paragraph (a) of subsection (6) over placements falling within the other paragraphs of that subsection;
- (b) comply, so far as is reasonably practicable in all the circumstances of C’s case, with the requirements of subsection (8); and
- (c) comply with subsection (9) unless that is not reasonably practicable.

(8) The local authority must ensure that the placement is such that—

- (a) it allows C to live near C’s home;
- (b) it does not disrupt C’s education or training;
- (c) if C has a sibling for whom the local authority are also providing accommodation, it enables C and the sibling to live together;
- (d) if C is disabled, the accommodation provided is suitable to C’s particular needs.

(9) The placement must be such that C is provided with accommodation within the local authority’s area.

(10) The local authority may determine—

- (a) the terms of any arrangements they make under subsection (2) in relation to C (including terms as to payment); and
- (b) the terms on which they place C with a local authority foster parent (including terms as to payment but subject to any order made under section 49 of the Children Act 2004).

(11) The appropriate national authority may make regulations for, and in connection with, the purposes of this section.

(12) In this Act “local authority foster parent” means a person who is approved as a local authority foster parent in accordance with regulations made by virtue of paragraph 12F of Schedule 2.]

Amendment

Substituted, together with ss 22A, 22B, 22D–22F, for s 23 as originally enacted, by the Children and Young Persons Act 2008, s 8(1). Date in force: to be appointed: see the Children and Young Persons Act 2008, s 44(3), (4), (5)(a).

Extent

This section does not extend to Scotland: see s 108(11).

[22D Review of child’s case before making alternative arrangements for accommodation]

[(1) Where a local authority are providing accommodation for a child (“C”) other than by arrangements under section 22C(6)(d), they must not make such arrangements for C unless they have decided to do so in consequence of a review of C’s case carried out in accordance with regulations made under section 26.

(2) But subsection (1) does not prevent a local authority making arrangements for C under section 22C(6)(d) if they are satisfied that in order to safeguard C’s welfare it is necessary—

- (a) to make such arrangements; and
- (b) to do so as a matter of urgency.]

Amendment

Substituted, together with ss 22A–22C, 22E, 22F, for s 23 as originally enacted, by the Children and Young Persons Act 2008, s 8(1). Date in force: to be appointed: see the Children and Young Persons Act 2008, s 44(3), (4), (5)(a).

Extent

This section does not extend to Scotland: see s 108(11).

[22E Children’s homes provided by appropriate national authority]

[Where a local authority place a child they are looking after in a children’s home provided, equipped and maintained by an appropriate national authority under section 82(5), they must do so on such terms as that national authority may from time to time determine.]

Amendment

Substituted, together with ss 22A–22D, 22F, for s 23 as originally enacted, by the Children and Young Persons Act 2008, s 8(1). Date in force: to be appointed: see the Children and Young Persons Act 2008, s 44(3), (4), (5)(a).

Extent

This section does not extend to Scotland: see s 108(11).

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[22F Regulations as to children looked after by local authorities]

[Part 2 of Schedule 2 has effect for the purposes of making further provision as to children looked after by local authorities and in particular as to the regulations which may be made under section 22C(11).]

Amendment

Substituted, together with ss 22A–22E, for s 23 as originally enacted, by the Children and Young Persons Act 2008, s 8(1). Date in force: to be appointed: see the Children and Young Persons Act 2008, s 44(3), (4), (5)(a).

Extent

This section does not extend to Scotland: see s 108(11).

[22G General duty of local authority to secure sufficient accommodation for looked after children]

[(1) It is the general duty of a local authority to take steps that secure, so far as reasonably practicable, the outcome in subsection (2).]

[(2) The outcome is that the local authority are able to provide the children mentioned in subsection (3) with accommodation that—

- (a) is within the authority's area; and
- (b) meets the needs of those children.

[(3) The children referred to in subsection (2) are those—

- (a) that the local authority are looking after,
- (b) in respect of whom the authority are unable to make arrangements under section 22C(2), and
- (c) whose circumstances are such that it would be consistent with their welfare for them to be provided with accommodation that is in the authority's area.

[(4) In taking steps to secure the outcome in subsection (2), the local authority must have regard to the benefit of having—

- (a) a number of accommodation providers in their area that is, in their opinion, sufficient to secure that outcome; and
- (b) a range of accommodation in their area capable of meeting different needs that is, in their opinion, sufficient to secure that outcome.

[(5) In this section “accommodation providers” means—

local authority foster parents; and
children's homes in respect of which a person is registered under Part 2 of the Care Standards Act 2000.]

Amendment

Inserted by the Children and Young Persons Act 2008, s 9. Date in force: to be appointed: see the Children and Young Persons Act 2008, s 44(3), (4), (5)(a).

Extent

This section does not extend to Scotland: see s 108(11).

PROCEDURE RULES, PRACTICE DIRECTIONS ETC

.

CIVIL PROCEDURE RULES 1998

1998 No 3132

Made 10th December 1998

Laid before Parliament 17th December 1998

Coming into force 26th April 1999

The Civil Procedure Rule Committee, having power under section 2 of the Civil Procedure Act 1997 to make rules of court under section 1 of that Act, make the following rules which may be cited as the Civil Procedure Rules 1998:

PART 54

JUDICIAL REVIEW AND STATUTORY REVIEW

[SECTION III—APPLICATIONS FOR STATUTORY REVIEW UNDER SECTION 103A OF THE NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002]

[54.28B Service of documents on appellants within the jurisdiction]

[(1) In proceedings under this Section, [rules 6.7 and 6.23(2)(a)] do not apply to the service of documents on an appellant who is within the jurisdiction.

(2) Where a representative is acting for an appellant who is within the jurisdiction, a document must be served on the appellant by—

- (a) serving it on [the appellant’s] representative; or
- (b) serving it on the appellant personally or sending it to [the appellant’s address] by first class post [(or an alternative service which provides for delivery on the next [business] day)],

but if the document is served on the appellant under sub-paragraph (b), a copy must also at the same time be sent to [the appellant’s representative].]

Amendment

Inserted by SI 2005/3515, r 12(b). Date in force: 6 April 2006: see SI 2005/3515, r 1.

Para (1): words “rules 6.7 and 6.23(2)(a)” in square brackets substituted by SI 2008/2178, r 27(a). Date in force: 1 October 2008: see SI 2008/2178, r 1(2).

Para (2): in sub-para (a) word “the appellant’s” in square brackets substituted by SI 2008/2178, r 27(b)(i). Date in force: 1 October 2008: see SI 2008/2178, r 1(2).

Para (2): in sub-para (b) words “the appellant’s address” in square brackets substituted by SI 2008/2178, r 27(b)(ii)(aa). Date in force: 1 October 2008: see SI 2008/2178, r 1(2).

Para (2): in sub-para (b) words from “(or an alternative” to “day)” in square brackets inserted by SI 2006/1689, r 8(1). Date in force: 2 October 2006: see SI 2006/1689, r 1.

Para (2): in sub-para (b) word “business” in square brackets substituted by SI 2008/2178, r 27(b)(ii)(bb). Date in force: 1 October 2008: see SI 2008/2178, r 1(2).

Para (2): words “the appellant’s representative” in square brackets substituted by SI 2008/2178, r 27(b)(iii). Date in force: 1 October 2008: see SI 2008/2178, r 1(2).

ASYLUM SUPPORT APPEALS (PROCEDURE) RULES 2000

2000 No 541

Amendment

Revoked by SI 2008/2683, art 6(2), Sch 2. Date in force: 3 November 2008: see SI 2008/2683, art 1.

SPECIAL IMMIGRATION APPEALS COMMISSION (PROCEDURE) RULES 2003

2003 No 1034

Made 1st April 2003

Coming into force in accordance with rule 1

The Lord Chancellor, in exercise of the powers conferred by sections 5 and 8 of the Special Immigration Appeals Commission Act 1997 and sections 24(3) and 27(5) of the Anti-terrorism, Crime and Security Act 2001, makes the following Rules a draft of which has, in accordance with sections 5(9) and 8(4) of the Special Immigration Appeals Commission Act 1997, been laid before and approved by resolution of each House of Parliament:

PART 5

APPLICATIONS FOR LEAVE TO APPEAL FROM COMMISSION

27 Application for leave to appeal

(1) An application for leave to appeal must be made by filing with the Commission an application in writing.

[(2) Subject to paragraph (2B), the appellant must file any application for permission to appeal with the Commission—

- (a) if he is in detention under the Immigration Acts when he is served with the Commission's determination [under rule 47(3)], not later than 5 days after he is so served; and
- (b) otherwise, not later than 10 days after he is so served.

(2A) Subject to paragraph (2B), the Secretary of State must file any application for permission to appeal with the Commission [not later than 10 days after he is served with the Commission's determination under rule 47(3)].

(2B) The Commission may accept an application filed after the expiry of the relevant period in paragraph (2) or (2A) if it is satisfied that, by reason of special circumstances, it would be unjust not to do so.]

(3) The application must—

- (a) state the grounds of appeal; and
- (b) be signed by the applicant or his representative, and dated.

(4) The applicant must serve a copy of the application notice on every other party.

(5) The Commission may decide an application for leave without a hearing unless it considers that there are special circumstances which make a hearing necessary or desirable.

Initial Commencement

Specified date: 1 April 2003: see r 1.

Amendment

Paras (2), (2A), (2B): substituted, for para (2) as originally enacted, by SI 2007/1285, r 15. Date in force: 7 May 2007: see SI 2007/1285, r 1(1); for transitional provisions see r 35 thereof.

Para (2): in sub-para (a) words “under rule 47(3)” in square brackets inserted by SI 2007/3370, r 2(a). Date in force: 1 December 2007: see SI 2007/3370, r 1(1).

Para (2A): words from “not later than” to “under rule 47(3)” in square brackets substituted by SI 2007/3370, r 2(b). Date in force: 1 December 2007: see SI 2007/3370, r 1(1).

ASYLUM AND IMMIGRATION TRIBUNAL (PROCEDURE) RULES 2005

2005 No 230

Made 6th February 2005

Laid before Parliament 8th February 2005

Coming into force 4th April 2005

The Lord Chancellor, in exercise of the powers conferred by sections 106(1)–(3) and 112(3) of the Nationality, Immigration and Asylum Act 2002 and section 40A(3) of the British Nationality Act 1981, after consulting with the Council on Tribunals in accordance with section 8 of the Tribunals and Inquiries Act 1992, makes the following Rules:

PART 2

APPEALS TO THE TRIBUNAL

8 Form and contents of notice of appeal

(1) The notice of appeal must be [made on a form approved for the purpose by the President] and must—

- (a) state the name and address of the appellant; and
- (b) state whether the appellant has authorised a representative to act for him in the appeal and, if so, give the representative’s name and address;
- (c) set out the grounds for the appeal;
- (d) give reasons in support of those grounds; and
- (e) so far as reasonably practicable, list any documents which the appellant intends to rely upon as evidence in support of the appeal.

[(2) The notice of appeal must be accompanied by—

- (a) the notice of decision against which the appellant is appealing; or
- (b) if it is not practicable to include the notice of decision, the reasons why it is not practicable.]

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(3) The notice of appeal must be signed by the appellant or his representative, and dated.

(4) If a notice of appeal is signed by the appellant's representative, the representative must certify in the notice of appeal that he has completed it in accordance with the appellant's instructions.

Initial Commencement

Specified date: 4 April 2005: see r 1.

Amendment

Para (1): words "made on a form approved for the purpose by the President" in square brackets substituted by SI 2006/2788, r 3. Date in force: 13 November 2006: see SI 2006/2788, r 1(2).

Para (2): substituted by SI 2008/1088, r 2. Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

[9 Where the Tribunal may not accept a notice of appeal]

[(1) Where a person has given a notice of appeal to the Tribunal and the circumstances in paragraph (1A) apply, the Tribunal may not accept the notice of appeal.

(1A) The circumstances referred to in paragraph (1) are that—

- (a) there is no relevant decision; or
- (b) the notice of appeal concerns the refusal of an application for entry clearance which was not made for a purpose falling within section 88A(1)(a) or (b) of the 2002 Act, and the notice of appeal does not rely on either of the grounds specified in section 88A(3)(a) of the 2002 Act.]

(2) Where the Tribunal does not accept a notice of appeal, it must—

- (a) notify the person giving the notice of appeal and the respondent; and
- (b) take no further action.

Initial Commencement

Specified date: 4 April 2005: see r 1.

Amendment

Provision heading: substituted by SI 2008/1088, r 3(a). Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

Paras (1), (1A): substituted, for para (1) as originally enacted, by SI 2008/1088, r 3(b). Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

15 Method of determining appeal

(1) Every appeal must be considered by the Tribunal at a hearing, except where—

- (a) the appeal—
 - (i) lapses pursuant to section 99 of the 2002 Act;
 - (ii) is treated as abandoned pursuant to section 104(4) of the 2002 Act;
 - (iii) is treated as finally determined pursuant to section 104(5) of the 2002 Act; or
 - (iv) is withdrawn by the appellant or treated as withdrawn in accordance with rule 17;
- (b) paragraph (2) of this rule applies; or
- (c) any other provision of these Rules or of any other enactment permits or requires the Tribunal to dispose of an appeal without a hearing.

(2) The Tribunal may determine an appeal without a hearing if—

- (a) all the parties to the appeal consent;
- (b) the appellant is outside the United Kingdom or it is impracticable to give him notice of a hearing and, in either case, he is unrepresented;

- [(ba) the appellant is outside the United Kingdom and his representative's address for service is outside the United Kingdom;]
 - (c) a party has failed to comply with a provision of these Rules or a direction of the Tribunal[, or to provide a satisfactory explanation under rule 8(2)(b)], and the Tribunal is satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing; or
 - (d) subject to paragraph (3), the Tribunal is satisfied, having regard to the material before it and the nature of the issues raised, that the appeal can be justly determined without a hearing.
- (3) Where paragraph (2)(d) applies, the Tribunal must not determine the appeal without a hearing without first giving the parties notice of its intention to do so, and an opportunity to make written representations as to whether there should be a hearing.

Initial Commencement

Specified date: 4 April 2005: see r 1.

Amendment

Para (2): sub-para (ba) inserted by SI 2008/1088, r 4(a). Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

Para (2): in sub-para (c) words “, or to provide a satisfactory explanation under rule 8(2)(b)” in square brackets inserted by SI 2008/1088, r 4(b). Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

PART 3

RECONSIDERATION OF APPEALS ETC

SECTION 2

RECONSIDERATION OF APPEALS

30 Reply

[(1) When the other party to the appeal is served with an order for reconsideration, he must file with the Tribunal and serve on the applicant a reply setting out his case if he contends that—

- (a) there was no error of law in the decision on the appeal; or
- (b) there was an error of law in the decision on the appeal, but it was not a material error of law.]

(2) The other party to the appeal must file and serve any reply not later than 5 days before the earliest date appointed for any hearing of or in relation to the reconsideration of the appeal.

(3) In this rule, “other party to the appeal” means the party other than the party on whose application the order for reconsideration was made.

Initial Commencement

Specified date: 4 April 2005: see r 1.

Amendment

Para (1): substituted by SI 2008/1088, r 5. Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

31 Procedure for reconsideration of appeal

(1) Where an order for reconsideration has been made, the Tribunal must reconsider an appeal as soon as reasonably practicable after that order has been served on both parties to the appeal.

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- (2) Where the reconsideration is pursuant to an order under section 103A—
- (a) the Tribunal carrying out the reconsideration must first decide whether the original Tribunal made a material error of law; and
 - (b) if it decides that the original Tribunal did not make a material error of law, the Tribunal must order that the original determination of the appeal shall stand.
- (3) Subject to paragraph (2), the Tribunal must substitute a fresh decision to allow or dismiss the appeal.
- (4) In carrying out the reconsideration, the Tribunal—
- (a) may limit submissions or evidence to one or more specified issues; and
 - (b) must have regard to any directions given by the immigration judge or court which ordered the [reconsideration; and]
 - [(c) when making a decision under paragraph (2)(a)—
 - (i) must take into account the section 103A application and any reply; and
 - (ii) may take into account any other matter which it considers relevant].
- (5) In [rule 30 and] this rule, a “material error of law” means an error of law which affected the Tribunal’s decision upon the appeal.

Initial Commencement

Specified date: 4 April 2005: see r 1.

Amendment

Para (4): in sub-para (a) word omitted revoked by SI 2008/1088, r 6(a)(i). Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

Para (4): in sub-para (b) words “reconsideration; and” in square brackets substituted by SI 2008/1088, r 6(a)(ii). Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

Para (4): sub-para (c) inserted by SI 2008/1088, r 6(a)(iii). Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

Para (5): words “rule 30 and” in square brackets inserted by SI 2008/1088, r 6(b). Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

33 Orders for funding on reconsideration

- (1) This rule applies where—
- (a) the Tribunal has reconsidered an appeal following a section 103A application made by the appellant in relation to an appeal decided in England, Wales or Northern Ireland; and
 - (b) the appellant’s representative has specified that he seeks an order under section 103D of the 2002 Act for his costs to be paid out of the relevant fund.
- [(2) The Tribunal must [make a determination (“the funding determination”) either at the same time as its determination of the reconsidered appeal (“the principal determination”) or in a separate determination,] stating whether it orders payment out of the relevant fund of the appellant’s costs—
- (a) in respect of the application for reconsideration;
 - (b) in respect of the preparation for reconsideration; and
 - (c) in respect of the reconsideration.]
- (3) The Tribunal must send the funding determination to—
- (a) the appellant’s representative; and
 - (b) if the Tribunal has made an order under section 103D, the relevant funding body.
- (4) Where [the principal determination] is served in accordance with rule 23, the Tribunal must not send the funding determination to the appellant’s representative until—

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- (a) the respondent has notified the Tribunal under rule 23(5)(b) that it has served the principal determination on the appellant; or
- (b) the Tribunal has served the principal determination on the appellant under rule 23(6).

[(4A) Where, in accordance with regulations under section 103D of the 2002 Act, a senior immigration judge reviews a decision by the Tribunal not to make an order under section 103D(3), the Tribunal must send notice of the decision upon that review to—

- (a) the appellant's representative; and
- (b) if the senior immigration judge makes an order under section 103D(3), the relevant funding body.]

(5) In this Rule—

- (a) “relevant fund” means—
 - (i) in relation to an appeal decided in England or Wales, the Community Legal Service Fund established under section 5 of the Access to Justice Act 1999;
 - (ii) in relation to an appeal decided in Northern Ireland, the fund established under paragraph 4(2)(a) of Schedule 3 to the Access to Justice (Northern Ireland) Order 2003; and
- (b) “relevant funding body” means—
 - (i) in relation to an appeal decided in England or Wales, the Legal Services Commission;
 - (ii) in relation to an appeal decided in Northern Ireland, the Northern Ireland Legal Services Commission.

Initial Commencement

Specified date: 4 April 2005: see r 1.

Amendment

Para (2): substituted by SI 2006/2788, r 11. Date in force: this amendment came into force on 30 April 2007 (being the day on which the Immigration, Asylum and Nationality Act 2006, s 8 came into force): see SI 2007/1109, art 3 and SI 2006/2788, r 1(3).

Para (2): words from “make a determination” to “a separate determination” in square brackets substituted by SI 2008/1088, r 7(a). Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

Para (4): words “the principal determination” in square brackets substituted by SI 2008/1088, r 7(b). Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

Para (4A): inserted by SI 2005/569, r 4. Date in force: 4 April 2005: see SI 2005/569, r 1(1).

SECTION 3

APPLICATIONS FOR PERMISSION TO APPEAL TO THE APPROPRIATE APPELLATE COURT

36 Determining the application

(1) An application for permission to appeal must be determined by a senior immigration judge without a hearing.

[(2) The Tribunal may—

- (a) grant permission to appeal;
- (b) refuse permission to appeal; or
- (c) subject to paragraph (3), set aside the Tribunal's determination and direct that the proceedings be reheard by the Tribunal.

(3) The power in paragraph (2)(c) may be exercised only—

- (a) by the President or a Deputy President;
- (b) with the agreement of the parties; and

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- (c) where there has been no previous exercise of the power in the proceedings.]
- (4) The Tribunal must serve on every party written notice of its decision, including its reasons, which may be in summary form.

Initial Commencement

Specified date: 4 April 2005: see r 1.

Amendment

Paras (2), (3): substituted by SI 2008/1088, r 8. Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

PART 4

BAIL

PART 5

GENERAL PROVISIONS

45 Directions

- (1) The Tribunal may give directions to the parties relating to the conduct of any appeal or application.
- (2) The power to give directions is to be exercised subject to any specific provision of these Rules.
- (3) Directions must be given orally or in writing to every party.
- (4) Directions of the Tribunal may, in particular—
- (a) relate to any matter concerning the preparation for a hearing;
 - (b) specify the length of time allowed for anything to be done;
 - (c) vary any time limit in these Rules or in directions previously given by the Tribunal for anything to be done by a party [(including, where the Tribunal considers that there are exceptional reasons for doing so, extending a time limit which has expired)];
 - (d) provide for—
 - (i) a particular matter to be dealt with as a preliminary issue;
 - (ii) a case management review hearing to be held;
 - (iii) a party to provide further details of his case, or any other information which appears to be necessary for the determination of the appeal;
 - (iv) the witnesses, if any, to be heard;
 - (v) the manner in which any evidence is to be given (for example, by directing that witness statements are to stand as evidence in chief);
 - (e) require any party to file and serve—
 - (i) statements of the evidence which will be called at the hearing;
 - (ii) a paginated and indexed bundle of all the documents which will be relied on at the hearing;
 - (iii) a skeleton argument which summarises succinctly the submissions which will be made at the hearing and cites all the authorities which will be relied on, identifying any particular passages to be relied on;
 - (iv) a time estimate for the hearing;
 - (v) a list of witnesses whom any party wishes to call to give evidence;
 - (vi) a chronology of events; and
 - (vii) details of whether an interpreter will be required at the hearing, and in respect of what language and dialect;
 - (f) limit—
 - (i) the number or length of documents upon which a party may rely at a hearing;

- (ii) the length of oral submissions;
 - (iii) the time allowed for the examination and cross-examination of witnesses; and
 - (iv) the issues which are to be addressed at a hearing; and
 - (g) require the parties to take any steps to enable two or more appeals to be heard together under rule 20.
 - (h) provide for a hearing to be conducted or evidence given or representations made by video link or by other electronic means; and
 - (i) make provision to secure the anonymity of a party or a witness.
- (5) The Tribunal must not direct an unrepresented party to do something unless it is satisfied that he is able to comply with the direction.
- (6) The President may direct that, in individual cases or in such classes of case as he shall specify, any time period in these Rules for the Tribunal to do anything shall be extended by such period as he shall specify.

Initial Commencement

Specified date: 4 April 2005: see r 1.

Amendment

Para (4): in sub-para (c) words “(including, where the” to “which has expired)” in square brackets inserted by SI 2008/1088, r 9. Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

56 Address for service

- (1) Every party, and any person representing a party, must notify the Tribunal in writing of a postal address at which documents may be served on him and of any changes to that address.
- (2) Until a party or representative notifies the Tribunal of a change of address, any document served on him at the most recent address which he has notified to the Tribunal shall be deemed to have been properly served on him.
- [(3) If the respondent knows that the appellant has changed the address referred to in paragraph (1), he must notify the Tribunal in writing of that fact and, if he is aware of it, the new address.]

Initial Commencement

Specified date: 4 April 2005: see r 1.

Amendment

Para (3): inserted by SI 2008/1088, r 10. Date in force: 12 May 2008: see SI 2008/1088, r 1(1).

ASYLUM AND IMMIGRATION TRIBUNAL (FAST TRACK PROCEDURE) RULES 2005

2005 No 560

Made 7th March 2005

Laid before Parliament 10th March 2005

Coming into force 4th April 2005

The Lord Chancellor, in exercise of the powers conferred by sections 106(1)–(3) and 112(3) of the Nationality, Immigration and Asylum Act 2002 and section 40A(3) of the British Nationality Act 1981, after consulting with the Council on Tribunals in accordance with section 8 of the Tribunals and Inquiries Act 1992, hereby makes the following Rules:

PART 2 APPEALS TO THE TRIBUNAL

6 Application of Part 2 of the Principal Rules

Where this Part applies to an appeal, the following provisions of Part 2 of the Principal Rules apply—

- (a) rule 6(1) to (3), omitting the reference to rule 6(4) in rule 6(2);
- (b) rule 8;
- (c) rule 10(1);
- (d) rule 13(1) and (4);
- (e) rule 14; ...
- (f) rules 17 to 19.
- [(g) rule 20, provided that this Part applies to all of the appeals proposed to be heard together].

Initial Commencement

Specified date: 4 April 2005: see r 1.

Amendment

In para (e) word omitted revoked by SI 2008/1089, r 2(a). Date in force: 12 May 2008: see SI 2008/1089, r 1(1).

Para (g) inserted by SI 2008/1089, r 2(c). Date in force: 12 May 2008: see SI 2008/1089, r 1(1).

13 Method of determining appeal

[(1)] The Tribunal must consider the appeal at the hearing fixed under rule 11 except where—

- (a) the appeal—
 - (i) lapses pursuant to section 99 of the 2002 Act;
 - (ii) is treated as abandoned pursuant to section 104(4) [or (4A)] of the 2002 Act;
 - (iii) is treated as finally determined pursuant to section 104(5) of the 2002 Act; or
 - (iv) is withdrawn by the appellant or treated as withdrawn in accordance with rule 17 of the Principal Rules;
- (b) the Tribunal adjourns the hearing under rule 28 or 30(2)(a) of these Rules; or
- (c) all of the parties to the appeal consent to the Tribunal determining the appeal without a hearing.

[(2) The Tribunal may consider an appeal without a hearing where—

- (a) the person giving notice of appeal fails to comply with rule 8(2) of the Principal Rules; or
- (b) the Tribunal does not consider that the reasons given under rule 8(2)(b) of those Rules are satisfactory.]

Initial Commencement

Specified date: 4 April 2005: see r 1.

Amendment

Para (1): numbered as such by SI 2008/1089, r 3(a). Date in force: 12 May 2008: see SI 2008/1089, r 1(1).

In para (a)(ii) words “or (4A)” in square brackets⁹ inserted by SI 2006/2789, r 4. Date in force: 13 November 2006: see SI 2006/2789, r 1(1).

Para (2): inserted by SI 2008/1089, r 3(b). Date in force: 12 May 2008: see SI 2008/1089, r 1(1).

SCHEDULE 2
SPECIFIED PLACES OF DETENTION

Rules 5 and 15

Campfield House Immigration Removal Centre, Kidlington, Oxfordshire
Colnbrook House Immigration Removal Centre, Harmondsworth, Middlesex
Harmondsworth Immigration Removal Centre, Harmondsworth, Middlesex
[Oakington Reception Centre, Longstanton, Cambridgeshire]
Yarls Wood Immigration Removal Centre, Clapham, Bedfordshire

Initial Commencement

Specified date: 4 April 2005: see r 1.

Amendment

Entry “Oakington Reception Centre, Longstanton, Cambridgeshire” inserted by SI 2008/1089, r 4. Date in force: 12 May 2008: see SI 2008/1089, r 1(1).

**TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL)
(SOCIAL ENTITLEMENT CHAMBER) RULES 2008**

2008 No 2685

Made 9th October 2008
Laid before Parliament 15th October 2008
Coming into force 3rd November 2008

After consulting in accordance with paragraph 28(1) of Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007, the Tribunal Procedure Committee has made the following Rules in exercise of the powers conferred by sections 20(2) and (3) of the Social Security Act 1998 and sections 9(3), 22 and 29(3) of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007.

The Lord Chancellor has allowed the Rules in accordance with paragraph 28(3) of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007.

PART 1
INTRODUCTION

1 Citation, commencement, application and interpretation

(1) These Rules may be cited as the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 and come into force on 3rd November 2008.

(2) These Rules apply to proceedings before the Tribunal which have been assigned to the Social Entitlement Chamber by the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008.

(3) In these Rules—

“the 2007 Act” means the Tribunals, Courts and Enforcement Act 2007;

“appeal” includes an application under section 19(9) of the Tax Credits Act 2002;

“appellant” means a person who makes an appeal to the Tribunal, or a person substituted as an appellant under rule 9(1) (substitution of parties);

“asylum support case” means proceedings concerning the provision of support for an asylum seeker *or his or her dependants* [a failed asylum seeker or a person designated under section 130 of the Criminal Justice and Immigration Act 2008 (designation), or the dependants of any such person];

“criminal injuries compensation case” means proceedings concerning the payment of compensation under a scheme made under the Criminal Injuries Compensation Act 1995;

“decision maker” means the maker of a decision against which an appeal has been brought;

“dispose of proceedings” includes, unless indicated otherwise, disposing of a part of the proceedings;

“document” means anything in which information is recorded in any form, and an obligation under these Rules to provide or allow access to a document or a copy of a document for any purpose means, unless the Tribunal directs otherwise, an obligation to provide or allow access to such document or copy in a legible form or in a form which can be readily made into a legible form;

“hearing” means an oral hearing and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication;

“legal representative” means an authorised advocate or authorised litigator as defined by section 119(1) of the Courts and Legal Services Act 1990, an advocate or solicitor in Scotland or a barrister or solicitor in Northern Ireland;

“party” means—

(a) a person who is an appellant or respondent in proceedings before the Tribunal;

(b) a person who makes a reference to the Tribunal under section 28D of the Child Support Act 1991;

(c) a person who starts proceedings before the Tribunal under paragraph 3 of Schedule 2 to the Tax Credits Act 2002; or

(d) if the proceedings have been concluded, a person who was a party under paragraph (a), (b) or (c) when the Tribunal finally disposed of all issues in the proceedings;

“practice direction” means a direction given under section 23 of the 2007 Act;

“respondent” means—

(a) in an appeal against a decision, the decision maker and any person other than the appellant who had a right of appeal against the decision;

- (b) in a reference under section 28D of the Child Support Act 1991—
 - (i) the absent parent or non-resident parent;
 - (ii) the person with care; and
 - (iii) in Scotland, the child if the child made the application for a departure direction or a variation;
- (c) in proceedings under paragraph 3 of Schedule 2 to the Tax Credits Act 2002, a person on whom it is proposed that a penalty be imposed; or
- (d) a person substituted or added as a respondent under rule 9 (substitution and addition of parties);

“Social Entitlement Chamber” means the Social Entitlement Chamber of the First-tier Tribunal established by the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008;

“social security and child support case” means any case allocated to the Social Entitlement Chamber except an asylum support case or a criminal injuries compensation case;

“Tribunal” means the First-tier Tribunal.

Initial Commencement

Specified date: 3 November 2008: see para (1) above.

Amendment

Para (3): in definition “asylum support case” words “or his or her dependants” in italics revoked and subsequent words in square brackets substituted by SI 2009/274, r 2. Date in force: 1 April 2009: see SI 2009/274, r 1.

2 Overriding objective and parties’ obligation to co-operate with the Tribunal

- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes—
 - (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it—
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- (4) Parties must—
 - (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

3 Alternative dispute resolution and arbitration

- (1) The Tribunal should seek, where appropriate—
 - (a) to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and

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- (b) if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure.
- (2) Part 1 of the Arbitration Act 1996 does not apply to proceedings before the Tribunal.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

PART 2

GENERAL POWERS AND PROVISIONS

4 Delegation to staff

- (1) Staff appointed under section 40(1) of the 2007 Act (tribunal staff and services) may, with the approval of the Senior President of Tribunals, carry out functions of a judicial nature permitted or required to be done by the Tribunal.
- (2) The approval referred to at paragraph (1) may apply generally to the carrying out of specified functions by members of staff of a specified description in specified circumstances.
- (3) Within 14 days after the date on which the Tribunal sends notice of a decision made by a member of staff under paragraph (1) to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by a judge.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

5 Case management powers

- (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
- (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
- (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may—
- (a) extend or shorten the time for complying with any rule, practice direction or direction;
 - (b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise);
 - (c) permit or require a party to amend a document;
 - (d) permit or require a party or another person to provide documents, information, evidence or submissions to the Tribunal or a party;
 - (e) deal with an issue in the proceedings as a preliminary issue;
 - (f) hold a hearing to consider any matter, including a case management issue;
 - (g) decide the form of any hearing;
 - (h) adjourn or postpone a hearing;
 - (i) require a party to produce a bundle for a hearing;
 - (j) stay (or, in Scotland, sist) proceedings;
 - (k) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and—
 - (i) because of a change of circumstances since the proceedings were started, the Tribunal no longer has jurisdiction in relation to the proceedings; or

- (ii) the Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case; or
- (l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal of an application for permission to appeal against, and any appeal or review of, that decision.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

6 Procedure for applying for and giving directions

- (1) The Tribunal may give a direction on the application of one or more of the parties or on its own initiative.
- (2) An application for a direction may be made—
 - (a) by sending or delivering a written application to the Tribunal; or
 - (b) orally during the course of a hearing.
- (3) An application for a direction must include the reason for making that application.
- (4) Unless the Tribunal considers that there is good reason not to do so, the Tribunal must send written notice of any direction to every party and to any other person affected by the direction.
- (5) If a party or any other person sent notice of the direction under paragraph (4) wishes to challenge a direction which the Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

7 Failure to comply with rules etc

- (1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.
- (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—
 - (a) waiving the requirement;
 - (b) requiring the failure to be remedied;
 - (c) exercising its power under rule 8 (striking out a party's case); or
 - (d) exercising its power under paragraph (3).
- (3) The Tribunal may refer to the Upper Tribunal, and ask the Upper Tribunal to exercise its power under section 25 of the 2007 Act in relation to, any failure by a person to comply with a requirement imposed by the Tribunal—
 - (a) to attend at any place for the purpose of giving evidence;
 - (b) otherwise to make themselves available to give evidence;
 - (c) to swear an oath in connection with the giving of evidence;
 - (d) to give evidence as a witness;
 - (e) to produce a document; or
 - (f) to facilitate the inspection of a document or any other thing (including any premises).

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

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8 Striking out a party's case

- (1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.
- (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
 - (a) does not have jurisdiction in relation to the proceedings or that part of them; and
 - (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
- (3) The Tribunal may strike out the whole or a part of the proceedings if—
 - (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
 - (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
 - (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
- (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.
- (5) If the proceedings, or part of them, have been struck out under paragraph (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.
- (6) An application under paragraph (5) must be made in writing and received by the Tribunal within 1 month after the date on which the Tribunal sent notification of the striking out to the appellant.
- (7) This rule applies to a respondent as it applies to an appellant except that—
 - (a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent from taking further part in the proceedings; and
 - (b) a reference to an application for the reinstatement of proceedings which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent from taking further part in the proceedings.
- (8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submission made by that respondent.

Initial Commencement

Specified date: 3 November 2008; see r 1(1).

9 Substitution and addition of parties

- (1) The Tribunal may give a direction substituting a party if—
 - (a) the wrong person has been named as a party; or
 - (b) the substitution has become necessary because of a change in circumstances since the start of proceedings.
- (2) The Tribunal may give a direction adding a person to the proceedings as a respondent.

(3) If the Tribunal gives a direction under paragraph (1) or (2) it may give such consequential directions as it considers appropriate.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

10 No power to award costs

The Tribunal may not make any order in respect of costs (or, in Scotland, expenses).

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

11 Representatives

(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.

(2) Subject to paragraph (3), if a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal written notice of the representative's name and address.

(3) In a case to which rule 23 (cases in which the notice of appeal is to be sent to the decision maker) applies, if the appellant (or the appellant's representative if the representative is a legal representative) provides written notification of the appellant's representative's name and address to the decision maker before the decision maker provides its response to the Tribunal, the appellant need not take any further steps in order to comply with paragraph (2).

(4) If the Tribunal receives notice that a party has appointed a representative under paragraph (2), it must send a copy of that notice to each other party.

(5) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement.

(6) A person who receives due notice of the appointment of a representative—

- (a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party; and
- (b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party.

(7) At a hearing a party may be accompanied by another person whose name and address has not been notified under paragraph (2) or (3) but who, with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.

(8) Paragraphs (2) to (6) do not apply to a person who accompanies a party under paragraph (7).

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

12 Calculating time

(1) Except in asylum support cases, an act required by these Rules, a practice direction or a direction to be done on or by a particular day must be done by 5pm on that day.

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(2) If the time specified by these Rules, a practice direction or a direction for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day.

(3) In this rule “working day” means any day except a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday under section 1 of the Banking and Financial Dealings Act 1971.

Initial Commencement

Specified date: 3 November 2008; see r 1(1).

13 Sending and delivery of documents

(1) Any document to be provided to the Tribunal under these Rules, a practice direction or a direction must be—

- (a) sent by pre-paid post or delivered by hand to the address specified for the proceedings;
- (b) sent by fax to the number specified for the proceedings; or
- (c) sent or delivered by such other method as the Tribunal may permit or direct.

(2) Subject to paragraph (3), if a party provides a fax number, email address or other details for the electronic transmission of documents to them, that party must accept delivery of documents by that method.

(3) If a party informs the Tribunal and all other parties that a particular form of communication (other than pre-paid post or delivery by hand) should not be used to provide documents to that party, that form of communication must not be so used.

(4) If the Tribunal or a party sends a document to a party or the Tribunal by email or any other electronic means of communication, the recipient may request that the sender provide a hard copy of the document to the recipient. The recipient must make such a request as soon as reasonably practicable after receiving the document electronically.

(5) The Tribunal and each party may assume that the address provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary.

Initial Commencement

Specified date: 3 November 2008; see r 1(1).

14 Use of documents and information

(1) The Tribunal may make an order prohibiting the disclosure or publication of—

- (a) specified documents or information relating to the proceedings; or
- (b) any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified.

(2) The Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—

- (a) the Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and
- (b) the Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.

(3) If a party (“the first party”) considers that the Tribunal should give a direction under paragraph (2) prohibiting the disclosure of a document or information to another party (“the second party”), the first party must—

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- (a) exclude the relevant document or information from any documents that will be provided to the second party; and
 - (b) provide to the Tribunal the excluded document or information, and the reason for its exclusion, so that the Tribunal may decide whether the document or information should be disclosed to the second party or should be the subject of a direction under paragraph (2).
- (4) The Tribunal must conduct proceedings as appropriate in order to give effect to a direction given under paragraph (2).
- (5) If the Tribunal gives a direction under paragraph (2) which prevents disclosure to a party who has appointed a representative, the Tribunal may give a direction that the documents or information be disclosed to that representative if the Tribunal is satisfied that—
-
- (a) disclosure to the representative would be in the interests of the party; and
 - (b) the representative will act in accordance with paragraph (6).
- (6) Documents or information disclosed to a representative in accordance with a direction under paragraph (5) must not be disclosed either directly or indirectly to any other person without the Tribunal's consent.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

15 Evidence and submissions

- (1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—
- (a) issues on which it requires evidence or submissions;
 - (b) the nature of the evidence or submissions it requires;
 - (c) whether the parties are permitted or required to provide expert evidence;
 - (d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;
 - (e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given—
 - (i) orally at a hearing; or
 - (ii) by written submissions or witness statement; and
 - (f) the time at which any evidence or submissions are to be provided.
- (2) The Tribunal may—
- (a) admit evidence whether or not—
 - (i) the evidence would be admissible in a civil trial in the United Kingdom; or
 - (ii) the evidence was available to a previous decision maker; or
 - (b) exclude evidence that would otherwise be admissible where—
 - (i) the evidence was not provided within the time allowed by a direction or a practice direction;
 - (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
 - (iii) it would otherwise be unfair to admit the evidence.
- (3) The Tribunal may consent to a witness giving, or require any witness to give, evidence on oath, and may administer an oath for that purpose.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

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16 Summoning or citation of witnesses and orders to answer questions or produce documents

- (1) On the application of a party or on its own initiative, the Tribunal may—
 - (a) by summons (or, in Scotland, citation) require any person to attend as a witness at a hearing at the time and place specified in the summons or citation; or
 - (b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.
- (2) A summons or citation under paragraph (1)(a) must—
 - (a) give the person required to attend 14 days' notice of the hearing or such shorter period as the Tribunal may direct; and
 - (b) where the person is not a party, make provision for the person's necessary expenses of attendance to be paid, and state who is to pay them.
- (3) No person may be compelled to give any evidence or produce any document that the person could not be compelled to give or produce on a trial of an action in a court of law in the part of the United Kingdom where the proceedings are due to be determined.
- (4) A summons, citation or order under this rule must—
 - (a) state that the person on whom the requirement is imposed may apply to the Tribunal to vary or set aside the summons, citation or order, if they have not had an opportunity to object to it; and
 - (b) state the consequences of failure to comply with the summons, citation or order.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

17 Withdrawal

- (1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it—
 - (a) at any time before a hearing to consider the disposal of the proceedings (or, if the Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Tribunal a written notice of withdrawal; or
 - (b) orally at a hearing.
- (2) In the circumstances described in paragraph (3), a notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal.
- (3) The circumstances referred to in paragraph (2) are where a party gives notice of withdrawal—
 - (a) under paragraph (1)(a) in a criminal injuries compensation case; or
 - (b) under paragraph (1)(b).
- (4) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.
- (5) An application under paragraph (4) must be made in writing and be received by the Tribunal within 1 month after—
 - (a) the date on which the Tribunal received the notice under paragraph (1)(a); or
 - (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b).

- (6) The Tribunal must notify each party in writing of an withdrawal under this rule.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

18 Lead cases

- (1) This rule applies if—

- (a) two or more cases have been started before the Tribunal;
- (b) in each such case the Tribunal has not made a decision disposing of the proceedings; and
- (c) the cases give rise to common or related issues of fact or law.

- (2) The Tribunal may give a direction—

- (a) specifying one or more cases falling under paragraph (1) as a lead case or lead cases; and
- (b) staying (or, in Scotland, sisting) the other cases falling under paragraph (1) (“the related cases”).

- (3) When the Tribunal makes a decision in respect of the common or related issues—

- (a) the Tribunal must send a copy of that decision to each party in each of the related cases; and
- (b) subject to paragraph (4), that decision shall be binding on each of those parties.

- (4) Within 1 month after the date on which the Tribunal sent a copy of the decision to a party under paragraph (3)(a), that party may apply in writing for a direction that the decision does not apply to, and is not binding on the parties to, a particular related case.

- (5) The Tribunal must give directions in respect of cases which are stayed or sisted under paragraph (2)(b), providing for the disposal of or further directions in those cases.

- (6) If the lead case or cases lapse or are withdrawn before the Tribunal makes a decision in respect of the common or related issues, the Tribunal must give directions as to—

- (a) whether another case or other cases are to be specified as a lead case or lead cases; and
- (b) whether any direction affecting the related cases should be set aside or amended.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

19 Confidentiality in child support or child trust fund cases

- (1) Paragraph (3) applies to proceedings under the Child Support Act 1991 in the circumstances described in paragraph (2), other than an appeal against a reduced benefit decision (as defined in section 46(10)(b) of the Child Support Act 1991, as that section had effect prior to the commencement of section 15(b) of the Child Maintenance and Other Payments Act 2008).

- (2) The circumstances referred to in paragraph (1) are that the absent parent, non-resident parent or person with care would like their address or the address of the child to be kept confidential and has given notice to that effect—

Appendix 1 Legislation and materials

- (a) to the Secretary of State or the Child Maintenance and Enforcement Commission in the notice of appeal or when notifying any subsequent change of address;
 - (b) to the Secretary of State or the Child Maintenance and Enforcement Commission, whichever has made the enquiry, within 14 days after an enquiry is made; or
 - (c) to the Tribunal when notifying any change of address.
- (3) Where this paragraph applies, the Secretary of State, the Child Maintenance and Enforcement Commission and the Tribunal must take appropriate steps to secure the confidentiality of the address, and of any information which could reasonably be expected to enable a person to identify the address, to the extent that the address or that information is not already known to each other party.
- (4) Paragraph (6) applies to proceedings under the Child Trust Funds Act 2004 in the circumstances described in paragraph (5).
- (5) The circumstances referred to in paragraph (4) are that a relevant person would like their address or the address of the eligible child to be kept confidential and has given notice to that effect, or a local authority with parental responsibility in relation to the eligible child would like the address of the eligible child to be kept confidential and has given notice to that effect—
- (a) to HMRC in the notice of appeal or when notifying any subsequent change of address;
 - (b) to HMRC within 14 days after an enquiry by HMRC; or
 - (c) to the Tribunal when notifying any change of address.
- (6) Where this paragraph applies, HMRC and the Tribunal must take appropriate steps to secure the confidentiality of the address, and of any information which could reasonably be expected to enable a person to identify the address, to the extent that the address or that information is not already known to each other party.
- (7) In this rule—
- “eligible child” has the meaning set out in section 2 of the Child Trust Funds Act 2004;
 - “HMRC” means Her Majesty’s Revenue and Customs;
 - “non-resident parent” and “parent with care” have the meanings set out in section 54 of the Child Support Act 1991;
 - “parental responsibility” has the meaning set out in section 3(9) of the Child Trust Funds Act 2004; and
 - “relevant person” has the meaning set out in section 22(3) of the Child Trust Funds Act 2004.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

20 Expenses in criminal injuries compensation cases

- (1) This rule applies only to criminal injuries compensation cases.
- (2) The Tribunal may meet reasonable expenses—
 - (a) incurred by the appellant, or any person who attends a hearing to give evidence, in attending the hearing; or
 - (b) incurred by the appellant in connection with any arrangements made by the Tribunal for the inspection of the appellant’s injury.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

21 Expenses in social security and child support cases

- (1) This rule applies only to social security and child support cases.
- (2) The Secretary of State may pay such travelling and other allowances (including compensation for loss of remunerative time) as the Secretary of State may determine to any person required to attend a hearing in proceedings under section 20 of the Child Support Act 1991, section 12 of the Social Security Act 1998 or paragraph 6 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

**PART 3
PROCEEDINGS BEFORE THE TRIBUNAL**

**CHAPTER 1
BEFORE THE HEARING**

22 Cases in which the notice of appeal is to be sent to the Tribunal

- (1) This rule applies to asylum support cases and criminal injuries compensation cases.
- (2) An appellant must start proceedings by sending or delivering a notice of appeal to the Tribunal so that it is received—
 - (a) in asylum support cases, within 3 days after the date on which the appellant received written notice of the decision being challenged;
 - (b) in criminal injuries compensation cases, within 90 days after the date of the decision being challenged.
- (3) The notice of appeal must be in English or Welsh, must be signed by the appellant and must state—
 - (a) the name and address of the appellant;
 - (b) the name and address of the appellant's representative (if any);
 - (c) an address where documents for the appellant may be sent or delivered;
 - (d) the name and address of any respondent;
 - (e) details (including the full reference) of the decision being appealed; and
 - (f) the grounds on which the appellant relies.
- (4) The appellant must provide with the notice of appeal—
 - (a) a copy of any written record of the decision being challenged;
 - (b) any statement of reasons for that decision that the appellant has or can reasonably obtain;
 - (c) any documents in support of the appellant's case which have not been supplied to the respondent; and
 - (d) any further information or documents required by an applicable practice direction.
- (5) In asylum support cases the notice of appeal must also—
 - (a) state whether the appellant will require an interpreter at any hearing, and if so for which language or dialect; and
 - (b) state whether the appellant intends to attend or be represented at any hearing.
- (6) If the appellant provides the notice of appeal to the Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 5(3)(a) (power to extend time)—

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- (a) the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time; and
 - (b) unless the Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Tribunal must not admit the notice of appeal.
- (7) The Tribunal must send a copy of the notice of appeal and any accompanying documents to each other party—
- (a) in asylum support cases, on the day that the Tribunal receives the notice of appeal, or (if that is not reasonably practicable) as soon as reasonably practicable on the following day;
 - (b) in criminal injuries compensation cases, as soon as reasonably practicable after the Tribunal receives the notice of appeal.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

23 Cases in which the notice of appeal is to be sent to the decision maker

- (1) This rule applies to social security and child support cases (except references under the Child Support Act 1991 and proceedings under paragraph 3 of Schedule 2 to the Tax Credits Act 2002).
- (2) An appellant must start proceedings by sending or delivering a notice of appeal to the decision maker so that it is received within the time specified in Schedule 1 to these Rules (time limits for providing notices of appeal to the decision maker).
- (3) If the appellant provides the notice of appeal to the decision maker later than the time required by paragraph (2) the notice of appeal must include the reason why the notice of appeal was not provided in time.
- (4) Subject to paragraph (5), where an appeal is not made within the time specified in Schedule 1, it will be treated as having been made in time if the decision maker does not object.
- (5) No appeal may be made more than 12 months after the time specified in Schedule 1.
- (6) The notice of appeal must be in English or Welsh, must be signed by the appellant and must state—
- (a) the name and address of the appellant;
 - (b) the name and address of the appellant's representative (if any);
 - (c) an address where documents for the appellant may be sent or delivered;
 - (d) details of the decision being appealed; and
 - (e) the grounds on which the appellant relies.
- (7) The decision maker must refer the case to the Tribunal immediately if—
- (a) the appeal has been made after the time specified in Schedule 1 and the decision maker objects to it being treated as having been made in time; or
 - (b) the decision maker considers that the appeal has been made more than 12 months after the time specified in Schedule 1.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

See Further

See further, in relation to the application of this rule, with modifications, to appeals brought under the Child Support Appeals (Jurisdiction of Courts) Order 2002, SI 2002/1915: the Child Support Appeals (Jurisdiction of Courts) Order 2002, SI 2002/1915, art 5 (as substituted by SI 2008/2683, art 6(1), Sch 1, paras 179, 181).

24 Responses and replies

- (1) When a decision maker receives the notice of appeal or a copy of it, the decision maker must send or deliver a response to the Tribunal—
 - (a) in asylum support cases, so that it is received within 3 days after the date on which the Tribunal received the notice of appeal; and
 - (b) in other cases, as soon as reasonably practicable after the decision maker received the notice of appeal.
- (2) The response must state—
 - (a) the name and address of the decision maker;
 - (b) the name and address of the decision maker's representative (if any);
 - (c) an address where documents for the decision maker may be sent or delivered;
 - (d) the names and addresses of any other respondents and their representatives (if any);
 - (e) whether the decision maker opposes the appellant's case and, if so, any grounds for such opposition which are not set out in any documents which are before the Tribunal; and
 - (f) any further information or documents required by a practice direction or direction.
- (3) The response may include a submission as to whether it would be appropriate for the case to be disposed of without a hearing.
- (4) The decision maker must provide with the response—
 - (a) a copy of any written record of the decision under challenge, and any statement of reasons for that decision, if they were not sent with the notice of appeal;
 - (b) copies of all documents relevant to the case in the decision maker's possession, unless a practice direction or direction states otherwise; and
 - (c) in cases to which rule 23 (cases in which the notice of appeal is to be sent to the decision maker) applies, a copy of the notice of appeal, any documents provided by the appellant with the notice of appeal and (if they have not otherwise been provided to the Tribunal) the name and address of the appellant's representative (if any).
- (5) The decision maker must provide a copy of the response and any accompanying documents to each other party at the same time as it provides the response to the Tribunal.
- (6) The appellant and any other respondent may make a written submission and supply further documents in reply to the decision maker's response.
- (7) Any submission or further documents under paragraph (6) must be provided to the Tribunal within 1 month after the date on which the decision maker sent the response to the party providing the reply, and the Tribunal must send a copy to each other party.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

25 Medical and physical examination in appeals under section 12 of the Social Security Act 1998

- (1) This rule applies only to appeals under section 12 of the Social Security Act 1998.
- (2) At a hearing an appropriate member of the Tribunal may carry out a physical examination of a person if the case relates to—

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- (a) the extent of that person's disablement and its assessment in accordance with section 68(6) of and Schedule 6 to, or section 103 of, the Social Security Contributions and Benefits Act 1992; or
 - (b) diseases or injuries prescribed for the purpose of section 108 of that Act.
- (3) If an issue which falls within Schedule 2 to these Rules (issues in relation to which the Tribunal may refer a person for medical examination) is raised in an appeal, the Tribunal may exercise its power under section 20 of the Social Security Act 1998 to refer a person to a health care professional approved by the Secretary of State for—
- (a) the examination of that person; and
 - (b) the production of a report on the condition of that person.
- (4) Neither paragraph (2) nor paragraph (3) entitles the Tribunal to require a person to undergo a physical test for the purpose of determining whether that person is unable to walk or virtually unable to do so.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

26 Social security and child support cases started by reference or information in writing

- (1) This rule applies to proceedings under section 28D of the Child Support Act 1991 and paragraph 3 of Schedule 2 to the Tax Credits Act 2002.
- (2) A person starting proceedings under section 28D of the Child Support Act 1991 must send or deliver a written reference to the Tribunal.
- (3) A person starting proceedings under paragraph 3 of Schedule 2 to the Tax Credits Act 2002 must send or deliver an information in writing to the Tribunal.
- (4) The reference or the information in writing must include—
- (a) an address where documents for the person starting proceedings may be sent or delivered;
 - (b) the names and addresses of the respondents and their representatives (if any); and
 - (c) a submission on the issues that arise for determination by the Tribunal.
- (5) Unless a practice direction or direction states otherwise, the person starting proceedings must also provide a copy of each document in their possession which is relevant to the proceedings.
- (6) Subject to any obligation under rule 19(3) (confidentiality in child support cases), the person starting proceedings must provide a copy of the written reference or the information in writing and any accompanying documents to each respondent at the same time as they provide the written reference or the information in writing to the Tribunal.
- (7) Each respondent may send or deliver to the Tribunal a written submission and any further relevant documents within one month of the date on which the person starting proceedings sent a copy of the written reference or the information in writing to that respondent.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

CHAPTER 2
HEARINGS

27 Decision with or without a hearing

(1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—

- (a) each party has consented to, or has not objected to, the matter being decided without a hearing; and
- (b) the Tribunal considers that it is able to decide the matter without a hearing.

(2) This rule does not apply to decisions under Part 4.

(3) The Tribunal may in any event dispose of proceedings without a hearing under rule 8 (striking out a party's case).

(4) In a criminal injuries compensation case—

- (a) the Tribunal may make a decision which disposes of proceedings without a hearing; and
- (b) subject to paragraph (5), if the Tribunal makes a decision which disposes of proceedings without a hearing, any party may make a written application to the Tribunal for the decision to be reconsidered at a hearing.

(5) An application under paragraph (4)(b) may not be made in relation to a decision—

- (a) not to extend a time limit;
- (b) not to set aside a previous decision;
- (c) not to allow an appeal against a decision not to extend a time limit; or
- (d) not to allow an appeal against a decision not to reopen a case.

(6) An application under paragraph (4)(b) must be received within 1 month after the date on which the Tribunal sent notice of the decision to the party making the application.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

28 Entitlement to attend a hearing

Subject to rule 30(5) (exclusion of a person from a hearing), each party to proceedings is entitled to attend a hearing.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

29 Notice of hearings

(1) The Tribunal must give each party entitled to attend a hearing reasonable notice of the time and place of the hearing (including any adjourned or postponed hearing) and any changes to the time and place of the hearing.

(2) The period of notice under paragraph (1) must be at least 14 days except that—

- (a) in an asylum support case the Tribunal must give at least 1 day's and not more than 5 days' notice; and
- (b) the Tribunal may give shorter notice—
 - (i) with the parties' consent; or
 - (ii) in urgent or exceptional circumstances.

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Initial Commencement

Specified date: 3 November 2008: see r 1(1).

30 Public and private hearings

- (1) Subject to the following paragraphs, all hearings must be held in public.
- (2) A hearing in a criminal injuries compensation case must be held in private unless—
 - (a) the appellant has consented to the hearing being held in public; and
 - (b) the Tribunal considers that it is in the interests of justice for the hearing to be held in public.
- (3) The Tribunal may give a direction that a hearing, or part of it, is to be held in private.
- (4) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.
- (5) The Tribunal may give a direction excluding from any hearing, or part of it—
 - (a) any person whose conduct the Tribunal considers is disrupting or is likely to disrupt the hearing;
 - (b) any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;
 - (c) any person who the Tribunal considers should be excluded in order to give effect to a direction under rule 14(2) (withholding information likely to cause harm); or
 - (d) any person where the purpose of the hearing would be defeated by the attendance of that person.
- (6) The Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

31 Hearings in a party's absence

If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

- (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
- (b) considers that it is in the interests of justice to proceed with the hearing.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

CHAPTER 3 DECISIONS

32 Consent orders

- (1) The Tribunal may, at the request of the parties but only if it considers it appropriate, make a consent order disposing of the proceedings and making such other appropriate provision as the parties have agreed.
- (2) Notwithstanding any other provision of these Rules, the Tribunal need not hold a hearing before making an order under paragraph (1), or provide reasons for the order.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

33 Notice of decisions

(1) The Tribunal may give a decision orally at a hearing.

(2) Subject to rule 14(2) (withholding information likely to cause harm), the Tribunal must provide to each party as soon as reasonably practicable after making a decision which finally disposes of all issues in the proceedings (except a decision under Part 4)—

- (a) a decision notice stating the Tribunal's decision;
- (b) where appropriate, notification of the right to apply for a written statement of reasons under rule 34(3); and
- (c) notification of any right of appeal against the decision and the time within which, and the manner in which, such right of appeal may be exercised.

(3) In asylum support cases the notice and notifications required by paragraph (2) must be provided at the hearing or sent on the day that the decision is made.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

34 Reasons for decisions

(1) In asylum support cases the Tribunal must send a written statement of reasons for a decision which disposes of proceedings (except a decision under Part 4) to each party—

- (a) if the case is decided at a hearing, within 3 days after the hearing; or
- (b) if the case is decided without a hearing, on the day that the decision is made.

(2) In all other cases the Tribunal may give reasons for a decision which disposes of proceedings (except a decision under Part 4)—

- (a) orally at a hearing; or
- (b) in a written statement of reasons to each party.

(3) Unless the Tribunal has already provided a written statement of reasons under paragraph (2)(b), a party may make a written application to the Tribunal for such statement following a decision which finally disposes of all issues in the proceedings.

(4) An application under paragraph (3) must be received within 1 month of the date on which the Tribunal sent or otherwise provided to the party a decision notice relating to the decision which finally disposes of all issues in the proceedings.

(5) If a party makes an application in accordance with paragraphs (3) and (4) the Tribunal must, subject to rule 14(2) (withholding information likely to cause harm), send a written statement of reasons to each party within 1 month of the date on which it received the application or as soon as reasonably practicable after the end of that period.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

PART 4

CORRECTING, SETTING ASIDE, REVIEWING AND APPEALING TRIBUNAL DECISIONS

35 Interpretation

In this Part—

“appeal” means the exercise of a right of appeal—

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- (a) under paragraph 2(2) or 4(1) of Schedule 2 to the Tax Credits Act 2002;
 - (b) under section 21(10) of the Child Trust Funds Act 2004; or
 - (c) on a point of law under section 11 of the 2007 Act; and
- “review” means the review of a decision by the Tribunal under section 9 of the 2007 Act.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

36 Clerical mistakes and accidental slips or omissions

The Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it, by—

- (a) sending notification of the amended decision or direction, or a copy of the amended document, to all parties; and
- (b) making any necessary amendment to any information published in relation to the decision, direction or document.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

37 Setting aside a decision which disposes of proceedings

(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—

- (a) the Tribunal considers that it is in the interests of justice to do so; and
- (b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are—

- (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party’s representative;
- (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
- (c) a party, or a party’s representative, was not present at a hearing related to the proceedings; or
- (d) there has been some other procedural irregularity in the proceedings.

(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 1 month after the date on which the Tribunal sent notice of the decision to the party.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

38 Application for permission to appeal

(1) This rule does not apply to asylum support cases or criminal injuries compensation cases.

(2) A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal.

(3) An application under paragraph (2) must be sent or delivered to the Tribunal so that it is received no later than 1 month after the latest of the dates that the Tribunal sends to the person making the application—

- (a) written reasons for the decision;

- (b) notification of amended reasons for, or correction of, the decision following a review; or
 - (c) notification that an application for the decision to be set aside has been unsuccessful.
- (4) The date in paragraph (3)(c) applies only if the application for the decision to be set aside was made within the time stipulated in rule 37 (setting aside a decision which disposes of proceedings) or any extension of that time granted by the Tribunal.
- (5) If the person seeking permission to appeal sends or delivers the application to the Tribunal later than the time required by paragraph (3) or by any extension of time under rule 5(3)(a) (power to extend time)—
- (a) the application must include a request for an extension of time and the reason why the application was not provided in time; and
 - (b) unless the Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Tribunal must not admit the application.
- (6) An application under paragraph (2) must—
- (a) identify the decision of the Tribunal to which it relates;
 - (b) identify the alleged error or errors of law in the decision; and
 - (c) state the result the party making the application is seeking.
- (7) If a person makes an application under paragraph (2) when the Tribunal has not given a written statement of reasons for its decision—
- (a) if no application for a written statement of reasons has been made to the Tribunal, the application for permission must be treated as such an application;
 - (b) unless the Tribunal decides to give permission and directs that this subparagraph does not apply, the application is not to be treated as an application for permission to appeal; and
 - (c) if an application for a written statement of reasons has been, or is, refused because of a delay in making the application, the Tribunal must only admit the application for permission if the Tribunal considers that it is in the interests of justice to do so.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

39 Tribunal's consideration of application for permission to appeal

- (1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 40 (review of a decision).
- (2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.
- (3) The Tribunal must send a record of its decision to the parties as soon as practicable.
- (4) If the Tribunal refuses permission to appeal it must send with the record of its decision—
- (a) a statement of its reasons for such refusal; and
 - (b) notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the method by which, such application must be made.

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(5) The Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (4) in relation to any grounds on which it has refused permission.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

40 Review of a decision

(1) This rule does not apply to asylum support cases or criminal injuries compensation cases.

(2) The Tribunal may only undertake a review of a decision—

- (a) pursuant to rule 39(1) (review on an application for permission to appeal); and
- (b) if it is satisfied that there was an error of law in the decision.

(3) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.

(4) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (3) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

41 Power to treat an application as a different type of application

The Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

SCHEDULE 1

TIME LIMITS FOR PROVIDING NOTICES OF APPEAL TO THE DECISION MAKER

Rule 23

<i>Type of proceedings</i>	<i>Time for providing notice of appeal</i>
cases other than those listed below	<p>the latest of—</p> <ul style="list-style-type: none"> (a) one month after the date on which notice of the decision being challenged was sent to the appellant; (b) if a written statement of reasons for the decision is requested, 14 days after the later of <ul style="list-style-type: none"> (i) the date on which the period at (a) expires; and (ii) the date on which the written statement of reasons was provided; or (c) where the appellant made an application for revision of the decision under regulation 3(1) or (3) or 3A(1) of the Social Security and Child Support (Decision & Appeals) Regulations 1999 or regulation 17(1)(a) of the Child Support (Maintenance Assessment Procedure) Regulations 1992, and that application was unsuccessful, one month of the date on which notice that the decision would not be revised was sent to the appellant
appeal against a certificate of NHS charges under section 157(1) of the Health and Social Care (Community Health and Standards) Act 2003	<ul style="list-style-type: none"> (a) 3 months after the latest of— <ul style="list-style-type: none"> (i) the date on the certificate; (ii) the date on which the compensation payment was made; (iii) if the certificate has been reviewed, the date the certificate was confirmed or a fresh certificate was issued; or (iv) the date of any agreement to treat an earlier compensation payment as having been made in final discharge of a claim made by or in respect of an injured person and arising out of the injury or death; or (b) if the person to whom the certificate has been issued makes an application under section 157(4) of the Health and Social Care (Community Health and Standards) Act 2003, one month after— <ul style="list-style-type: none"> (i) the date of the decision on that application; or (ii) if the person appeals against that decision under section 157(6) of that Act, the date on which the appeal is decided or withdrawn

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<i>Type of proceedings</i>	<i>Time for providing notice of appeal</i>
appeal against a waiver decision under section 157(6) of the Health and Social Care (Community Health and Standards) Act 2003	one month after the date of the decision
appeal against a certificate of NHS charges under section 7 of the Road Traffic (NHS Charges) Act 1999	3 months after the latest of— <ul style="list-style-type: none">(a) the date on which the liability under section 1(2) of the Road Traffic (NHS Charges) Act 1999 was discharged;(b) if the certificate has been reviewed, the date the certificate was confirmed or a fresh certificate was issued; or(c) the date of any agreement to treat an earlier compensation payment as having been made in final discharge of a claim made by or in respect of a traffic casualty and arising out of the injury or death
appeal against a certificate of recoverable benefits under section 11 of the Social Security (Recovery of Benefits) Act 1997	one month after the latest of— <ul style="list-style-type: none">(a) the date on which any payment to the Secretary of State required under section 6 of the Social Security (Recovery of Benefits) Act 1997 was made;(b) if the certificate has been reviewed, the date the certificate was confirmed or a fresh certificate was issued; or(c) the date of any agreement to treat an earlier compensation payment as having been made in final discharge of a claim made by or in respect of an injured person and arising out of the accident, injury or disease
appeal under the Vaccine Damage Payments Act 1979	no time limit
appeal under the Tax Credits Act 2002	as set out in the Tax Credits Act 2002
appeal under the Child Trust Funds Act 2004	as set out in the Child Trust Funds Act 2004

<i>Type of proceedings</i>	<i>Time for providing notice of appeal</i>
appeal against a decision in respect of a claim for child benefit or guardian's allowance under section 12 of the Social Security Act 1998	as set out in regulation 28 of the Child Benefit and Guardian's Allowance (Decisions and Appeals) Regulations 2003

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

SCHEDULE 2

ISSUES IN RELATION TO WHICH THE TRIBUNAL MAY REFER A PERSON FOR MEDICAL EXAMINATION UNDER SECTION 20(2) OF THE SOCIAL SECURITY ACT 1998

Rule 25(3)

An issue falls within this Schedule if the issue—

- (a) is whether the claimant satisfies the conditions for entitlement to—
 - (i) an attendance allowance specified in section 64 and 65(1) of the Social Security Contributions and Benefits Act 1992;
 - (ii) severe disablement allowance under section 68 of that Act;
 - (iii) the care component of a disability living allowance specified in section 72(1) and (2) of that Act;
 - (iv) the mobility component of a disability living allowance specified in section 73(1), (8) and (9) of that Act; or
 - (v) a disabled person's tax credit specified in section 129(1)(b) of that Act.
- (b) relates to the period throughout which the claimant is likely to satisfy the conditions for entitlement to an attendance allowance or a disability living allowance;
- (c) is the rate at which an attendance allowance is payable;
- (d) is the rate at which the care component or the mobility component of a disability living allowance is payable;
- (e) is whether a person is incapable of work for the purposes of the Social Security Contributions and Benefits Act 1992;
- (f) relates to the extent of a person's disablement and its assessment in accordance with Schedule 6 to the Social Security Contributions and Benefits Act 1992;
- (g) is whether the claimant suffers a loss of physical or mental faculty as a result of the relevant accident for the purposes of section 103 of the Social Security Contributions and Benefits Act 1992;
- (h) relates to any payment arising under, or by virtue of a scheme having effect under, section 111 of, and Schedule 8 to, the Social Security Contributions and Benefits Act 1992 (workmen's compensation);
- (i) is whether a person has limited capability for work or work-related activity for the purposes of the Welfare Reform Act 2007.

Initial Commencement

Specified date: 3 November 2008: see r 1(1).

STATUTORY INSTRUMENTS

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SOCIAL SECURITY (IMMIGRATION AND ASYLUM) CONSEQUENTIAL AMENDMENTS REGULATIONS 2000

2000 No 636

Made 7th March 2000
Laid before Parliament 13th March 2000
Coining into force 3rd April 2000

The Secretary of State for Social Security, in exercise of the powers conferred upon him by sections 115(3), (4) and (7), 123(5) and (6), 166(3) and 167 of the Immigration and Asylum Act 1999, sections 64(1), 68(4), 70(4), 71(6), 123(1)(a), (d) and (e), 135(1), 136(3) and (4), 137(1) and (2)(i), and 175(1), (3) and (4) of the Social Security Contributions and Benefits Act 1992, section 5(1)(a) and (b), 189(1) and (4) and 191 of the Social Security Administration Act 1992, sections 12(1) and (2), 35(1) and 36(2) and (4) of the Jobseekers Act 1995 and of all other powers enabling him in that behalf, by this Instrument, which contains only regulations made by virtue of, or consequential upon, the Immigration and Asylum Act 1999 and which is made before the end of the period of six months beginning with the coming into force of that Act and, in so far as they relate to housing benefit and council tax benefit, with the agreement of such organisations appearing to him to be representative of the authorities concerned that consultation should not be undertaken hereby make the following Regulations:

1 Citation, commencement and interpretation

(1) These Regulations may be cited as the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000.

(2) These Regulations shall come into force on 3rd April 2000.

(3) In these Regulations—

“the Act” means the Immigration and Asylum Act 1999;

“the Attendance Allowance Regulations” means the Social Security (Attendance Allowance) Regulations 1991;

“the Claims and Payments Regulations” means the Social Security (Claims and Payments) Regulations 1987;

“the Contributions and Benefits Act” means the Social Security Contributions and Benefits Act 1992;

...

“the Disability Living Allowance Regulations” means the Social Security (Disability Living Allowance) Regulations 1991;

[“the Employment and Support Allowance Regulations” means the Employment and Support Allowance Regulations 2008;]

...

“the Income Support Regulations” means the Income Support (General) Regulations 1987;

“the Invalid Care Allowance Regulations” means the Social Security (Invalid Care Allowance) Regulations 1976;

“the Jobseeker’s Allowance Regulations” means the Jobseeker’s Allowance Regulations 1996;

“the Persons from Abroad Regulations” means the Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996;

“the Severe Disablement Allowance Regulations” means the Social Security (Severe Disablement Allowance) Regulations 1984;

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[“income-related employment and support allowance” means an income-related allowance under Part 1 of the Welfare Reform Act 2007 (employment and support allowance)].

- (4) In these Regulations, unless the context otherwise requires, a reference—
- (a) to a numbered regulation or Schedule is to the regulation in, or the Schedule to, these Regulations bearing that number;
 - (b) in a regulation or Schedule to a numbered paragraph is to the paragraph in that regulation or Schedule bearing that number.

Initial Commencement

Specified date: 3 April 2000: see para (2) above.

Amendment

Para (3): definition “the Claims and Payments Regulations” revoked, in so far as it relates to child benefit or guardian’s allowance, by SI 2003/492, reg 43, Sch 3, Pt 1; for transitional provisions see reg 44 thereof. Date in force: 7 April 2003: see SI 2003/492, reg 1(1).

Para (3): definition “the Council Tax Benefit Regulations” (omitted) revoked by SI 2006/217, regs 2, 3, Sch 1. Date in force: 6 March 2006: see SI 2006/217, reg 1(1).

Para (3): definition “the Employment and Support Allowance Regulations” inserted by SI 2008/1554, reg 69(1), (2)(a). Date in force: 27 October 2008: see SI 2008/1554, reg 1(2)(b).

Para (3): definition “the Housing Benefit Regulations” (omitted) revoked by SI 2006/217, regs 2, 3, Sch 1. Date in force: 6 March 2006: see SI 2006/217, reg 1(1).

Para (3): definition “income-related employment and support allowance” inserted by SI 2008/1554, reg 69(1), (2)(b). Date in force: 27 October 2008: see SI 2008/1554, reg 1(2)(b).

2 Persons not excluded from specified benefits under section 115 of the Immigration and Asylum Act 1999

(1) For the purposes of entitlement to income-based jobseeker’s allowance, income support, a social fund payment, housing benefit or council tax benefit under the Contributions and Benefits Act, [income-related employment and support allowance,] [or state pension credit under the State Pension Credit Act 2002,] as the case may be, a person falling within a category or description of persons specified in Part I of the Schedule is a person to whom section 115 of the Act does not apply.

(2) For the purposes of entitlement to attendance allowance, severe disablement allowance, [carer’s allowance], disability living allowance, a social fund payment[, health in pregnancy grant] or child benefit under the Contributions and Benefits Act, as the case may be, a person falling within a category or description of persons specified in Part II of the Schedule is a person to whom section 115 of the Act does not apply.

(3) For the purposes of entitlement to child benefit, attendance allowance or disability living allowance under the Contributions and Benefits Act, as the case may be, a person in respect of whom there is an Order in Council made under section 179 of the Social Security Administration Act 1992 giving effect to a reciprocal agreement in respect of one of those benefits, as the case may be, is a person to whom section 115 of the Act does not apply.

(4) For the purposes of entitlement to—

- (a) income support, a social fund payment, housing benefit or council tax benefit under the Contributions and Benefits Act [or income-related employment and support allowance], as the case may be, a person who is entitled to or is receiving benefit by virtue of paragraph (1) or (2) of regulation 12 of the Persons from Abroad Regulations is a person to whom section 115 of the Act does not apply;
- (b) attendance allowance, disability living allowance, [carer’s allowance], severe disablement allowance, a social fund payment or child benefit under the

Contributions and Benefits Act, as the case may be, a person who is entitled to or is receiving benefit by virtue of paragraph (10) of regulation 12 is a person to whom section 115 of the Act does not apply;

- [(c) state pension credit under the State Pension Credit Act 2002, a person to whom sub-paragraph (a) would have applied but for the fact that they have attained the qualifying age for the purposes of state pension credit, is a person to whom section 115 of the Act does not apply].

(5) For the purposes of entitlement to income support by virtue of regulation 70 of the Income Support Regulations (urgent cases), to jobseeker's allowance by virtue of regulation 147 of the Jobseeker's Allowance Regulations (urgent cases)[, to employment and support allowance by virtue of regulation 162 of the Employment and Support Allowance Regulations (urgent cases)] or to a social fund payment under the Contributions and Benefits Act, as the case may be, a person to whom regulation 12(3) applies is a person to whom section 115 of the Act does not apply.

(6) For the purposes of entitlement to housing benefit, council tax benefit or a social fund payment under the Contributions and Benefits Act, as the case may be, a person to whom regulation 12(6) applies is a person to whom section 115 of the Act does not apply.

[(7) For the purposes of entitlement to state pension credit under the State Pension Credit Act 2002, a person to whom paragraph (5) would have applied but for the fact that they have attained the qualifying age for the purposes of state pension credit, is a person to whom section 115 of the Act does not apply.

(8) Where paragraph 1 of Part I of the Schedule to these Regulations applies in respect of entitlement to state pension credit, the period for which a claimant's state pension credit is to be calculated shall be any period, or the aggregate of any periods, not exceeding 42 days during any one period of leave to which paragraph 1 of Part I of the Schedule to these Regulations applies.]

Initial Commencement

Specified date: 3 April 2000: see reg 1(2).

Amendment

Para (1): words "income-related employment and support allowance," in square brackets inserted by SI 2008/1554, reg 69(1), (3)(a). Date in force: 27 October 2008: see SI 2008/1554, reg 1(2)(b).

Para (1): words "or state pension credit under the State Pension Credit Act 2002," in square brackets inserted by SI 2003/2274, reg 6(1), (2). Date in force: 6 October 2003: see SI 2003/2274, reg 1.

Para (2): words "carer's allowance" in square brackets substituted by SI 2002/2497, reg 3, Sch 2, paras 1, 2. Date in force: 1 April 2003: see SI 2002/2497, reg 1(b).

Para (2): words " , health in pregnancy grant" in square brackets inserted by SI 2008/3108, reg 8(1), (2). Date in force: 1 January 2009: see SI 2008/3108, reg 1(1).

Para (4): in sub-para (a) words "or income-related employment and support allowance" in square brackets inserted by SI 2008/1554, reg 69(1), (3)(b). Date in force: 27 October 2008: see SI 2008/1554, reg 1(2)(b).

Para (4): in sub-para (b) words "carer's allowance" in square brackets substituted by SI 2002/2497, reg 3, Sch 2, paras 1, 2. Date in force: 1 April 2003: see SI 2002/2497, reg 1(b).

Para (4): sub-para (c) inserted by SI 2003/2274, reg 6(1), (3). Date in force: 6 October 2003: see SI 2003/2274, reg 1.

Para (5): words from " , to employment and" to "Employment and Support Allowance Regulations (urgent cases)" in square brackets inserted by SI 2008/1554, reg 69(1), (3)(c). Date in force: 27 October 2008: see SI 2008/1554, reg 1(2)(b).

Paras (7), (8): inserted by SI 2003/2274, reg 6(1), (4). Date in force: 6 October 2003: see SI 2003/2274, reg 1.

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12 Transitional arrangements and savings

(1) ...

(2) ...

(3) Regulation 70 of the Income Support Regulations[, regulation 162 of the Employment and Support Allowance Regulations] and regulation 147 of the Jobseeker's Allowance Regulations, as the case may be, shall apply to a person who is an asylum seeker within the meaning of paragraph (4) who has not ceased to be an asylum seeker by virtue of paragraph (5).

(4) An asylum seeker within the meaning of this paragraph is a person who—

- (a) submits on his arrival (other than on his re-entry) in the United Kingdom from a country outside the Common Travel Area a claim for asylum on or before 2nd April 2000 to the Secretary of State that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed or required to leave, the United Kingdom and that claim is recorded by the Secretary of State as having been made before that date; or
- (b) on or before 2nd April 2000 becomes, while present in Great Britain, an asylum seeker when—
 - (i) the Secretary of State makes a declaration to the effect that the country of which he is a national is subject to such a fundamental change of circumstances that he would not normally order the return of a person to that country; and
 - (ii) he submits, within a period of three months from the date that declaration was made, a claim for asylum to the Secretary of State under the Convention relating to the Status of Refugees, and
 - (iii) his claim for asylum under that Convention is recorded by the Secretary of State as having been made; and
- (c) in the case of a claim for jobseeker's allowance, holds a work permit or has written authorisation from the Secretary of State permitting him to work in the United Kingdom.

(5) A person ceases to be an asylum seeker for the purposes of this paragraph when his claim for asylum is recorded by the Secretary of State as having been decided (other than on appeal) or abandoned.

(6) ...

(7) ...

(8) ...

(9) In paragraphs (4) and (7) "the Common Travel Area" means the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland collectively and "the Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 as extended by Article 2(1) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967.

(10) Where, before the coming into force of these Regulations, a person has claimed benefit to which he is entitled or is receiving benefit by virtue of regulation 12(3) of the Persons from Abroad Regulations or regulation 14B(g) of the Child Benefit (General) Regulations 1976, as the case may be, those provisions shall continue to have effect, for the purposes of entitlement to attendance allowance, disability living allowance, [carer's allowance], severe disablement allowance or child benefit, as the case may be, until such time as—

- (a) his claim for asylum (if any) is recorded by the Secretary of State as having been decided or abandoned; or

- (b) his entitlement to that benefit is revised or superseded under section 9 or 10 of the Social Security Act 1998, if earlier,

as if regulations 8, 9, 10 and 11 and paragraph (2) or paragraph (3), as the case may be, of regulation 13, had not been made.

(11) In the Persons from Abroad Regulations—

- (a) in paragraph (1) of regulation 12, after the words “shall continue to have effect” there shall be inserted the words “(both as regards him and as regards persons who are members of his family at the coming into force of these Regulations)”; and
- (b) notwithstanding the amendments and revocations in regulations 3, 6 and 7, regulations 12(1) and (2) of the Persons from Abroad Regulations shall continue to have effect as they had effect before those amendments and revocations came into force.

Initial Commencement

Specified date: 3 April 2000: see reg 1(2).

Amendment

Paras (1), (2): revoked by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 12(3). Date in force: 14 June 2007 (except in relation to a person who is notified on or before that date that he has been recognised as a refugee and granted asylum in the United Kingdom): see SI 2007/1602, art 2(1), (3), (4).

Para (3): words “, regulation 162 of the Employment and Support Allowance Regulations” in square brackets inserted by SI 2008/1554, reg 69(1), (4). Date in force: 27 October 2008: see SI 2008/1554, reg 1(2)(b).

Paras (6)–(8): revoked by SI 2006/217, regs 2, 3, Sch 1. Date in force: 6 March 2006: see SI 2006/217, reg 1(1).

Para (10): words “carer’s allowance” in square brackets substituted by SI 2002/2497, reg 3, Sch 2, paras 1, 2. Date in force: 1 April 2003: see SI 2002/2497, reg 1(b).

ASYLUM SUPPORT REGULATIONS 2000

2000 No 704

Made 6th March 2000

Laid before Parliament 13th March 2000

Coming into force 3rd April 2000

The Secretary of State, in exercise of the powers conferred on him by sections 94, 95, 97, 114, 166 and 167 of and Schedule 8 to the Immigration and Asylum Act 1999, hereby makes the following Regulations:

Initial application for support

4 Persons excluded from support

(1) The following circumstances are prescribed for the purposes of subsection (2) of section 95 of the Act as circumstances where a person who would otherwise fall within subsection (1) of that section is excluded from that subsection (and, accordingly, may not be provided with asylum support).

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(2) A person is so excluded if he is applying for asylum support for himself alone and he falls within paragraph (4) by virtue of any sub-paragraph of that paragraph.

(3) A person is so excluded if—

- (a) he is applying for asylum support for himself and other persons, or he is included in an application for asylum support made by a person other than himself;
- (b) he falls within paragraph (4) (by virtue of any sub-paragraph of that paragraph); and
- (c) each of the other persons to whom the application relates also falls within paragraph (4) (by virtue of any sub-paragraph of that paragraph).

(4) A person falls within this paragraph if at the time when the application is determined—

- (a) he is a person to whom interim support applies; or
- (b) he is a person to whom social security benefits apply; or
- (c) he has not made a claim for leave to enter or remain in the United Kingdom, or for variation of any such leave, which is being considered on the basis that he is an asylum-seeker or dependent on an asylum-seeker.

(5) For the purposes of paragraph (4), interim support applies to a person if—

- (a) at the time when the application is determined, he is a person to whom, under the interim Regulations, support under regulation 3 of those Regulations must be provided by a local authority;
- (b) sub-paragraph (a) does not apply, but would do so if the person had been determined by the local authority concerned to be an eligible person; or
- (c) sub-paragraph (a) does not apply, but would do so but for the fact that the person's support under those Regulations was (otherwise than by virtue of regulation 7(1)(d) of those Regulations) refused under regulation 7, or suspended or discontinued under regulation 8, of those Regulations;

and in this paragraph “local authority”, “local authority concerned” and “eligible person” have the same meanings as in the interim Regulations.

(6) For the purposes of paragraph (4), a person is a person to whom social security benefits apply if he is—

- (a) a person who by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 is not excluded by section 115(1) of the Act from entitlement to—
 - (i) income-based jobseeker's allowance under the Jobseekers Act 1995; ...
 - (ii) income support, housing benefit or council tax benefit under the Social Security Contributions and Benefits Act 1992; [or
 - (iii) income-related employment and support allowance payable under Part 1 of the Welfare Reform Act 2007;]
- (b) a person who, by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations (Northern Ireland) 2000 is not excluded by section 115(2) of the Act from entitlement to—
 - (i) income-based jobseeker's allowance under the Jobseekers (Northern Ireland) Order 1995; ...
 - (ii) income support or housing benefit under the Social Security Contributions and Benefits (Northern Ireland) Act 1992; [or
 - (iii) income-related employment and support allowance payable under Part 1 of the Welfare Reform Act (Northern Ireland) 2007.]

(7) A person is not to be regarded as falling within paragraph (2) or (3) if, when asylum support is sought for him, he is a dependant of a person who is already a supported person.

(8) The circumstances prescribed by paragraphs (2) and (3) are also prescribed for the purposes of section 95(2), as applied by section 98(3), of the Act as circumstances where a person who would otherwise fall within subsection (1) of section 98 is excluded from that subsection (and, accordingly, may not be provided with temporary support under section 98).

(9) For the purposes of paragraph (8), paragraphs (2) and (3) shall apply as if any reference to an application for asylum support were a reference to an application for support under section 98 of the Act.

Initial Commencement

Specified date: 3 April 2000: see reg 1.

Amendment

Para (6): in sub-para (a)(i) word omitted revoked by SI 2008/1879, reg 11(a). Date in force: 27 October 2008: see SI 2008/1879, reg 1(1).

Para (6): sub-para (a)(iii) and word “or” immediately preceding it inserted by SI 2008/1879, reg 11(b). Date in force: 27 October 2008: see SI 2008/1879, reg 1(1).

Para (6): in sub-para (b)(i) word omitted revoked by the Employment and Support Allowance (Consequential Provisions No 2) Regulations (Northern Ireland) 2008, SR 2008/412, reg 9(a). Date in force: 27 October 2008: see the Employment and Support Allowance (Consequential Provisions No 2) Regulations (Northern Ireland) 2008, SR 2008/412, reg 1.

Para (6): sub-para (b)(iii) and word “or” immediately preceding it inserted by the Employment and Support Allowance (Consequential Provisions No 2) Regulations (Northern Ireland) 2008, SR 2008/412, reg 9(b). Date in force: 27 October 2008: see the Employment and Support Allowance (Consequential Provisions No 2) Regulations (Northern Ireland) 2008, SR 2008/412, reg 1.

Provision of support

10 Kind and levels of support for essential living needs

(1) This regulation applies where the Secretary of State has decided that asylum support should be provided in respect of the essential living needs of a person.

[(2) As a general rule, asylum support in respect of the essential living needs of that person may be expected to be provided weekly in the form of [cash, equal to] the amount shown in the second column of the following Table opposite the entry in the first column which for the time being describes that person ...]

Qualifying couple	£66.13
Lone parent aged 18 or over	£42.16
Single person aged 25 or over	£42.16
Single person aged at least 18 but under 25	£33.39
Person aged at least 16 but under 18 (except a member of a qualifying couple)	£36.29
Person aged under 16	£48.30]

(3) In paragraph (1) and the provisions of paragraph (2) preceding the Table, “person” includes “couple”.

(4) In this regulation—

[(a) “qualifying couple” means a married couple, an unmarried couple, a civil partnership couple or a same-sex couple, at least one of whom is aged 18 or over and neither of whom is aged under 16;]

[(b) “lone parent” means a parent who is not a member of a married couple, an unmarried couple, a civil partnership couple or a same-sex couple;]

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- (c) “single person” means a person who is not a parent or a member of a qualifying couple; and
- (d) “parent” means a parent of a relevant child, that is to say a child who is aged under 18 and for whom asylum support is provided.

(5) Where the Secretary of State has decided that accommodation should be provided for a person (or couple) by way of asylum support, and the accommodation is provided in a form which also meets other essential living needs (such as bed and breakfast, or half or full board), the amounts shown in the Table in paragraph (2) shall be treated as reduced accordingly.

(6) ...

Initial Commencement

Specified date: 3 April 2000: see reg 1.

Amendment

Para (2): substituted by SI 2002/472, reg 4(1). Date in force: 8 April 2002: see SI 2002/472, reg 1.

Para (2): words “cash, equal to” in square brackets substituted by SI 2004/1313, reg 2(a). Date in force: 4 June 2004: see SI 2004/1313, reg 1.

Para (2): words omitted revoked by SI 2004/1313, reg 2(b). Date in force: 4 June 2004: see SI 2004/1313, reg 1.

Para (2): Table: substituted by SI 2008/760, reg 2. Date in force: 14 April 2008: see SI 2008/760, reg 1.

Para (4): sub-para (a) substituted by SI 2005/2114, art 2(13), Sch 13, Pt 1, para 2(1), (4)(a). Date in force: 5 December 2005: see SI 2005/2114, art 1.

Para (4): sub-para (b) substituted by SI 2005/2114, art 2(13), Sch 13, Pt 1, para 2(1), (4)(b). Date in force: 5 December 2005: see SI 2005/2114, art 1.

Para (6): revoked by SI 2002/472, reg 4(2). Date in force: 8 April 2002: see SI 2002/472, reg 1.

**PERSONS SUBJECT TO IMMIGRATION
CONTROL (HOUSING AUTHORITY
ACCOMMODATION AND HOMELESSNESS)
ORDER 2000**

2000 No 706

Made 7th March 2000

Laid before Parliament 13th March 2000

Coming into force 3rd April 2000

In exercise of the powers conferred on him by sections 118, 119 and 166(3) of the Immigration and Asylum Act 1999, the Secretary of State hereby makes the following Order:

2 Interpretation

In this Order—

“the 1971 Act” means the Immigration Act 1971;

“the 1985 Act” means the Housing Act 1985;

...

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“the 1999 Act” means the Immigration and Asylum Act 1999;

“asylum-seeker” means a person who is not under 18 and who made a claim for asylum which is recorded by the Secretary of State as having been made on or before 2nd April 2000 but which has not been determined;

“child in need” means a child—

- (a) who is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under Part III of the Children Act 1989 (local authority support for children and families);
- (b) whose health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
- (c) who is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed by regulations made under section 17 of the Children Act 1989 (provision of services for children in need, their families and others);

“claim for asylum” means a claim that it would be contrary to the United Kingdom’s obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom;

“Common Travel Area” means the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland collectively;

“designated course” means a course of any kind designated by regulations made by the Secretary of State for the purposes of paragraph 10 of Schedule 1 to the 1985 Act (student lettings which are not secure tenancies);

“development” means physical, intellectual, emotional, social or behavioural development;

“educational establishment” means a university or institution which provides further education or higher education (or both); and for the purposes of this definition “further education” has the same meaning as in section 2 of the Education Act 1996 (definition of further education) and “higher education” means education provided by means of a course of any description mentioned in Schedule 6 to the Education Reform Act 1988 (courses of higher education);

“family”, in relation to a child in need, includes any person who has parental responsibility for the child and any other person with whom he has been living;

“full-time course” means a course normally involving not less than 15 hours attendance a week in term time for the organised day-time study of a single subject or related subjects;

“health” means physical or mental health;

“the immigration rules” means the rules laid down as mentioned in section 3(2) of the 1971 Act (general provisions for regulation and control);

...
“the Refugee Convention” means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967;

“specified education institution” means—

- (a) a university or other institution within the higher education sector within the meaning of section 91(5) of the Further and Higher Education Act 1992 (interpretation of Education Acts), in respect of a university or other institution in England, or section 56(2) of the Further and Higher Education (Scotland) Act 1992 (interpretation of Part II), in respect of a university or other institution in Scotland;
- (b) an institution in England within the further education sector within the meaning of section 91(3) of the Further and Higher Education Act 1992;
- (c) a college of further education in Scotland which is under the management of an education authority or which is managed by a board of

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- management in terms of Part I of the Further and Higher Education (Scotland) Act 1992 (further education in Scotland);
- (d) a central institution in Scotland within the meaning of section 135(1) of the Education (Scotland) Act 1980 (interpretation);
 - (e) an institution in England which provides a course qualifying for funding under Part I of the Education Act 1994 (teaching training);
 - (f) a higher education institution in Northern Ireland within the meaning of Article 30(3) of the Education and Libraries (Northern Ireland) Order 1993 (funding by Department of higher education); or
 - (g) an institution of further education in Northern Ireland within the meaning of Article 3 of the Further Education (Northern Ireland) Order 1997 (definition of “further education”).

Initial Commencement

Specified date: 3 April 2000: see art 1(1).

Amendment

Definition “the 1995 Act” (omitted) revoked by SI 2008/1768, art 2(1), (2)(a). Date in force: 7 August 2008: see SI 2008/1768, art 1.

Definition “limited leave” (omitted) revoked by SI 2008/1768, art 2(1), (2)(b). Date in force: 7 August 2008: see SI 2008/1768, art 1.

Extent

This Order does not extend to Wales: see art 1(2).

3 Housing authority accommodation—England, Scotland and Northern Ireland

The following are classes of persons specified for the purposes of section 118(1) of the 1999 Act (housing authority accommodation) in respect of England, Scotland and Northern Ireland—

- (a) Class A—a person recorded by the Secretary of State as a refugee within the definition in Article 1 of the Refugee Convention;
- (b) Class B—a person—
 - [(i) who has leave to enter or remain in the United Kingdom granted outside the provisions of the immigration rules; and]
 - (ii) whose leave is not subject to a condition requiring him to maintain and accommodate himself, and any person who is dependent on him, without recourse to public funds;
- [(bb) Class BA—a person who has humanitarian protection granted under the immigration rules;]
- (c) Class C—a person who has current leave to enter or remain in the United Kingdom which is not subject to any limitation or condition and who is habitually resident in the Common Travel Area other than a person—
 - (i) who has been given leave to enter or remain in the United Kingdom upon an undertaking given by another person (his “sponsor”) in writing in pursuance of the immigration rules to be responsible for his maintenance and accommodation;
 - (ii) who has been resident in the United Kingdom for less than five years beginning on the date of entry or the date on which the undertaking was given in respect of him, whichever date is the later; and
 - (iii) whose sponsor or, where there is more than one sponsor, at least one of whose sponsors, is still alive;
- (d) Class D—a person who left the territory of Montserrat after 1st November 1995 because of the effect on that territory of a volcanic eruption;
- (e) ...

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- (f) Class F—a person who is attending a full-time course at a specified education institution in a case where the housing accommodation which is or may be provided to him—
 - (i) is let by a housing authority to that specified education institution for the purposes of enabling that institution to provide accommodation for students attending a full-time course at that institution; and
 - (ii) would otherwise be difficult for that housing authority to let on terms which, in the opinion of the housing authority, are satisfactory.

Initial Commencement

Specified date: 3 April 2000: see art 1(1).

Amendment

Para (b)(i) substituted by SI 2006/2521, art 2(1), (2)(a). Date in force: 9 October 2006: see SI 2006/2521, art 1.

Para (bb) inserted by SI 2006/2521, art 2(1), (2)(b). Date in force: 9 October 2006: see SI 2006/2521, art 1.

Para (e) revoked by SI 2008/1768, art 2(1), (3). Date in force: 7 August 2008: see SI 2008/1768, art 1; for transitional provisions see art 3(1) thereof.

7 Homelessness—Scotland and Northern Ireland

(1) The following are classes of persons specified for the purposes of section 119(1) of the 1999 Act (homelessness: Scotland and Northern Ireland) in respect of Scotland and Northern Ireland—

- [(a) the classes specified in article 3(a) to (d) (Class A, Class B, Class BA, Class C and Class D);]
- (b) Class Q—a person who is an asylum-seeker and who made a claim for asylum—
 - (i) which is recorded by the Secretary of State as having been made on his arrival (other than on re-entry) in the United Kingdom from a country outside the Common Travel Area; and
 - (ii) which has not been recorded by the Secretary of State as having been either decided (other than on appeal) or abandoned;
- (c) Class R—a person who is an asylum-seeker and—
 - (i) who made a relevant claim for asylum on or before 4th February 1996; and
 - (ii) who was, on 4th February 1996, entitled to benefit under regulation 7A of the Housing Benefit (General) Regulations 1987 (persons from abroad) or regulation 7A of the Housing Benefit (General) Regulations (Northern Ireland) 1987 (persons from abroad).

(2) In paragraph (1)(c)(i), a relevant claim for asylum is a claim for asylum which—

- (a) has not been recorded by the Secretary of State as having been either decided (other than on appeal) or abandoned; or
- (b) has been recorded as having been decided (other than on appeal) on or before 4th February 1996 and in respect of which an appeal is pending which—
 - (i) was pending on 5th February 1996; or
 - (ii) was made within the time limits specified in the rules of procedure made under section 22 of the 1971 Act (procedure).

Initial Commencement

Specified date: 3 April 2000: see art 1(1).

Amendment

Para (1): sub-para (a) substituted by SI 2008/1768, art 2(1), (4). Date in force: 7 August 2008: see SI 2008/1768, art 1; for transitional provisions see art 3(2) thereof.

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[8 Homelessness—Northern Ireland]

[The following is a class of person specified for the purposes of section 119(1) of the 1999 Act in respect of Northern Ireland—

Class T—a person who is an asylum-seeker and—

- (a) who was in Northern Ireland when the Secretary of State made a declaration to the effect that the country of which that person is a national is subject to such a fundamental change in circumstances that he would not normally order the return of a person to that country;
- (b) who made a claim for asylum which is recorded by the Secretary of State as having been made within a period of three months from the day on which that declaration was made; and
- (c) whose claim for asylum has not been recorded by the Secretary of State as having been either decided (other than on appeal) or abandoned.]

Initial Commencement

Specified date: 3 April 2000: see art 1(1).

Amendment

Substituted by SI 2008/1768, art 2(1), (5). Date in force: 7 August 2008: see SI 2008/1768, art 1; for transitional provisions see art 3(2) thereof.

[9 Homelessness—Scotland]

[The following is a class of person specified for the purposes of section 119(1) of the 1999 Act in respect of Scotland—

Class V—a person who is an asylum-seeker and—

- (a) who was in Great Britain when the Secretary of State made a declaration to the effect that the country of which that person is a national is subject to such a fundamental change in circumstances that he would not normally order the return of a person to that country;
- (b) who made a claim for asylum which is recorded by the Secretary of State as having been made within a period of three months from the day on which that declaration was made; and
- (c) whose claim for asylum has not been recorded by the Secretary of State as having been either decided (other than on appeal) or abandoned.]

Initial Commencement

Specified date: 3 April 2000: see art 1(1).

Amendment

Substituted by SI 2008/1768, art 2(1), (6). Date in force: 7 August 2008: see SI 2008/1768, art 1; for transitional provisions see art 3(2) thereof.

IMMIGRATION (DESIGNATION OF TRAVEL BANS) ORDER 2000

2000 No 2724

Made 3rd October 2000

Laid before Parliament 9th October 2000

Coming into force 10th October 2000

The Secretary of State, in exercise of the powers conferred upon him by section 8B(5) and (6) of the Immigration Act 1971, hereby makes the following Order:

[SCHEDULE DESIGNATED INSTRUMENTS]

[Article 2]

[PART 1

RESOLUTIONS OF THE SECURITY COUNCIL OF THE UNITED NATIONS]

[Resolution 1390 (2002) of 16 January 2002 (Al Qaida and the Taliban).

Resolution 1735 (2006) of 22 December 2006 (Al Qaida and the Taliban).

Resolution 1822 (2008) of 30 June 2008 (Al Qaida and the Taliban).

Resolution 1572 (2004) of 15 November 2004 (Côte d'Ivoire).

Resolution 1782 (2007) of 29 October 2007 (Côte d'Ivoire).

Resolution 1596 (2005) of 18 April 2005 (Democratic Republic of the Congo).

Resolution 1649 (2005) of 21 December 2005 (Democratic Republic of the Congo).

Resolution 1698 (2006) of 31 July 2006 (Democratic Republic of the Congo).

Resolution 1807(2008) of 31 March 2008 (Democratic Republic of the Congo).

Resolution 1718 (2006) of 14 October 2006 (Democratic Republic of North Korea).

Resolution 1737 (2006) of 23 December 2006 (Iran).

Resolution 1747 (2007) of 24 March 2007 (Iran).

Resolution 1803(2008) of 3 March 2008 (Iran).

Resolution 1521 (2003) of 22 December 2003 (Liberia).

Resolution 1792 (2007) of 19 December 2007 (Liberia).

Resolution 1171 (1998) of 5 June 1998 (Sierra Leone).

Resolution 1793 (2007) of 21 December 2007 (Sierra Leone).

Resolution 1591 (2005) of 29 March 2005 (Sudan).

Resolution 1672 (2006) of 25 April 2006 (Sudan).

Resolution 1636 (2005) of 31 October 2005 (Syria and the Lebanon).]

Amendment

Substituted by SI 2008/3052, art 2, Schedule. Date in force: 17 December 2008: see SI 2008/3052, art 1.

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[PART 2

INSTRUMENTS MADE BY THE COUNCIL OF THE EUROPEAN UNION]

[Common Position 2002/402/CFSP of 27 May 2002 (Al-Qaida, Usama bin Laden and the Taliban).

Common Position 2006/276/CFSP of 10 April 2006 (Belarus) as implemented by Council Decision 2006/718/CFSP of 23 October 2006 (Belarus) and as amended by Council Common Position 2008/844/CFSP of 10 November 2008 (Belarus).

Common Position 97/193/CFSP of 17 March 1997 (Bosnia-Herzegovina).

Common Position 2006/318/CFSP of 27 April 2006 (Burma) as amended by Common Position 2007/750/CFSP of 19 November 2007 (Burma/Myanmar) and as renewed and amended by Common Position 2008/349/CFSP of 29 April 2008 (Burma/Myanmar).

Common Position 2004/852/CFSP of 13 December 2004 (Côte d'Ivoire) as implemented by Council Decision 2006/483/CFSP of 11 July 2006 (Cote d'Ivoire) and as renewed by Common Position 2007/761/CFSP of 22 November 2007 (Cote d'Ivoire).

Common Position 2006/795/CFSP of 20 November 2006 (Democratic People's Republic of Korea).

Common Position 2008/369/CFSP of 14 May 2008 (Democratic Republic of Congo).

Common Position 2000/696/CFSP of 10 November 2000 (Federal Republic of Yugoslavia) as amended by Common Position 2001/155/CFSP of 26 February 2001 (Federal Republic of Yugoslavia).

Common Position 2004/133/CFSP of 10 February 2004 (Former Yugoslav Republic of Macedonia) as amended by Common Position 2008/104/CFSP of 8 February 2008 (Former Yugoslav Republic of Macedonia).

Common Position 2004/293/CFSP of 30 March 2004 (International Criminal Tribunal for the former Yugoslavia) as implemented by Council Decision 2008/732/CFSP of 15 September 2008 (International Criminal Tribunal for the former Yugoslavia) and as extended by Common Position 2008/223/CFSP of 11 March 2008 (International Criminal Tribunal for the former Yugoslavia).

Common Position 2007/140/CFSP of 27 February 2007 (Iran) as amended by Common Position 2008/652/CFSP of 7 August 2008 (Iran).

Common Position 2008/109/CFSP of 12 February 2008 (Liberia).

Common Position 2008/160/CFSP of 25 February 2008 (Moldovan Republic).

Common Position 98/409/CFSP of 29 June 1998 (Sierra Leone) as amended by Common Position 2008/81/CFSP of 28 January 2008 (Sierra Leone).

Common Position 2005/411/CFSP of 30 May 2005 (Sudan) as implemented by Common Position 2006/386/CFSP of 1 June 2006 (Sudan).

Common Position 2005/888/CFSP of 12 December 2005 (Syria and the Lebanon).

Common Position 2004/161/CFSP of 19 February 2004 (Zimbabwe) as updated by Council Decision 2007/455/CFSP of 25 June 2007 (Zimbabwe) and as renewed by Common Position 2008/135/CFSP of 18 February 2008 (Zimbabwe) and as implemented by Council Decision 2008/605/CFSP of 22 July 2008 (Zimbabwe) and as amended by Common Position 2008/632/CFSP of 31 July 2008 (Zimbabwe).]

Amendment

Substituted by SI 2008/3052, art 2, Schedule. Date in force: 17 December 2008: see SI 2008/3052, art 1.

RACE RELATIONS ACT 1976 (STATUTORY DUTIES) ORDER 2001

2001 No 3458

Made 23rd October 2001

Laid before Parliament 24th October 2001

Coming into force 3rd December 2001

The Secretary of State, in exercise of the powers conferred upon him by section 71(2) and (3) of the Race Relations Act 1976, after consultation with the National Assembly for Wales and with the consent of the Assembly, and after consultation with the Commission for Racial Equality, hereby makes the following Order:

SCHEDULE 1

BODIES AND OTHER PERSONS REQUIRED TO PUBLISH RACE EQUALITY SCHEMES

Article 2

The Higher Education Funding Council for England.

A body corporate established pursuant to an order under section 67 of the Local Government Act 1985 (transfer of functions to successors of residuary bodies, etc).

[A fire and rescue authority constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies.]

[A Strategic Health Authority established under section 8 of the National Health Service Act 1977.]

A Health Authority established under section 8 of the National Health Service Act 1977.

A housing action trust established under Part III of the Housing Act 1988.

A joint authority established under Part IV of the Local Government Act 1985 (fire services, civil defence and transport).

A joint authority established under section 21 of the Local Government Act 1992.

In England, a county council, a London borough council or a district council.

In Wales, a county council or a county borough council.

A local probation board established under section 4 of the Criminal Justice and Court Services Act 2000.

...

A Minister of the Crown or government department.

A National Health Service trust established under section 5 of the National Health Service and Community Care Act 1990.

A Passenger Transport Executive for a passenger transport area [in England and Wales] within the meaning of Part II of the Transport Act 1968.

A police authority established under section 3 of the Police Act 1996.

A primary care trust established under section 16A of the National Health Service Act 1977.

[A probation trust.]

Appendix 1 Legislation and materials

[A provider of probation services (other than the Secretary of State or a probation trust), in respect of its statutory functions and the carrying out by it of activities of a public nature in pursuance of arrangements made with it under section 3(2) of the Offender Management Act 2007.]

A regional development agency established under the Regional Development Agencies Act 1998 (other than the London Development Agency).

A special health authority established under section 11 of the National Health Service Act 1977.

An Assembly subsidiary as defined by section 99(4) of the Government of Wales Act 1998.

Any of the naval, military or air forces of the Crown.

The Audit Commission for Local Authorities and the National Health Service in England and Wales.

The British Broadcasting Corporation, in respect of its public functions.

The British Transport Police.

...

The Channel Four Television Corporation, in respect of its public functions.

A chief constable of a police force maintained under section 2 of the Police Act 1996.

The Commissioner of Police of the Metropolis.

The Commissioner of Police for the City of London.

The Children and Family Court Advisory and Support Service.

...

[The Commission for Equality and Human Rights.]

...

[The Homes and Communities Agency.]

...

...

The Health and Safety Executive.

The Higher Education Funding Council for Wales.

...

The Learning and Skills Council for England.

The Legal Services Commission.

...

The National Audit Office.

...

...

...

Sianel Pedwar Cymru (Welsh Fourth Channel Authority), in respect of its public functions.

The Strategic Rail Authority.

The Chief Constable for the Ministry of Defence Police appointed by the Secretary of State under section 1(3) of the Ministry of Defence Police Act 1987.

The Common Council of the City of London, in its capacity as a local authority or port health authority.

The Common Council of the City of London, in its capacity as a police authority.

The Council of the Isles of Scilly.

The Greater London Authority.

[The Regulator of Social Housing.]

The London Development Agency.

The London Fire and Emergency Planning Authority.

The Metropolitan Police Authority established under section 5B of the Police Act 1996.

The National Assembly for Wales.

The Scottish Parliamentary Corporate Body.

[The Serious Organised Crime Agency.]

The Sub-Treasurer of the Inner Temple or the Under-Treasurer of the Middle Temple, in his capacity as a local authority.

Transport for London.

Initial Commencement

Specified date: 3 December 2001: see art 1(1).

Amendment

Entry "A fire and rescue authority constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies." substituted for entry "A fire authority constituted by a combination scheme under section 5 or 6 of the Fire Services Act 1947." as originally enacted in relation to England by SI 2004/3125, art 4; a corresponding amendment has been made in relation to Wales by SI 2005/2929, art 62. Date in force (in relation to England): 31 December 2004: see SI 2004/3125, art 1(1). Date in force (in relation to Wales): 25 October 2005: see SI 2005/2929, art 1(1).

Entry relating to "A Strategic Health Authority" inserted by SI 2002/2469, reg 4, Sch 1, Pt 2, para 97. Date in force: 1 October 2002: see SI 2002/2469, reg 1.

Entry relating to "A magistrates' courts committee" (omitted) revoked by SI 2005/617, art 2, Schedule, para 193. Date in force: 1 April 2005: see SI 2005/617, art 1.

In entry relating to "A Passenger Transport Executive" words "in England and Wales" in square brackets inserted by SI 2003/3006, art 5(a)(i). Date in force: 31 December 2003: see SI 2003/3006, art 1(1).

Entry "A probation trust." inserted by SI 2008/912, art 3, Sch 2, para 4(1), (2). Date in force: 1 April 2008: see SI 2008/912, art 1.

Entry relating to "A provider of probation services" inserted by SI 2008/912, art 3, Sch 2, para 4(1), (2). Date in force: 1 April 2008: see SI 2008/912, art 1.

Entry relating to "The Broadcasting Standards Commission" (omitted) revoked by SI 2003/3006, art 5(a)(ii). Date in force: 31 December 2003: see SI 2003/3006, art 1(1).

Entry relating to "The Commission for Health Improvement." (omitted) revoked by SI 2004/664, art 2, Sch 1, para 6. Date in force: 1 April 2004: see SI 2004/664, art 1(1).

Entry "The Commission for Equality and Human Rights" substituted, for entry "The Commission for Racial Equality" as originally enacted, by SI 2007/2602, art 4(1), Schedule, para 5(a). Date in force: 1 October 2007: see SI 2007/2602, art 1(1).

Entry "The Disability Rights Commission" (omitted) revoked by SI 2007/2602, art 4(1), Schedule, para 5(b)(i). Date in force: 1 October 2007: see SI 2007/2602, art 1(1).

Entry "The Homes and Communities Agency." substituted, for entry "English Partnerships" as originally enacted, by SI 2008/2831, art 3, Sch 1, para 12. Date in force: 1 December 2008 (being the date on which the Housing and Regeneration Act 2008, s 5 came into force): see

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SI 2008/2831, art 1(2) and SI 2008/3068, arts 1(2), 2(1)(b); for transitional provisions and savings see SI 2008/2831, art 5, Sch 3, paras 1–3 and SI 2008/3068, arts 9, 10.

Entry “The Equal Opportunities Commission” (omitted) revoked by SI 2007/2602, art 4(1), Schedule, para 5(b)(ii). Date in force: 1 October 2007: see SI 2007/2602, art 1(1).

Entry “The Health and Safety Commission” (omitted) revoked by SI 2008/960, art 22, Sch 3. Date in force: 1 April 2008: see SI 2008/960, art 1; for transitional provisions see art 21, Sch 2 thereof.

Entry relating to “The Independent Television Commission” (omitted) revoked by SI 2003/3006, art 5(a)(ii). Date in force: 31 December 2003: see SI 2003/3006, art 1(1).

Entry relating to “The Local Government Commission for England” (omitted) revoked by SI 2003/3006, art 5(a)(ii). Date in force: 31 December 2003: see SI 2003/3006, art 1(1).

Entry “The National Council for Education and Training for Wales.” (omitted) revoked by SI 2005/3238, art 9(2), Sch 2, para 22(1). Date in force: 1 April 2006: see SI 2005/3238, art 1(1); for transitional provisions see art 7 thereof.

Entry relating to “The Police Complaints Authority” (omitted) revoked by SI 2003/3006, art 5(a)(ii). Date in force: 31 December 2003: see SI 2003/3006, art 1(1).

Entry relating to “The Radio Authority” (omitted) revoked by SI 2003/3006, art 5(a)(ii). Date in force: 31 December 2003: see SI 2003/3006, art 1(1).

Entry “The Regulator of Social Housing.” substituted, for entry “The Housing Corporation.” as originally enacted, by SI 2008/2831, art 4, Sch 2, para 5. Date in force: 1 December 2008 (being the date on which the Housing and Regeneration Act 2008, s 5 came into force): see SI 2008/2831, art 1(2) and SI 2008/3068, arts 1(2), 2(1)(b); for transitional provisions and savings see SI 2008/2831, art 5, Sch 3, paras 1–3 and SI 2008/3068, arts 9, 10.

Entry “The Serious Organised Crime Agency” substituted, for entries relating to “The Service Authority for the National Crime Squad” and “The Service Authority for the National Criminal Intelligence Authority” as originally enacted, by SI 2006/594, art 2, Schedule, para 27. Date in force: 1 April 2006: see SI 2006/594, art 1.

Entry relating to “The Welsh Development Agency” (omitted) revoked by SI 2005/3226, art 7(1)(b), Sch 2, Pt 1, para 5. Date in force: 1 April 2006: see SI 2005/3226, arts 1(2), 7(1)(b); for transitional provisions see art 3 thereof.

SCHEDULE 3

BODIES AND OTHER PERSONS EXCEPTED BY ARTICLE 5(5)(B)

Article 5

A parish meeting constituted under section 13 of the Local Government Act 1972.

A Parish Council in England.

A community council in Wales.

The Administration of Radioactive Substances Advisory Committee, otherwise than in respect of its Scottish functions within the meaning given by section L2 of Part II of Schedule 5 to the Scotland Act 1998.

The Advisory Committee on Hazardous Substances, otherwise than in respect of its Scottish functions within the meaning given by section L2 of Part II of Schedule 5 to the Scotland Act 1998.

The Advisory Committee on Pesticides, otherwise than in respect of its Scottish functions within the meaning given by section L2 of Part II of Schedule 5 to the Scotland Act 1998.

The Advisory Committee on Releases to the Environment, otherwise than in respect of its Scottish functions within the meaning given by section L2 of Part II of Schedule 5 to the Scotland Act 1998.

The Advisory Council on Public Records.

The Advisory Council on the Misuse of Drugs, otherwise than in respect of its Scottish functions within the meaning given by section L2 of Part II of Schedule 5 to the Scotland Act 1998.

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An Agricultural Dwelling House Advisory Committee, established under the Rent (Agriculture) Act 1976.

The Agricultural Wages Board for England and Wales.

An Agricultural Wages Committee.

...

The Animal Procedures Committee.

The Building Regulations Advisory Committee.

The Central Advisory Committee on War Pensions.

The Civil Justice Council.

The Civil Procedure Rule Committee.

The Commonwealth Scholarship Commission in the United Kingdom.

The Consumer Council for Postal Services [{"Postwatch"}].

The [Administrative Justice and Tribunals Council], otherwise than in respect of its Scottish functions within the meaning given by section L2 of Part II of Schedule 5 to the Scotland Act 1998.

The Crown Court Rule Committee.

The Disability Living Allowance Advisory Board.

The Disabled Persons Transport Advisory Committee, otherwise than in respect of its Scottish functions within the meaning given by section L2 of Part II of Schedule 5 to the Scotland Act 1998.

The Environment Agency Advisory Committee for Wales.

The Family Proceedings Rule Committee.

The Firearms Consultative Committee.

The Government Hospitality Advisory Committee for the Purchase of Wine.

The Hill Farming Advisory Sub-Committee for Wales.

...

The Honours Scrutiny Committee.

A Visiting Committee appointed under section 152 of the Immigration and Asylum Act 1999 for an immigration detention centre.

The Industrial Injuries Advisory Council.

The [Inland Waterways Advisory Council], otherwise than in respect of its Scottish functions within the meaning given by section L2 of Part II of Schedule 5 to the Scotland Act 1998.

The Insolvency Rules Committee.

The Joint Committee on Vaccination and Immunisation.

The Land Registration Rule Committee.

The Law Commission.

The Legal Services Consultative Panel.

The Local Government Boundary Commission for Wales.

The Low Pay Commission.

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The Magistrates' Courts Rule Committee.

The Overseas Service Pensions Scheme Advisory Board.

The Police Negotiating Board, otherwise than in respect of its Scottish functions within the meaning given by section L2 of Part II of Schedule 5 to the Scotland Act 1998.

...

A Regional Flood Defence Committee established under section 14 of the Environment Act 1995.

The School Teachers' Review Body.

The Sentencing Advisory Panel.

The Social Security Advisory Committee.

The Standing Dental Advisory Committee.

The Standing Medical Advisory Committee.

The Standing Nursing and Midwifery Advisory Committee.

The Standing Pharmaceutical Advisory Committee.

The Theatres Trust, otherwise than in respect of its Scottish functions within the meaning given by section L2 of Part II of Schedule 5 to the Scotland Act 1998.

The Treasure Valuation Committee.

The Unrelated Live Transplant Regulatory Authority, otherwise than in respect of its Scottish functions within the meaning given by section L2 of Part II of Schedule 5 to the Scotland Act 1998.

The Wales New Deal Advisory Task Force.

A War Pensions Committee.

The Welsh Committee for Professional Development of Pharmacy.

The Welsh Dental Committee.

The Welsh Industrial Development Advisory Board.

The Welsh Medical Committee.

The Welsh Nursing and Midwifery Committee.

The Welsh Optometric Committee.

The Welsh Pharmaceutical Committee.

The Welsh Scientific Advisory Committee.

The Wilton Park Academic Council.

Initial Commencement

Specified date: 3 December 2001: see art 1(1).

Amendment

Entry relating to "The Ancient Monuments Board for Wales." (omitted) revoked by SI 2006/64, art 3(2)(a). Date in force: 1 April 2006: see SI 2006/64, art 1(2).

In entry relating to "The Consumer Council for Postal Services" word ("Postwatch") in square brackets inserted by SI 2003/3006, art 5(b)(i). Date in force: 31 December 2003: see SI 2003/3006, art 1(1).

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In entry relating to “The Administrative Justice and Tribunals Council” (entry relating to “The Council on Tribunals” as originally enacted) words “Administrative Justice and Tribunals Council” in square brackets substituted by SI 2008/2683, art 6(1), Sch 1, para 175. Date in force: 3 November 2008: see SI 2008/2683, art 1.

Entry relating to “The Historic Buildings Council for Wales.” (omitted) revoked by SI 2006/63, art 3(2)(a). Date in force: 1 April 2006: see SI 2006/63, art 1(2).

In entry relating to “The Inland Waterways Advisory Council” words “Inland Waterways Advisory Council” in square brackets substituted by the Natural Environment and Rural Communities Act 2006, s 105(1), Sch 11, Pt 2, para 175(1)(b). Date in force: 1 April 2007: see SI 2007/816, art 2(b).

Entry relating to “The Quality Assurance Agency for Higher Education” (omitted) revoked by SI 2003/3006, art 5(b)(ii). Date in force: 31 December 2003: see SI 2003/3006, art 1(1).

Modification

Modified, in relation to the application of this Order to the Commission for Equality and Human Rights, by the Equality Act 2006 (Dissolution of Commissions and Consequential and Transitional Provisions) Order 2007, SI 2007/2602, arts 2, 4(1), Schedule, para 4 (as amended by SI 2007/3555, art 2(a)).

See Further

See further, the Nationality, Immigration and Asylum Act 2002, s 66(4) which provides that the reference to a detention centre is to be construed as a reference to a removal centre as defined in the Immigration and Asylum Act 1999, Pt VIII.

IMMIGRATION (NOTICES) REGULATIONS 2003

SI 2003/658

Made ...11th March 2003

Laid before Parliament ...11th March 2003

Coming into force ...1st April 2003

The Secretary of State, in exercise of the powers conferred on him by section 105 and 112(1) to (3) of the Nationality, Immigration and Asylum Act 2002, hereby makes the following Regulations:

2 Interpretation

In these Regulations—

“the 1971 Act” means the Immigration Act 1971;

“the 1997 Act” means the Special Immigration Appeals Commission Act 1997;

“the 1999 Act” means the Immigration and Asylum Act 1999;

“the 2002 Act” means the Nationality, Immigration and Asylum Act 2002;

“decision-maker” means—

- (a) the Secretary of State;
- (b) an immigration officer;
- (c) an entry clearance officer;

“EEA decision” means an immigration decision within the meaning of section 109(3) of the 2002 Act or a decision under Regulation 1251/70 which concerns a person’s—

- (a) removal from the United Kingdom;
- (b) entitlement to be admitted to the United Kingdom; ...

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- (c) entitlement to be issued with or to have removed, or not to have removed, a residence permit or residence document; [or]
- [(d) on or after 30th April 2006, entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, document certifying permanent residence or permanent residence card;]
- “entry clearance officer” means a person responsible for the grant or refusal of entry clearance;
- “immigration decision” has the same meaning as in section 82(2) [and (3A)] of the 2002 Act;
- “minor” means a person who is under 18 years of age;
- “notice of appeal” means a notice in the appropriate prescribed form in accordance with the rules for the time being in force under section 106(1) of the 2002 Act;
- “Procedure Rules” means rules made under section 106(1) of the 2002 Act;
- “representative” means a person who appears to the decision-maker—
 - (a) to be the representative of a person referred to in regulation 4(1) below; and
 - (b) not to be prohibited from acting as a representative by section 84 of the 1999 Act.

Initial Commencement

Specified date: 1 April 2003: see reg 1.

Amendments

In definition “EEA decision” in para (b) word omitted revoked by SI 2006/1003, reg 31(2), Sch 5, para 3(1), (2)(a). Date in force: 30 April 2006: see SI 2006/1003, reg 1.

In definition “EEA decision” in para (c) word “or” in square brackets inserted by SI 2006/1003, reg 31(2), Sch 5, para 3(1), (2)(b). Date in force: 30 April 2006: see SI 2006/1003, reg 1.

In definition “EEA decision” para (d) inserted by SI 2006/1003, reg 31(2), Sch 5, para 3(1), (2)(c). Date in force: 30 April 2006: see SI 2006/1003, reg 1.

In definition “immigration decision” words “and (3A)” in square brackets inserted by SI 2008/1819, reg 2(1), (2). Date in force: 1 August 2008: see SI 2008/1819, reg 1.

5 Contents of notice

[(1) A notice given under regulation 4(1)—

- (a) is to include or be accompanied by a statement of the reasons for the decision to which it relates; and
- (b) if it relates to an immigration decision specified in section 82(2)(a), (g), (h), [(ha),] (i), (ia)[, (j) or (3A)] of the 2002 Act—
 - (i) shall state the country or territory to which it is proposed to remove the person; or
 - (i) may, if it appears to the decision-maker that the person to whom the notice is to be given may be removable to more than one country or territory, state any such countries or territories.]

(2) A notice given under regulation 4(2) is to include or be accompanied by a statement of the reasons for the rejection of the claim for asylum.

[(2A) A notice given under regulation 4(2A) is to include or be accompanied by a statement of the reasons for the decision that the person is no longer a refugee.]

(3) Subject to paragraph (6), the notice given under regulation 4 shall also include, or be accompanied by, a statement which advises the person of—

- (a) his right of appeal and the statutory provision on which his right of appeal is based;
- (b) whether or not such an appeal may be brought while in the United Kingdom;
- (c) the grounds on which such an appeal may be brought; and

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- (d) the facilities available for advice and assistance in connection with such an appeal.
- (4) Subject to paragraph (6), the notice given under regulation 4 shall be accompanied by a notice of appeal which indicates the time limit for bringing the appeal, the address to which it should be sent or may be taken by hand and a fax number for service by fax.
- (5) Subject to paragraph (6), where the exercise of the right is restricted by an exception or limitation by virtue of a provision of Part 5 of the 2002 Act, the notice given under regulation 4 shall include or be accompanied by a statement which refers to the provision limiting or restricting the right of appeal.
- (6) The notice given under regulation 4 need not comply with paragraphs (3), (4) and (5) where a right of appeal may only be exercised on the grounds referred to in section 84(1)(b), (c) or (g) of the 2002 Act by virtue of the operation of section 88(4), [88A(3),] [89(2)], 90(4), 91(2), 98(4) or (5) of that Act.
- (7) Where notice is given under regulation 4 and paragraph (6) applies, if the person claims in relation to the immigration decision or the EEA decision that—
- (a) the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (discrimination by public authorities);
 - (b) the decision is unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to the Human Rights Convention) as being incompatible with the person's Convention rights; or
 - (c) removal of the person from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the person's Convention rights,
- the decision-maker must as soon as practicable re-serve the notice of decision under regulation 4 and paragraph (6) of this regulation shall not apply.
- (8) Where a notice is re-served under paragraph (7), the time limit for appeal under the Procedure Rules shall be calculated as if the notice of decision had been served on the date on which it was re-served.

Initial Commencement

Specified date: 1 April 2003: see reg 1.

Amendments

- Para (1): substituted by SI 2006/2168, regs 2, 4. Date in force: 31 August 2006: see SI 2006/2168, reg 1.
- Para (1): in sub-para (b) reference to "(ha)," in square brackets inserted by SI 2008/684, reg 2(1). Date in force: 1 April 2008: see SI 2008/684, reg 1.
- Para (1): in sub-para (b) words ", (j) or (3A)" in square brackets substituted by SI 2008/1819, reg 2(1), (3). Date in force: 1 August 2008: see SI 2008/1819, reg 1.
- Para (2A): inserted by SI 2007/3187, reg 6. Date in force: 1 December 2007: see SI 2007/3187, reg 1.
- Para (6): reference to "88A(3)," in square brackets inserted by SI 2008/684, reg 2(2). Date in force: 1 April 2008: see SI 2008/684, reg 1.
- Para (6): reference to "89(2)" in square brackets substituted by SI 2008/684, reg 2(2). Date in force: 1 April 2008: see SI 2008/684, reg 1.

7 Service of notice

- (1) A notice required to be given under regulation 4 may be—
- (a) given by hand;
 - (b) sent by fax;

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- (c) sent by postal service in which delivery or receipt is recorded to:-
 - (i) an address provided for correspondence by the person or his representative; or
 - (ii) where no address for correspondence has been provided by the person, the last-known or usual place of abode or place of business of the person or his representative[;]
 - [(c) sent electronically;
 - (d) sent by document exchange to a document exchange number or address;
 - (e) sent by courier; or
 - (f) collected by the person who is the subject of the decision or their representative].
- (2) Where—
- (a) a person's whereabouts are not known; and
 - (b)
 - (i) no address has been provided for correspondence and the decision-maker does not know the last-known or usual place of abode or place of business of the person; or
 - (ii) the address provided to the decision-maker is defective, false or no longer in use by the person; and
 - (c) no representative appears to be acting for the person,
- the notice shall be deemed to have been given when the decision-maker enters a record of the above circumstances and places the signed notice on the relevant file.
- (3) Where a notice has been given in accordance with paragraph (2) and then subsequently the person is located, he shall be given a copy of the notice and details of when and how it was given as soon as is practicable.
- (4) Where a notice is sent by post in accordance with paragraph (1)(c) it shall be deemed to have been served, unless the contrary is proved,—
- (a) on the second day after it was posted if it is sent to a place within the United Kingdom;
 - (b) on the twenty-eighth day after it was posted if it is sent to a place outside the United Kingdom.
- (5) For the purposes of paragraph (4) the period is to be calculated—
- (a) excluding the day on which the notice is posted; and
 - (b) in the case of paragraph (4)(a), excluding any day which is not a business day.
- (6) In this regulation, “business day” means any day other than Saturday or Sunday, a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom to which the notice is sent, Christmas Day or Good Friday.
- (7) A notice given under regulation 4 may, in the case of a minor who does not have a representative, be given to the parent, guardian or another adult who for the time being takes responsibility for the child.

Initial Commencement

Specified date: 1 April 2003: see reg 1.

Amendment

Para (1): in first sub-para (c)(ii) semi-colon inserted by virtue of SI 2008/684, reg 2(3)(a). Date in force: 1 April 2008: see SI 2008/684, reg 1.

Para (1): second sub-para (c) and sub-paras (d)–(f) inserted by SI 2008/684, reg 2(3)(b). Date in force: 1 April 2008: see SI 2008/684, reg 1.

IMMIGRATION (PASSENGER TRANSIT VISA) ORDER 2003

2003 No 1185

Made 30th April 2003

Laid before Parliament 1st May 2003

Coming into force 2nd May 2003

In exercise of the powers conferred upon him by section 41 of the Immigration and Asylum Act 1999 the Secretary of State hereby makes the following Order:

2

(1) Subject to paragraph (4), in this Order a “transit passenger” means a person to whom [paragraph (2), (3) or (3A)] applies and who on arrival in the United Kingdom passes through to another country or territory without entering the United Kingdom.

(2) This paragraph applies to a person who is a citizen or national of a country or territory listed in Schedule 1 to this Order.

(3) This paragraph applies to a person holding a travel document issued by:

- (a) the purported “Turkish Republic of Northern Cyprus”;
- (b) the former Socialist Republic of Yugoslavia;
- (c) the former Federal Republic of Yugoslavia; or
- (d) the former Zaire.

[(3A) This paragraph applies to a person who holds a valid passport issued by the Republic of South Africa, and who has not previously entered the United Kingdom lawfully using that passport.]

(4) A person to whom [paragraph (2), (3) or (3A)] applies will not be a transit passenger if he:

- (a) has the right of abode in the United Kingdom under the Immigration Act 1971;
- (b) is a national of an EEA State; or
- (c) in the case of a national or citizen of the People’s Republic of China, holds a passport issued by either the Hong Kong Special Administrative Region or the Macao Special Administrative Region.

(5) In [this Order] “EEA State” means a country which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993.

Initial Commencement

Specified date: 2 May 2003: see art 1.

Amendment

Para (1): words “paragraph (2), (3) or (3A)” in square brackets substituted by SI 2009/198, art 2(1), (2)(a). Date in force: 3 March 2009: see SI 2009/198, art 1.

Para (3A): inserted by SI 2009/198, art 2(1), (2)(b). Date in force: 3 March 2009: see SI 2009/198, art 1.

Para (4): words “paragraph (2), (3) or (3A)” in square brackets substituted by SI 2009/198, art 2(1), (2)(a). Date in force: 3 March 2009: see SI 2009/198, art 1.

Para (5): words “this Order” in square brackets substituted by SI 2003/2628, art 2(1), (2). Date in force: 16 October 2003: see SI 2003/2628, art 1.

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[SCHEDULE 1

COUNTRIES OR TERRITORIES WHOSE NATIONALS OR CITIZENS NEED TRANSIT VISAS]

[Article 2]

[Afghanistan

Albania

Algeria

Angola

Bangladesh

Belarus

Burma

Burundi

Cameroon

Colombia

[Congo]

Democratic Republic of the Congo

Ecuador

Eritrea

Ethiopia

Former Yugoslav Republic of Macedonia

Gambia

Ghana

[Guinea

Guinea-Bissau]

India

Iran

Iraq

Ivory Coast

[Jamaica]

[Kenya]

Lebanon

Liberia

[Malawi]

Moldova

[Mongolia]

Nepal

Nigeria

Pakistan

Palestinian Territories

People's Republic of China

Rwanda

Senegal

Serbia and Montenegro

Sierra Leone

Somalia

Sri Lanka

Sudan

[Tanzania]

Turkey

Uganda

Vietnam

Zimbabwe]

Amendment

Substituted by SI 2003/2628, art 2(1), (5), Schedule. Date in force: 16 October 2003: see SI 2003/2628, art 1.

Entry "Congo" inserted by SI 2005/492, art 2(1), (3)(a). Date in force: 9 March 2005: see SI 2005/492, art 1.

Entries "Guinea" and "Guinea-Bissau" inserted by SI 2005/492, art 2(1), (3)(b). Date in force: 9 March 2005: see SI 2005/492, art 1.

Entry "Jamaica" inserted by SI 2009/198, art 2(1), (3). Date in force: 3 March 2009: see SI 2009/198, art 1.

Entry "Kenya" inserted by SI 2004/1304, art 2(1), (3)(a). Date in force: 13 May 2004: see SI 2004/1304, art 1.

Entry "Malawi" inserted by SI 2006/493, art 2. Date in force: 2 March 2006: see SI 2006/493, art 1.

Entry "Mongolia" inserted by SI 2005/492, art 2(1), (3)(c). Date in force: 9 March 2005: see SI 2005/492, art 1.

Entry "Tanzania" inserted by SI 2004/1304, art 2(1), (3)(b). Date in force: 13 May 2004: see SI 2004/1304, art 1.

CONSULAR FEES ORDER 2007

2007 No 649

Amendment

Revoked by SI 2008/676, art 4, Sch 2. Date in force: 1 April 2008: see SI 2008/676, art 1.

IMMIGRATION AND NATIONALITY (COST RECOVERY FEES) REGULATIONS 2007

2007 No 936

Made 19th March 2007

Laid before Parliament 22nd March 2007

Coming into force 2nd April 2007

The Secretary of State, in exercise of the powers conferred on him by sections 51(3) and 52(3) of the Immigration, Asylum and Nationality Act 2006, and with the consent of the Treasury, makes the following Regulations:

2

In these Regulations—

“application for naturalisation” means an application for naturalisation as a:

- (a) British citizen under section 6(1) or (2) of the 1981 Act, or
- (b) British overseas territories citizen under section 18(1) or (2) of the 1981 Act;

“application for registration” means an application for registration as a:

- (a) British citizen under section 1(3) or (4), 3(1), (2) or (5), 4A, 4B, 4C, 10(1) or (2), or 13(1) or (3) of, or paragraph 3, 4 or 5 of Schedule 2 to, the 1981 Act, or section 1 of the British Nationality (Hong Kong) Act 1997,
- (b) British overseas territories citizen under sections 24 and 13(1), or 15(3) or (4), 17(1), (2) or (5), or 22(1) or (2) of, or paragraph 3, 4, or 5 of Schedule 2 to, the 1981 Act,
- (c) British overseas citizen under section 27(1) of, or paragraph 4 or 5 of Schedule 2 to, the 1981 Act, or
- (d) British subject under section 32 of or paragraph 4 of Schedule 2 to, that Act;

“assistance” means assistance, accommodation or maintenance provided under—

- (a) section 17, 20 or 23 of the Children Act 1989,
- (b) section 22, 25 or 26 of the Children (Scotland) Act 1995, or
- (c) article 18, 21 or 27 of the Children (Northern Ireland) Order 1995;

[“certificate of sponsorship” means an authorisation issued by the Secretary of State to a sponsor in respect of one or more applications, or potential applications, for leave to remain or enter the United Kingdom under the immigration rules;]

[“charity” means an English charity, a Scottish charity or a Northern Ireland charity;]

“child” means a person under the age of eighteen;

“claim for asylum” has the same meaning given in section 94(1) of the Immigration and Asylum Act 1999 and a claim for asylum is to be taken to be determined—

- (a) on the day on which the Secretary of State notifies the claimant of his decision on the claim,
- (b) if the claimant has appealed against the Secretary of State’s decision, on the day on which the appeal is disposed of, or
- (c) if the claimant has brought an in-country appeal against an immigration decision under section 82 of the Nationality, Immigration and Asylum Act 2002, or section 2 of the Special Immigration Appeals Commission Act 1997, on the day on which the appeal is disposed of;

“Convention travel document” means a travel document issued in accordance with Article 28 of the Refugee Convention (travel documents) or Article 28 of the Stateless Persons Convention (travel documents);

“dependant” in respect of a person means—

- (a) the spouse, civil partner, unmarried or same-sex partner; or
- (b) a child,

of that person;

“document of identity” means a travel document issued in the United Kingdom to a person who is not a British citizen which enables the holder to make one journey out of the United Kingdom;

[“English charity” means—

- (a) subject to paragraph (b), a charity as defined in section 1 of the Charities Act 2006;
- (b) prior to the commencement of section 1 of the Charities Act 2006, a charity within the meaning of section 96 of the Charities Act 1993;]

“European Community Association Agreement” means any of the following—

- (a) the Agreement establishing an Association between the European Community and Turkey, signed at Ankara on 12th September 1963,
- (b) the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, signed at Brussels on 8th March 1993, or
- (c) the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Romania, of the other part, signed at Brussels on 1st February 1993;

“immigration rules” means rules made under section 3(2) of the Immigration Act 1971;

“leave to remain” includes variation of leave to enter, or remain;

[“Northern Ireland charity” means a charity within the meaning of section 35 of the Charities Act (Northern Ireland) 1964;]

[“Scottish charity” means a body entered in the Scottish Charity Register;]

[“small sponsor” means a sponsor that is either—

- (a) subject to paragraph (b)—
 - (i) a company that qualifies as small in accordance with sections 382 and 383 of the Companies Act 2006; or
 - (ii) in the case of a person who is not a company for the purposes of sections 382 and 383 of the Companies Act 2006 and therefore does not qualify as small in accordance with those sections, a person who employs no more than 50 employees;
- (b) prior to the commencement of sections 382 and 383 of the Companies Act 2006—
 - (i) a company that qualifies as small or medium sized for the purposes of section 247 of the Companies Act 1985; or
 - (ii) in the case of a person who is not a company for the purposes of section 247 of the Companies Act 1985 and therefore does not

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qualify as small or medium-sized in accordance with that section, a person who employs no more than 50 employees; or

(c) a charity;]

[“sponsor” means a person who is granted a sponsorship licence;]

[“sponsorship licence” means a licence granted by the Secretary of State to a person who, by virtue of such grant, is licensed as a sponsor;]

“the former nationality Acts” has the same meaning as provided in section 50(1) of the 1981 Act;

“the Refugee Convention” means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and the Protocol to the Convention;

“the Stateless Persons Convention” means the Convention relating to the Status of Stateless Persons done at New York on 28th September 1954;

“the 1981 Act” means the British Nationality Act 1981;

“the 1997 Act” means the British Nationality (Hong Kong) Act 1997;

“the 2007 Order” means the Immigration and Nationality (Fees) Order 2007; ...

[“Tier 2 migrant” means a migrant who makes an application of a kind identified in the immigration rules as requiring to be considered under “Tier 2” of the immigration rules’ “Points Based System”;

“Tier 4 migrant” means a migrant who makes an application of a kind identified in the immigration rules as requiring to be considered under “Tier 4” of the immigration rules’ “Points Based System”;

“Tier 5 migrant” means a migrant who makes an application of a kind identified in the immigration rules as requiring to be considered under “Tier 5” of the immigration rules’ “Points Based System”;

“Tier 5 (Temporary Worker) migrant” means a migrant who makes an application of a kind identified in the immigration rules as requiring to be considered under the category “Tier 5 (Temporary Worker)” of the immigration rules’ “Points Based System”; and]

“unmarried or same-sex partner” of a person means a person who is living with that other person in a relationship akin to marriage which has subsisted for two years or more.

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendments

Definition “certificate of sponsorship” inserted by SI 2008/1337, reg 2(1), (2)(a). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

Definition “charity” inserted by SI 2008/218, reg 2(1), (2)(a). Date in force: 29 February 2008: see SI 2008/218, reg 1(2).

Definition “English charity” inserted by SI 2008/218, reg 2(1), (2)(b). Date in force: 29 February 2008: see SI 2008/218, reg 1(2).

Definition “Northern Ireland charity” inserted by SI 2008/218, reg 2(1), (2)(c). Date in force: 29 February 2008: see SI 2008/218, reg 1(2).

Definition “Scottish charity” inserted by SI 2008/218, reg 2(1), (2)(c). Date in force: 29 February 2008: see SI 2008/218, reg 1(2).

Definition “small sponsor” inserted by SI 2008/218, reg 2(1), (2)(c). Date in force: 29 February 2008: see SI 2008/218, reg 1(2).

Definition “sponsor” inserted by SI 2008/218, reg 2(1), (2)(c). Date in force: 29 February 2008: see SI 2008/218, reg 1(2).

Definition “sponsorship licence” inserted by SI 2008/218, reg 2(1), (2)(c). Date in force: 29 February 2008: see SI 2008/218, reg 1(2).

In definition “the 2007 Order” word omitted revoked by SI 2008/1337, reg 2(1), (2)(b). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

Definitions “Tier 2 migrant”, “Tier 4 migrant”, “Tier 5 migrant” and “Tier 5 (Temporary Worker) migrant” inserted by SI 2008/1337, reg 2(1), (2)(b). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

3 Fees for leave to remain applications

(1) Subject to regulations 5, 6, 7, 8, 9 and 10, in the case of an application to which article 3(2)(a) or (b) of the 2007 Order applies, where the application is for limited leave to remain in the United Kingdom, other than an application referred to in paragraph (2) or regulation 4, the fee is—

- (a) ...
- (b) £395 for an application made by post.

[(2) The fee referred to in paragraph (1) does not apply to applications for limited leave to remain in the United Kingdom—

- (a) for work permit employment;
- (b) for the purposes of employment under the Sectors-Based Scheme;
- (c) for Home Office approved training;
- (d) as a seasonal agricultural worker;
- (e) of a kind identified as requiring to be considered under a “Points Based System”;
- (f) as a retired person of independent means; or
- (g) as a sole representative,

under the immigration rules.]

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

Para (1): sub-para (a) revoked by SI 2008/218, reg 2(1), (3). Date in force: 29 February 2008: see SI 2008/218, reg 1(2).

Para (2): substituted by SI 2008/2790, reg 3(1), (2). Date in force: 27 November 2008: see SI 2008/2790, reg 2(1).

4

(1) Subject to regulations 6, 7, 8, 9 and 10, in the case of an application to which article 3(2)(a) or (b) of the 2007 Order applies, where the application is for limited leave to remain in the United Kingdom—

- (a) as a student;
- (b) to re-sit an examination;
- (c) to write up a thesis;
- (d) as a student union sabbatical officer; ...
- (e) as a prospective student[; or
- (f) as a Tier 4 migrant],

under the immigration rules, the fee is that specified in paragraph (2).

(2) The fee is—

- (a) £500 for an application made by a person at a Public Enquiry Office of the Border and Immigration Agency of the Home Office [where applicable]; or
- (b) £295 for an application made by post.

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

Para (1): in sub-para (d) word omitted revoked by SI 2008/2790, reg 3(1), (3)(a)(i). Date in force: 1 February 2009: see SI 2008/2790, reg 2(2).

Para (1): sub-para (f) and word “; or” immediately preceding it inserted by SI 2008/2790, reg 3(1), (3)(a)(ii). Date in force: 1 February 2009: see SI 2008/2790, reg 2(2).

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Para (2): in sub-para (a) words “where applicable” in square brackets inserted by SI 2008/2790, reg 3(1), (3)(b). Date in force: 1 February 2009: see SI 2008/2790, reg 2(2).

4A

[(1) In the case of an application to which article 3(2)(a) or (b) of the 2007 Order applies, where the application is for limited leave to remain in the United Kingdom as a Tier 5 migrant, the fee is £100.

(2) This regulation is subject to regulations 6, 7, 8, 8A, 9 and 10.]

Amendment

Inserted by SI 2008/1337, reg 2(1), (4). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

6

No fee is payable in respect of an application referred to in regulation 3[, 4 or 4A] if the application is made in respect of a person who, at the time of making the application, is a child who is being provided with assistance by a local authority (or, in Northern Ireland, an authority, which has the same meaning given in article 2(2) of the Children (Northern Ireland) Order 1995).

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

Words “, 4 or 4A” in square brackets substituted by SI 2008/1337, reg 2(1), (5). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

7

No fee is payable in respect of an application referred to in regulation 3[, 4 or 4A] if the application is made in respect of a person seeking variation of leave to enter or remain in the United Kingdom for a period of up to 6 months where the application is made to an immigration officer on arrival at a port of entry in the United Kingdom.

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

Words “, 4 or 4A” in square brackets substituted by SI 2008/1337, reg 2(1), (6). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

8

No fee is payable in respect of an application referred to in regulation 3[, 4 or 4A], if it is made under the terms of a European Community Association Agreement.

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

Words “, 4 or 4A” in square brackets substituted by SI 2008/1337, reg 2(1), (7). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

8A

[No fee is payable in respect of an application referred to in regulation 4A insofar as the application is—

- (i) for leave to remain as a Tier 5 (Temporary Worker) migrant; and

Appendix 1 Legislation and materials

- (ii) in respect of a person who is a national of a state which has ratified the Council of Europe Social Charter or the Council of Europe Revised Social Charter.]

Amendment

Inserted by SI 2008/1337, reg 2(1), (8). Date in force: 30 June 2008; see SI 2008/1337, reg 1.

10

(1) If the conditions specified in paragraph (2) are met, a single fee is payable in connection with the applications made.

(2) The conditions are—

- (a) an application referred to in regulation 3[, 4 or 4A] is made by an applicant (A); and
- (b) at the same time A makes a similar application on behalf of one or more of his dependants, in circumstances where such persons are applying as dependants of A.

(3) The fee payable shall be the fee specified for the application in respect of A.

Initial Commencement

Specified date: 2 April 2007; see reg 1.

Amendment

Para (2): in sub-para (a) words “, 4 or 4A” in square brackets substituted by SI 2008/1337, reg 2(1), (9). Date in force: 30 June 2008; see SI 2008/1337, reg 1.

[10A Fees for entry clearance]

[(1) In the case of an application to which article 3(2)(aa) of the 2007 Order applies,

- (a) subject to sub-paragraph (b), where the application is for entry clearance as a visitor under the immigration rules for a period of—

- (i) twelve months or less in the case of an academic visitor, or
- (ii) six months or less in the case of a visitor other than an academic visitor,

the fee is £65;

- (b) the fee referred to at sub-paragraph (a) will be reduced to £45 where the Secretary of State decides that the application is one to which the operation of a scheme for such a reduced fee applies;

- (c) where the application is for entry clearance as a Tier 4 migrant, the fee is £99;

- (d) subject to sub-paragraph (e), where the application is for entry clearance as a Tier 5 migrant, the fee is £99;

- (e) where the application is for entry clearance as a Tier 5 (Temporary Worker) migrant and is in respect of a person who is a national of a state that has ratified the Council of Europe Social Charter, the fee is £90;

- (f) where the application is for entry clearance as a student under the immigration rules, the fee is £99;

- (g) where the application is for entry clearance for passing through the United Kingdom, the fee is £45.

(2) This regulation is subject to regulations 10B and 10C.]

Amendment

Substituted (for this reg as inserted by SI 2008/218, reg 2(1), (4)) by SI 2008/2790, reg 3(1), (4). Date in force (for certain purposes): 27 November 2008; see SI 2008/2790, reg 2(1). Date in force (for remaining purposes): 1 February 2009; see SI 2008/2790, reg 2(2).

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[10B Exceptions and waivers in respect of fees for entry clearance applications]

[No fee is payable in relation to an application referred to in regulation 10A where—

- (a) it is in connection with the official duty of any official of Her Majesty's Government;
- (b) it is for the purpose of family reunion under Part 11 of the immigration rules; ...[or]
- (c) the Secretary of State determines that the fee should be waived[...
- (d) ...]

Amendment

Inserted by SI 2008/218, reg 2(1), (4). Date in force: 1 April 2008: see SI 2008/218, reg 1(3).

In para (b) word omitted revoked by SI 2008/1337, reg 2(1), (11)(a). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

In para (b) word “or” in square brackets inserted by SI 2008/2790, reg 3(1), (5)(a). Date in force: 27 November 2008: see SI 2008/2790, reg 2(1).

Para (d) and word omitted immediately preceding it inserted by SI 2008/1337, reg 2(1), (11)(b). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

Para (d) and word omitted immediately preceding it revoked by SI 2008/2790, reg 3(1), (5)(b). Date in force: 27 November 2008: see SI 2008/2790, reg 2(1).

14

...

Amendment

Revoked by SI 2008/1337, reg 2(1), (12). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

[15A Fee for an application for a document recording biometric information]

[(1) Subject to paragraphs (2) and (3), in the case of an application to which article 3(2)(o) of the 2007 Order applies, namely an application for a document recording biometric information within the meaning of section 5 of the UK Borders Act 2007, where the application is required by regulations made under section 5 of the UK Borders Act 2007, the fee is £30.

(2) No fee is payable in respect of an application referred to in paragraph (1) which is required under the Immigration (Biometric Registration) (Pilot) Regulations 2008.

(3) No fee is payable in respect of an application referred to in paragraph (1) where the application is made in conjunction with an application for leave to remain in the United Kingdom.]

Amendment

Substituted, together with regs 15B–15E, for this reg as inserted by SI 2008/218, reg 2(1), (7), by SI 2008/1337, reg 2(1), (13). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

[15B Fees for sponsorship licences]

[(1) In the case of an application to which article 3(2)(p) of the 2007 Order applies, where such application is in respect of a person who, if granted a sponsorship licence, would be a small sponsor and the application is for a sponsorship licence in respect of Tier 2 migrants, the fee is £300.]

Amendment

Substituted, together with regs 15A, 15C–15E, for reg 15A as inserted by SI 2008/218, reg 2(1), (7), by SI 2008/1337, reg 2(1), (13). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

[15C]

[(1) Subject to regulation 15D, in the case of an application to which article 3(2)(p) of the 2007 Order applies, where the application is—

- (a) for a sponsorship licence in respect of Tier 4 migrants;
- (b) for a sponsorship licence in respect of Tier 5 migrants;
- (c) for a sponsorship licence in respect of Tier 4 migrants and Tier 5 migrants;
- (d) in respect of a person who, if granted a sponsorship licence, would be a small sponsor and is for—
 - (i) a sponsorship licence in respect of Tier 2 migrants and Tier 4 migrants;
 - (ii) a sponsorship licence in respect of Tier 2 migrants and Tier 5 migrants;or
- (iii) a sponsorship licence in respect of Tier 2 migrants, Tier 4 migrants, and Tier 5 migrants,

the fee is £400.]

Amendment

Substituted, together with regs 15A, 15B, 15D, 15E, for reg 15A as inserted by SI 2008/218, reg 2(1), (7), by SI 2008/1337, reg 2(1), (13). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

[15D]

[(1) In the case of an application to which article 3(2)(p) of the 2007 Order applies, where such application the application is for a licence referred to in sub-paragraphs (a) to (c) of regulation 15C and is in respect of a person who—

- (a) holds a valid sponsorship licence in respect of Tier 2 migrants; and
- (b) is a small sponsor,

the fee is £100.]

Amendment

Substituted, together with regs 15A–15C, 15E for reg 15A as inserted by SI 2008/218, reg 2(1), (7), by SI 2008/1337, reg 2(1), (13). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

[15E Fee for the process of issuing a certificate of sponsorship]

[(1) Subject to paragraph (2), in the case of a process to which article 5 of the 2007 Order applies, the fee shall be £10 where the process is the issuing of a certificate of sponsorship in respect of an application or applications or a potential application or applications for leave to remain or enter the United Kingdom as a Tier 5 migrant.

(2) No fee is payable in respect of the process for which a fee is specified in paragraph (1) where the certificate is issued in respect of an application or applications or a potential application or applications for leave to remain or enter the United Kingdom as a Tier 5 (Temporary Worker) made by a person who is a national of a state which has ratified the Council of Europe Social Charter or the Council of Europe Revised Social Charter.]

Amendment

Substituted, together with regs 15A–15D, for reg 15A as inserted by SI 2008/218, reg 2(1), (7), by SI 2008/1337, reg 2(1), (13). Date in force: 30 June 2008: see SI 2008/1337, reg 1.

[16 Consequences of failing to pay the fee specified for an application]

[Where an application to which these Regulations refer is to be accompanied by a specified fee, the application will not be considered to have been validly made unless it has been accompanied by that fee.]

Initial Commencement

Substituted by SI 2008/2790, reg 3(1), (6). Date in force: 27 November 2008: see SI 2008/2790, reg 2(1).

IMMIGRATION AND NATIONALITY (FEES) REGULATIONS 2007

2007 No 1158

Made 1st April 2007

Coming into force 2nd April 2007

A draft of these Regulations has been laid before and approved by a resolution of each House of Parliament, in pursuance of section 42(7) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004;

The Secretary of State makes the following regulations with the consent of the Treasury in exercise of the powers conferred on him by sections 51(3) and 52(3) of the Immigration, Asylum and Nationality Act 2006, and in reliance on section 42(1) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004;

In accordance with section 42(6) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, the Secretary of State has consulted with such persons as appear to him to be appropriate prior to making these Regulations:

2

In these Regulations—

“an application for naturalisation” means an application for naturalisation as a:

- (a) British citizen under section 6(1) or (2) of the 1981 Act, or
- (b) British overseas territories citizen under section 18(1) or (2) of the 1981 Act;

“an application for registration” means an application for registration as a:

- (a) British citizen under section 1(3) or (4), 3(1), (2) or (5), 4(2) or (5), 4A, 4B, 4C, 10(1) or (2), or 13(1) or (3) of, or paragraph 3, 4 or 5 of Schedule 2 to, the 1981 Act,
- (b) British overseas territories citizen under sections 24 and 13(1) or (3), or 15(3) or (4), 17(1), (2) or (5), or 22(1) or (2) of, or paragraph 3, 4 or 5 of Schedule 2 to, the 1981 Act,
- (c) British overseas citizen under section 27(1) of, or paragraph 4 or 5 of Schedule 2 to, the 1981 Act, or
- (d) British subject under section 32 of, or paragraph 4 of Schedule 2 to, the 1981 Act;

“assistance” means assistance, accommodation or maintenance provided under—

- (a) section 17, 20 or 23 of the Children Act 1989,
- (b) section 22, 25 or 26 of the Children (Scotland) Act 1995, or
- (c) article 18, 21 or 27 of the Children (Northern Ireland) Order 1995;

[“certificate of sponsorship” means an authorisation issued by the Secretary of State to a sponsor in respect of one or more applications, or potential applications, for leave to remain or enter the United Kingdom under the immigration rules;]

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["charity" means an English charity, a Scottish charity or a Northern Ireland charity;]

"claim for asylum" has the meaning given in section 94(1) of the Immigration and Asylum Act 1999, and a claim for asylum is to be taken to be determined—

- (a) on the day on which the Secretary of State notifies the claimant of his decision on the claim,
- (b) if the claimant has appealed against the Secretary of State's decision, on the day on which the appeal is disposed of, or
- (c) if the claimant has brought an in-country appeal against an immigration decision under section 82 of the Nationality, Immigration and Asylum Act 2002 or section 2 of the Special Immigration Appeals Commission Act 1997, on the day on which the appeal is disposed of;

"child" means a person under the age of eighteen;

"dependant" in respect of a person means—

- (a) the spouse, civil partner, unmarried or same-sex partner, or
- (b) a child,

of that person;

["English charity" means—

- (a) subject to paragraph (b), a charity as defined in section 1 of the Charities Act 2006;
- (b) prior to the commencement of section 1 of the Charities Act 2006, a charity within the meaning of section 96 of the Charities Act 1993;]

"European Community Association Agreement" means the—

- (a) Agreement establishing an Association between the European Community and Turkey, signed at Ankara on 12 September 1963,
- (b) Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, signed at Brussels on 8th March 1993, and
- (c) Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Romania, of the other part, signed at Brussels on 1st February 1993;

"Highly Skilled Migrant Programme" means the programme operated by the Secretary of State for highly skilled migrants under the immigration rules;

"immigration rules" means rules made under section 3(2) of the Immigration Act 1971;

"leave to remain" includes variation of leave to enter or remain;

["Northern Ireland charity" means a charity within the meaning of section 35 of the Charities Act (Northern Ireland) 1964;]

"school teacher" has the same meaning as in section 122 of the Education Act 2002;

["Scottish charity" means a body entered in the Scottish Charity Register;

"small sponsor" means a sponsor that is either—

- (a) subject to paragraph (b)—
 - (i) a company that qualifies as small in accordance with sections 382 and 383 of the Companies Act 2006; or
 - (ii) in the case of a person who is not a company for the purposes of sections 382 and 383 of the Companies Act 2006 and therefore does not qualify as small in accordance with those sections, a person who employs no more than 50 employees;
- (b) prior to the commencement of sections 382 and 383 of the Companies Act 2006—
 - (i) a company that qualifies as small or medium sized for the purposes of section 247 of the Companies Act 1985; or
 - (ii) in the case of a person who is not a company for the purposes of section 247 of the Companies Act 1985 and therefore does not

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qualify as small or medium-sized in accordance with that section, a person who employs no more than 50 employees; or

(c) a charity;

“sponsor” means a person who is granted a sponsorship licence;

“sponsorship licence” means a licence granted by the Secretary of State to a person who, by virtue of such grant, is licensed as a sponsor;]

“the 1981 Act” means the British Nationality Act 1981;

“the 2007 Order” means the Immigration and Nationality (Fees) Order 2007; and

[“Tier 1 migrant” means a migrant who makes an application of a kind identified in the immigration rules as requiring to be considered under “Tier 1” of the immigration rules’ “Points Based System”;

“Tier 2 migrant” means a migrant who makes an application of a kind identified in the immigration rules as requiring to be considered under “Tier 2” of the immigration rules’ “Points Based System”;

“Tier 4 migrant” means a migrant who makes an application of a kind identified in the immigration rules as requiring to be considered under “Tier 4” of the immigration rules’ “Points Based System”;

“Tier 5 migrant” means a migrant who makes make an application of a kind identified in the immigration rules as requiring to be considered under “Tier 5” of the immigration rules’ “Points Based System”; [and]

...]

“unmarried or same sex partner” of a person means a person who is living with that other person in a relationship akin to marriage which has subsisted for two years or more.

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

Definition “certificate of sponsorship” inserted by SI 2008/1695, reg 2(1), (2)(a). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

Definition “charity” inserted by SI 2008/544, reg 2(1), (2)(a). Date in force: 29 February 2008: see SI 2008/544, reg 1(2).

Definition “English charity” inserted by SI 2008/544, reg 2(1), (2)(b). Date in force: 29 February 2008: see SI 2008/544, reg 1(2).

Definition “Northern Ireland charity” inserted by SI 2008/544, reg 2(1), (2)(c). Date in force: 29 February 2008: see SI 2008/544, reg 1(2).

Definitions “Scottish charity”, “small sponsor”, “sponsor” and “sponsorship licence” inserted by SI 2008/544, reg 2(1), (2)(d). Date in force: 29 February 2008: see SI 2008/544, reg 1(2).

In definition “the 2007 Order” word omitted revoked by SI 2008/1695, reg 2(1), (2)(b). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

Definitions from “Tier 1 migrant” to “Tier 5 (Temporary Worker) migrant” inserted by SI 2008/1695, reg 2(1), (2)(b). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

Para (1): in definition “Tier 5 migrant” word “and” in square brackets inserted by SI 2008/3017, reg 2(1), (2)(a). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

Para (1): definition “Tier 5 (Temporary Worker) migrant” omitted revoked by SI 2008/3017, reg 2(1), (2)(b). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

4

...

Amendment

Revoked by SI 2008/544, reg 2(1), (3). Date in force: 29 February 2008: see SI 2008/544, reg 1(2).

5

(1) In the case of an application to which article 3(2)(a) or (b) of the 2007 Order applies, where the application is for a limited leave to remain in the United Kingdom as—

- (a) ...
- (b) ...
- (c) ...
- (d) a retired person of independent means; or
- (e) a sole representative,

under the immigration rules, the fee is £750.

(2) This regulation is subject to regulations 10, 12, 13 and 14.

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

Para (1): sub-paras (a)–(c) revoked by SI 2008/1695, reg 2(1), (3). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

[5A]

[(1) In the case of an application to which article 3(2)(a) or (b) of the 2007 Order applies, where the application is for limited leave to remain in the United Kingdom as a Tier 1 migrant, the fees are those specified in paragraphs (2) and (3).

(2) Where the application is for limited leave to remain in the United Kingdom as a Tier 1 (General) migrant, a Tier 1 (Investor) migrant or a Tier 1 (Entrepreneur) migrant under the immigration rules, the fee is—

- (a) subject to sub-paragraph (b), £750;
- (b) £350 for an application by a person who has been granted an approval letter under the Highly Skilled Migrant Programme that is valid for such an application.

[(3) Where the application is for limited leave to remain in the United Kingdom as a Tier 1 (Post Study Work) migrant under the immigration rules the fee is—

- (a) £400 for an application made by post or courier; or
- (b) £600 where such application is made in person at a Public Enquiry Office of the UK Border Agency of the Home Office.]

(4) This regulation is subject to regulations 9, 12, 13 and 14.]

Amendment

Substituted (as inserted by SI 2008/544, reg 2(1), (4)) by SI 2008/1695, reg 2(1), (4). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

Para (3): substituted by SI 2008/3017, reg 2(1), (3). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

[5B]

[(1) In the case of an application to which article 3(2)(a) or (b) of the 2007 Order applies, where the application is for limited leave to remain in the United Kingdom, other than an application referred to in paragraph (2), where such application is made in person at the relevant Public Enquiry Office of the Border and Immigration Agency of the Home Office, the fee is £595.

(2) The fee referred to in paragraph (1) does not apply to applications for limited leave to remain in the United Kingdom—

- (a) for work permit employment;
- (b) for the purposes of employment under the Sectors-Based Scheme;
- (c) for Home Office approved training;
- (d) as a seasonal agricultural worker;

Appendix 1 *Legislation and materials*

- (e) ...
- (f) ...
- (g) ...
- (h) as a retired person of independent means;
- (i) as a sole representative,
- (j) as a student;
- (k) to re-sit an examination;
- (l) to write up a thesis;
- (m) as a student union sabbatical officer; ...
- (n) as a prospective student[; or
- (o) of a kind identified in the immigration rules as requiring to be considered under a "Points Based System",]under the immigration rules.

(3) This regulation is subject to regulations 7, 11, 12, 13 and 14.]

Amendment

Inserted by SI 2008/544, reg 2(1), (4). Date in force: 29 February 2008: see SI 2008/544, reg 1(2).
Para (2): sub-paras (e)–(g) revoked by SI 2008/1695, reg 2(1), (5)(a). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

Para (2): in sub-para (m) word omitted revoked by SI 2008/1695, reg 2(1), (5)(b). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

Para (2): sub-para (o) and word “; or” immediately preceding it inserted by SI 2008/1695, reg 2(1), (5)(c). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

[5C]

[(1) In the case of an application to which article 3(2)(a) or (b) of the 2007 Order applies, where the application is for limited leave to remain in the United Kingdom as a Tier 2 migrant, the fee is £400.

(2) This regulation is subject to regulations 9, 12, 13 and 14.]

Amendment

Inserted by SI 2008/1695, reg 2(1), (6). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

7 Exceptions in respect of fees for leave to remain applications

No fee is payable in connection with an application for ... leave to remain in the United Kingdom, which is made on the basis that the applicant is—

- (a) a person making a claim for asylum which has not been determined or has been granted;
- (b) a person who has been granted humanitarian protection under the immigration rules;
- (c) a person who has been granted limited leave to enter or remain in the United Kingdom outside the provisions of the immigration rules on the rejection of their claim for asylum; or
- (d) a dependant of a person referred to in paragraph (a), (b) or (c).

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

Word omitted revoked by SI 2008/544, reg 2(1), (5). Date in force: 29 February 2008: see SI 2008/544, reg 1(2).

[9]

[No fee is payable in connection with applications referred to in—

- (a) regulation 3;
- (b) regulation 5A, in so far as the application is for leave to remain as a Tier 1 (General) migrant or a Tier 1 (Entrepreneur) migrant under the immigration rules;
- (c) regulation 5C; or
- (d) regulation 6, in so far as the application is for work permit employment under the immigration rules, as a highly skilled migrant under the immigration rules, as a Tier 1 (General) migrant or a Tier 1 (Entrepreneur) migrant under the immigration rules or a Tier Two migrant,

where the application is in respect of a person who is a national of a state which has ratified the Council of Europe Social Charter or the Council of Europe Revised Social Charter.]

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

Substituted by SI 2008/3017, reg 2(1), (4). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

10

No fee is payable in respect of applications referred to in regulation 3 ... or 5, if the application is made in respect of a person seeking variation of leave to enter or remain in the United Kingdom for a period of up to 6 months where the application is made to an immigration officer on arrival at a port of entry in the United Kingdom.

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

Reference omitted revoked by SI 2008/544, reg 2(1), (7). Date in force: 29 February 2008: see SI 2008/544, reg 1(2).

11

No fee is payable in respect of an application referred to in regulation [5B or] 6 if the application is made in respect of a person who, at the time of making the application, is a child and is being provided with assistance by a local authority (or, in Northern Ireland, an authority, which has the same meaning given in article 2(2) of the Children (Northern Ireland) Order 1995).

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

Words "5B or" in square brackets inserted by SI 2008/544, reg 2(1), (8). Date in force: 29 February 2008: see SI 2008/544, reg 1(2).

12

No fee is payable in respect of an application referred to in regulation 3, ... 5[, 5A, 5B][, 5C ...] or 6 if it is made under the terms of a European Community Association Agreement.

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

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Reference omitted revoked by SI 2008/544, reg 2(1), (9). Date in force: 29 February 2008: see SI 2008/544, reg 1(2).

Reference to “, 5A, 5B” in square brackets inserted by SI 2008/544, reg 2(1), (9). Date in force: 29 February 2008: see SI 2008/544, reg 1(2).

Reference to “, 5C, 5D” in square brackets inserted by SI 2008/1695, reg 2(1), (8). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

Reference omitted revoked by SI 2008/3017, reg 2(1), (5). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

15

...

Amendment

Revoked by SI 2008/3017, reg 2(1), (6). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

16

...

Amendment

Revoked by SI 2008/3017, reg 2(1), (6). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

17

...

Amendment

Revoked by SI 2008/1695, reg 2(1), (10). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

18

...

Amendment

Revoked by SI 2008/3017, reg 2(1), (6). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

20

(1) In the case of an application to which [article 3(2)(h) to (l)] of the 2007 Order applies, namely an application for registration, the fee to be paid is £400.

(2) Where an application for registration of a child is made at the same time as an application for registration of another child and those children have the same parent, or parents, the total fee payable in respect of the applications shall be the same as that for a single application.

(3) In this regulation, “parent” includes a step-parent and an adoptive parent.

Initial Commencement

Specified date: 2 April 2007: see reg 1.

Amendment

Para (1): words “article 3(2)(h) to (l)” in square brackets substituted by SI 2008/1695, reg 2(1), (11). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

[20A Fees for sponsorship applications]

[(1) [Subject to regulation 20AA,] in the case of an application to which article 3(2)(p) of the 2007 Order applies, where the application is not in respect of a person who, if granted a sponsorship licence, would be a small sponsor, and the application is for a licence referred to in paragraph (2), the fee is £1000.

(2) The sponsorship licences are—

- (a) a sponsorship licence in respect of Tier 2 migrants;
- (b) a sponsorship licence in respect of Tier 2 and Tier 4 migrants;
- (c) a sponsorship licence in respect of Tier 2 and Tier 5 migrants; and
- (d) a sponsorship licence in respect of Tier 2, Tier 4 and Tier 5 migrants.]

Amendment

Substituted (as inserted by SI 2008/544, reg 2(1), (11)) by SI 2008/1695, reg 2(1), (12). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

Para (1): words “Subject to regulation 20AA,” in square brackets inserted by SI 2008/3017, reg 2(1), (7). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

[20AA]

[In the case of an application to which article 3(2)(p) of the 2007 Order applies, where such application is for a licence referred to in sub-paragraphs (a) to (d) of regulation 20A and is in respect of a person who—

- (a) holds a valid licence in respect of Tier 4 migrants, Tier 5 migrants or Tier 4 and Tier 5 migrants; and
- (b) is not a small sponsor,

the fee is £600.]

Amendment

Inserted by SI 2008/3017, reg 2(1), (8). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

[20B Fees for entry clearance applications]

[(1) In the case of an application to which article 3(2)(aa) of the 2007 Order applies—

- (a) subject to sub-paragraphs (b), (c) and (d), where the application is for entry clearance as a Tier 1 (General) migrant, a Tier 1 (Investor) migrant or a Tier 1 (Entrepreneur) migrant under the immigration rules, the fee is £600;
- (b) subject to sub-paragraph (d), where the application is for entry clearance as a Tier 1 (General) migrant or a Tier 1 (Entrepreneur) migrant under the immigration rules and is in respect of a person who is a national of a state which has ratified the Council of Europe Social Charter, the fee is £540;
- (c) subject to sub-paragraph (d), where the application is for entry clearance as a Tier 1 (General) migrant under the immigration rules and is in respect of a person who has been granted an approval letter under the Highly Skilled Migrant Programme that is valid for such an application, the fee is £200;
- (d) where the application is for entry clearance as a Tier 1 (General) migrant under the immigration rules and is in respect of a person who—
 - (i) has been granted an approval letter under the Highly Skilled Migrant Programme that is valid for such an application; and
 - (ii) who is a national of a state which has ratified the Council of Europe Social Charter,

the fee is £180;

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- (e) where the application is for entry clearance as a Tier 1 (Post Study Work) migrant under the immigration rules, the fee is £205;
- (f) subject to sub-paragraph (g), where the application is for entry clearance as a Tier 2 migrant, the fee is £205;
- (g) where the application is for entry clearance as a Tier 2 migrant and is in respect of a person who is a national of a state which has ratified the Council of Europe Social Charter, the fee is £185;
- (h) where the application is for entry clearance for settlement in the United Kingdom, the fee is £515;
- (i) where the application is for entry clearance to the United Kingdom other than—
 - (i) for the purposes listed in sub-paragraphs (a) to (h);
 - (ii) as a visitor for a period of six months or less under the immigration rules;
 - (iii) as a student under the immigration rules;
 - (iv) as a Tier 4 migrant;
 - (v) as a Tier 5 migrant; or
 - (vi) for passing through the United Kingdom,the fee is £205.

(2) This regulation is subject to regulation 20C and regulation 20D.]

Amendment

Substituted by SI 2008/3017, reg 2(1), (9). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

[Exceptions and waivers in respect of fees for entry clearance applications]

[20C]

[No fee is payable in relation to an application referred to in regulation 20B where—

- (a) it is in connection with the official duty of any official of Her Majesty's Government;
- (b) it is for the purpose of family reunion under Part 11 of the immigration rules; ... [or]
- (c) the Secretary of State determines that the fee should be waived[...
- (d) ...]

Amendment

Inserted by SI 2008/544, reg 2(1), (11). Date in force: 1 April 2008: see SI 2008/544, reg 1(3).
In para (b) word omitted revoked by SI 2008/1695, reg 2(1), (14). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

In para (b) word "or" in square brackets inserted by SI 2008/3017, reg 2(1), (10)(a). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

Para (d) and word "; or" immediately preceding it inserted by SI 2008/1695, reg 2(1), (14). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

Para (d) and word "or" immediately preceding it in italics revoked by SI 2008/3017, reg 2(1), (10)(b). Date in force: 27 November 2008: see SI 2008/3017, reg 1.

[20D]

[The official determining the application may waive the payment of a fee required under regulation 20B where—

- (a) it is made by a candidate for or holder of a scholarship funded by Her Majesty's Government and is in connection with such scholarship; or
- (b) where the official so decides as a matter of international courtesy.]

Amendment

Inserted by SI 2008/544, reg 2(1), (11). Date in force: 1 April 2008: see SI 2008/544, reg 1(3).

[Fee for a certificate of entitlement to the right of abode]

[20E]

[In the case of an application to which article 3(2)(lb) of the 2007 Order applies, where such application is made by an applicant who is outside the United Kingdom the fee is £205.]

Amendment

Inserted by SI 2008/544, reg 2(1), (11). Date in force: 1 April 2008: see SI 2008/544, reg 1(3).

[Fee for the process of issuing a certificate of sponsorship]

[20F]

(1) Subject to paragraph (2), in the case of a process to which article 5 of the 2007 Order applies, the fee shall be £170 where the process is the issuing of a certificate of sponsorship in respect of an application or potential application for leave to remain or enter the United Kingdom as a Tier 2 migrant.

(2) No fee is payable in respect of the process for which a fee is specified in paragraph (1) where the certificate is issued in respect of a person who is a national of a state which has ratified the Council of Europe Social Charter or the Council of Europe Revised Social Charter.]

Amendment

Inserted by SI 2008/1695, reg 2(1), (15). Date in force: 30 June 2008: see SI 2008/1695, reg 1.

IMMIGRATION, ASYLUM AND NATIONALITY ACT 2006 (DATA SHARING CODE OF PRACTICE) ORDER 2008

2008 No 8

Made 8th January 2008

Laid before Parliament 10th January 2008

Coming into force 1st March 2008

The Secretary of State and the Treasury make the following Order in exercise of the powers conferred by section 37(2) of the Immigration, Asylum and Nationality Act 2006.

1 Citation and commencement

This Order may be cited as the Immigration, Asylum and Nationality Act 2006 (Data Sharing Code of Practice) Order 2008 and shall come into force on 1st March 2008.

Appointment

Specified date: 1 March 2008: see above.

2 Entry into force of code of practice

The Code of Practice on the Management of Information Shared by the Border and Immigration Agency, Her Majesty’s Revenue and Customs and the Police laid before Parliament on 10th January 2008 shall come into force on 1st March 2008.

Appointment

Specified date: 1 March 2008: see art 1.

**INDEPENDENT POLICE COMPLAINTS
COMMISSION (IMMIGRATION AND ASYLUM
ENFORCEMENT FUNCTIONS)
REGULATIONS 2008**

2008 No 212

Made 31st January 2008

Laid before Parliament 4th February 2008

Coming into force 25th February 2008

The Secretary of State makes the following Regulations in exercise of the powers conferred by section 41 of the Police and Justice Act 2006.

1 Citation and commencement

These Regulations may be cited as the Independent Police Complaints Commission (Immigration and Asylum Enforcement Functions) Regulations 2008 and shall come into force on 25th February 2008.

Appointment

Specified date: 25 February 2008: see above.

2 Interpretation

(1) In these Regulations —

- “the 2002 Act” means the Police Reform Act 2002;
- “appropriate authority” means a person nominated by the Secretary of State;
- “the Commission” means the Independent Police Complaints Commission established under section 9 of the 2002 Act;
- “Complaints Regulations” means the Police (Complaints and Misconduct) Regulations 2004;
- “complaint” has the meaning given in section 12 of the 2002 Act for the purposes of these Regulations;
- “conduct matter” has the meaning given in section 12 of the 2002 Act for the purposes of these Regulations;
- “death and serious injury matter” and “DSI matter” have the meaning given in section 12 of the 2002 Act;
- “immigration decision” has the meaning given in section 82(2) of the Nationality, Immigration and Asylum Act 2002; and

“Staff Conduct Regulations” means the Independent Police Complaints Commission (Staff Conduct) Regulations 2004.

(2) In these Regulations “specified enforcement functions” means subject to paragraphs (3) and (4)—

- (a) powers of entry;
- (b) powers to search persons and property;
- (c) powers to seize or detain property;
- (d) powers to arrest persons;
- (e) powers to detain persons;
- (f) powers to examine persons or otherwise obtain information (including powers to take fingerprints or to acquire other personal data); and
- (g) powers in connection with the removal of persons from the United Kingdom.

(3) The following shall not be regarded as an enforcement function—

- (i) the making of an immigration decision;
- (ii) the making of any decision to grant or refuse asylum; or
- (iii) the giving of any direction to remove persons from the United Kingdom.

(4) For the avoidance of doubt, references to “specified enforcement functions” include their exercise in connection with any authorisation granted under Part 2 of the Regulation of Investigatory Powers Act 2000.

Appointment

Specified date: 25 February 2008: see reg 1.

3 Conferral of functions on the Independent Police Complaints Commission

(1) Subject to regulation 4, the Commission shall have functions in relation to the exercise (in, or in relation to, England and Wales) by—

- (a) immigration officers of the enforcement functions specified in paragraph (2), and
- (b) officials of the Secretary of State of the enforcement functions specified in paragraph (2) when carried out in relation to immigration or asylum.

(2) Subject to paragraphs (3) and (4) the enforcement functions are—

- (a) powers of entry;
- (b) powers to search persons and property;
- (c) powers to seize or detain property;
- (d) powers to arrest persons;
- (e) powers to detain persons;
- (f) powers to examine persons or otherwise obtain information (including powers to take fingerprints or to acquire other personal data); and
- (g) powers in connection with the removal of persons from the United Kingdom.

(3) The following shall not be regarded as an enforcement function—

- (i) the making of an immigration decision;
- (ii) the making of any decision to grant or refuse asylum; or
- (iii) the giving of directions to remove persons from the United Kingdom.

(4) For the avoidance of doubt, the enforcement functions specified in paragraph (2) include their exercise in connection with any authorisation granted under Part 2 of the Regulation of Investigatory Powers Act 2000.

Appointment

Specified date: 25 February 2008: see reg 1.

The Commission shall not have functions in relation to—

- (a) a complaint relating to the conduct of an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum,
- (b) a conduct matter relating to the conduct of an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum, or
- (c) a DSI matter relating to an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum,

where the conduct or matter is alleged to have occurred before 1st April 2007.

Appointment

Specified date: 25 February 2008: see reg 1.

5 Application of provisions of the 2002 Act with modifications

For the purposes of the Commission exercising the functions conferred on it by regulation 3(1)—

- (a) Part 2 of the 2002 Act (complaints and misconduct) shall apply and have effect with the modifications made by Schedule 1; and
- (b) Schedule 3 to the 2002 Act (handling of complaints and conduct matters etc) shall apply and have effect with the modifications made by Schedule 2.

Appointment

Specified date: 25 February 2008: see reg 1.

6 Application of other provisions with modifications

For the purposes of the Commission exercising the functions conferred on it by regulation 3(1)—

- (a) the Complaints Regulations shall apply and have effect with the modifications made by Schedule 3;
- (b) the Staff Conduct Regulations shall apply and have effect with the modifications made by Schedule 4;
- (c) the Independent Police Complaints Commission (Investigatory Powers) Order 2004 shall apply; and
- (d) the Regulation of Investigatory Powers (Communications Data) Order 2003 shall apply in so far as it makes provision in respect of the Commission.

Appointment

Specified date: 25 February 2008: see reg 1.

7 Disclosure of Information

Where the Commission, or any person acting on its behalf, obtains information in the course of performing a function conferred on it by regulation 3(1) they may not disclose it except as permitted by Part 2 of the 2002 Act or the Complaints Regulations as modified by Schedule 1 and Schedule 3 respectively.

Appointment

Specified date: 25 February 2008: see reg 1.

8 Use of Information

Where the Commission, or any person acting on its behalf, obtains information in the course of performing a function conferred on it by regulation 3(1) they may not use it for any purpose other than the performance of a function under these Regulations.

Appointment

Specified date: 25 February 2008: see reg 1.

SCHEDULE 1 MODIFICATION OF PART 2 OF THE 2002 ACT

Regulation 5(a)

1 (1) Section 10 of the 2002 Act (general functions of the Commission) is modified as follows.

(2) In subsection (1), after “the functions of the Commission” insert “in relation to the exercise by immigration officers of specified enforcement functions and officials of the Secretary of State of specified enforcement functions relating to immigration or asylum”.

(3) In subsection (1)(a), for “police authorities and chief officers” substitute “the appropriate authority”.

(4) In subsection (1)(e) omit “and also of police practice in relation to other matters,”.

(5) Omit subsections (1)(f), (1)(g) and (1)(h).

(6) For subsection (3), substitute—

“(3) In carrying out its functions under subsection (1)(d) and (e) the Commission shall only have regard to the following matters—

(a) the handling of complaints which—

- (i) fall within regulation 2(2) of the Complaints Regulations;
- (ii) the Commission has notified the appropriate authority that it requires to be referred to it for its consideration; or
- (iii) the appropriate authority has referred to the Commission on the grounds that it would be appropriate to do so by reason of—
 - (aa) the gravity of the subject matter of the complaint; or
 - (bb) any exceptional circumstances;

(b) the recording of conduct matters which—

- (i) fall within regulation 5(1) of the Complaints Regulations;
- (ii) the Commission has notified the appropriate authority that it requires to be referred to it for its consideration;
- (iii) the appropriate authority has referred to the Commission on the grounds that it would be appropriate to do so by reason of—
 - (aa) the gravity of the subject matter of the complaint; or
 - (bb) any exceptional circumstances;

(c) the recording of a DSI matter; and

(d) the manner in which any such complaints or any such matters as are mentioned in paragraph (b) or (c) are investigated or otherwise handled and dealt with.”.

(7) In subsection (4), for “subsections (1) and (3)” substitute “subsection (1)”.

(8) After subsection (4) insert—

“(4A) It shall be the duty of the Commission to carry out its functions under subsection (1) in relation to the following:

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- (a) any DSI matter;
 - (b) those complaints falling within paragraph 2(2) of the Complaints Regulations;
 - (c) those conduct matters falling within paragraph 5(1) of the Complaints Regulations;
 - (d) those complaints or recordable conduct matters which the Commission has notified the appropriate authority that it requires to be referred to it for its consideration;
 - (e) those complaints or recordable conduct matters that the appropriate authority has referred to the Commission on the grounds that it would be appropriate to do so by reason of—
 - (i) the gravity of the subject-matter of the complaint; or
 - (ii) any exceptional circumstances; and
 - (f) any matter that is subject to any of the appeal rights set out in Schedule 3.”
- (9) In subsection (5)(a)—
- (a) for “the chief inspector of constabulary” substitute “the Chief Inspector of the Border and Immigration Agency, Her Majesty’s Chief Inspector of Prisons, the Prison and Probation Ombudsman”; and
 - (b) for “between the Commission and the inspectors of constabulary” substitute “in relation to the exercise by immigration officers of specified enforcement functions and officials of the Secretary of State of specified enforcement functions in relation to immigration or asylum”.
- (10) After subsection (5) insert—
- “(5A) Until such time as the chief inspector of the Border and Immigration Agency is appointed under section 48 of the UK Borders Act 2007 (establishment of Border and Immigration Inspectorate), subsection (5) shall be read as if his name is omitted.”.
- (11) For subsection (7), substitute—
- “(7) The Commission may, in connection with the making of any recommendation or the giving of any advice to any person for the carrying out of its function under subsection (1)(e) impose any such charge on that person for anything done by the Commission for the purposes of, or in connection with, the carrying out of that function as it thinks fit.”.
- (12) Omit subsections (8) and (9).
- 2 (1) Section 11 of the 2002 Act (reports to the Secretary of State) is modified as follows.
- (2) For subsection (4) substitute—
- “(4) The Commission shall prepare such reports containing advice and recommendations as it thinks appropriate for the purpose of carrying out its function under subsection (1)(e) of section 10.”.
- (3) Omit subsections (6), (7), (8), (9) and (9A).
- (4) In subsection (10), from the words “under subsection (4)” to the end substitute “under subsection (4) to the Secretary of State and the appropriate authority”.
- 3 (1) Section 12 of the 2002 Act (complaints, matters and persons to which Part 2 applies) is modified as follows.
- (2) In subsections (1) and (2), for “a person serving with the police” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum”.

(3) In subsections (2B), (2C) and (2D), for “a person serving with the police” (in each place that it occurs) substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum”.

(4) Omit subsection (7).

4 (1) Section 14 of the 2002 Act (direction and control matters) is modified as follows.

(2) For subsection (1) substitute—

“(1) Nothing in Part 2 or Schedule 3 shall have effect with respect to so much of any complaint as relates to the direction and control of immigration officers exercising specified enforcement functions or officials of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum by the Secretary of State.”.

(3) For subsection (2) substitute—

“(2) The Secretary of State may issue guidance to any person he sees fit about the handling of so much of any complaint as relates to the direction and control of immigration officers exercising specified enforcement functions or officials of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum.”.

(4) In subsection (3) for “a chief officer and of a police authority” substitute “the appropriate authority”.

5 (1) Section 15 of the 2002 Act (general duties of police authorities, chief officers and inspectors) is modified as follows.

(2) For the heading of this section substitute “General duties of the appropriate authority and the Secretary of State in relation to immigration or asylum functions”.

(3) For subsection (1) substitute—

“(1) It shall be the duty of the appropriate authority, the Chief Inspector of the Border and Immigration Agency, Her Majesty’s Chief Inspector of Prisons and the Prisons and Probation Ombudsman to ensure that they are kept informed, in relation to the exercise by immigration officers of specified enforcement functions and officials of the Secretary of State of specified enforcement functions in relation to immigration or asylum, about all matters falling within subsection (2).”.

(4) For subsections (1A) and (1B) substitute—

“(1A) Until such time as the Chief Inspector of the Border and Immigration Agency is appointed under section 48 of the UK Borders Act 2007, subsection (5) shall be read as if his name is omitted from those sections.”.

(5) For subsection (3) substitute—

“(3) Where the appropriate authority or the Commission requires the chief officer of a police force to provide a member of his force for appointment under paragraph 17A or 18A of Schedule 3 it shall be the duty of the chief officer to whom the requirement is addressed to comply with it.”.

(6) For subsection (4) substitute—

“(4) It shall be the duty of—

- (a) the Secretary of State,
- (b) the appropriate authority,
- (c) a police authority maintaining a police force, and
- (d) the chief officer of police of a police force

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to provide the Commission and every member of the Commission's staff with all such assistance as the Commission or that member of staff may reasonably require for the purposes of, or in connection with, the carrying out of any investigation by the Commission under this Part.”.

(7) For subsection (5) substitute—

“(5) It shall be the duty of the appropriate authority to ensure that a person appointed under paragraph 16, 17, 17A, 18, or 18A of Schedule 3 to carry out an investigation is given all such assistance and co-operation in the carrying out of that investigation as that person may reasonably require.”.

(8) Omit subsections (6) to (10).

6 (1) Section 16 of the 2002 Act (payment for assistance with investigations) is modified as follows.

(2) In subsection (1)—

- (a) in paragraph (a)—
 - (i) for “one” substitute “a”;
 - (ii) for “to another” substitute “to the appropriate authority”; and
 - (iii) omit “or”;
- (b) at the end of paragraph (b) insert “or”; and
- (c) after paragraph (b) insert—
 - “(c) a police force provides assistance by agreement under paragraph 17A(2) or 18A(2) of Schedule 3.”.

(3) In subsection (2)(a)—

- (a) for “one police force to another” substitute “a police force to the appropriate authority”;
- (b) for “the first force (“the assisting force”)” substitute “that force”;
- (c) in sub-paragraph (i) for “a member of the other force” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum”; and
- (d) in sub-paragraph (ii)—
 - (i) for “relevant officer” substitute “person being investigated”; and
 - (ii) for “a member of the other force” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum”.

(4) In subsection (2)(b)—

- (a) omit “(“the assisting force”)”;
- (b) in sub-paragraph (i), for “not a member of that force” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified functions in relation to immigration or asylum”; and
- (c) in sub-paragraph (ii)—
 - (i) for “relevant officer” substitute “person being investigated”; and
 - (ii) for “not a member of that force” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum” (in each place that it occurs).

(5) In subsection (3)—

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- (a) for “one police force to another, the police authority maintaining that other police force” substitute “a police force to the appropriate authority or to the Commission or where a police force provides assistance by agreement under paragraph 17A(2) or 18A(2) of Schedule 3, the Secretary of State”;
 - (b) for “the assisting force” substitute “that force”;
 - (c) omit “(if any)”;
 - (d) in paragraph (b)(ii) omit “, by one police force to another”.
- (6) Omit subsection (4) to (7).
- 7 Section 16A of the 2002 Act (investigations: National Policing Improvement Agency involvement) is omitted.
- 8 (1) Section 17 of the 2002 Act (provision of information to the Commission) is modified as follows.
- (2) In subsection (1) for paragraphs (a) and (b) substitute “the appropriate authority”.
- (3) In subsection (2)—
- (a) for “every police authority and of every chief officer” substitute “the appropriate authority”; and
 - (b) in paragraph (a) omit “or chief officer”.
- (4) In subsection (4)—
- (a) for “a police authority or chief officer” substitute “the appropriate authority”; and
 - (b) in paragraphs (a) and (b) for “that authority, or chief officer” substitute “the appropriate authority”.
- (5) Subsection (6) is omitted.
- 9 (1) Section 18 of the 2002 Act (inspections of police premises on behalf of the Commission) is modified as follows.
- (2) In the heading omit “police”.
- (3) In subsection (1)—
- (a) in paragraph (a), for sub-paragraphs (i) and (ii) substitute “the appropriate authority”;
 - (b) for “that force” substitute “immigration officers exercising specified enforcement functions and officials of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum”; and
 - (c) for “authority or, as the case may be, of the chief officer” substitute “appropriate authority”.
- (4) In subsection (2), for “force in question” substitute the “appropriate authority”.
- (5) In subsection (3), for “authority or chief officer” substitute “appropriate authority”.
- (6) In subsection (5)(b), for “police authorities and chief officers” substitute “the appropriate authority”.
- 10 (1) Section 20 of the 2002 Act (duty to keep the complainant informed) is modified as follows.
- (2) After subsection (3) insert—
- “(3A) The Commission shall consult the appropriate authority before deciding whether or not to disclose that information to the complainant in accordance with

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subsection (1) or to give directions under subsection (3), and shall have regard to any representations made to it by the appropriate authority.”.

(3) In subsection (8), for “any police authority of chief officer” substitute “the appropriate authority”.

11 (1) Section 21 of the 2002 Act (duty to provide information for other persons) is modified as follows.

(2) In subsection (1), in paragraph (a) for “an appropriate authority” substitute “the appropriate authority”.

(3) In subsection (3)(q) for “an appropriate authority” substitute “the appropriate authority”.

(4) After subsection (9) insert—

“(9A) The Commission shall consult the appropriate authority before deciding whether or not to disclose that information to the complainant in accordance with subsection (6) or to give directions under subsection (8), and shall have regard to any representations made to it by the appropriate authority.”.

12 (1) Section 22 of the 2002 Act (power of the Commission to issue guidance) is modified as follows.

(2) For subsection (1) substitute—

“(1) The Commission may issue guidance to the appropriate authority and any person it sees fit concerning the exercise or performance, by the persons to whom the guidance is issued, of any of the powers or duties specified in subsection (2).”.

(3) In subsection (2), in paragraph (b)(iii)—

“(b)

(iii) for “persons serving with the police” substitute “immigration officers exercising specified enforcement functions or officials of the Secretary of State exercising enforcement functions in relation to immigration or asylum”.

(4) For subsection (3) substitute—

“(3) Before issuing any guidance under this section, the Commission shall consult the appropriate authority and any person it sees fit.”.

13 (1) Section 23 of the 2002 Act (regulations) is modified as follows.

(2) In subsection (2)(k), for “a person serving with the police” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum”.

(3) In subsection (2)(n), for “police authorities and chief officers” substitute “the Secretary of State”.

(4) In subsection (2)(p)—

- (a) for “chief officers” substitute “the appropriate authority”; and
- (b) for “them” substitute “it”.

14 (1) Section 24 (consultation on regulations) is modified as follows.

(2) At the end of paragraph (a) insert “and”;

(3) Omit paragraphs (b) and (c).

15 Sections 26 (forces maintained otherwise than by police authorities), 26A (Serious Organised Crime Agency) and 26B (National Policing Improvement Agency) of the 2002 Act are omitted.

16 (1) Section 29 of the 2002 Act (interpretation of Part 2) is modified as follows.

(2) In subsection (1)—

(a) for the definition of “the appropriate authority” substitute—

““the appropriate authority” means a person nominated by the Secretary of State;”;

(b) after the definition of “complaint” insert—

““Complaints Regulations” means the Police (Complaints and Misconduct) Regulations 2004;”;

(c) for the definition of “disciplinary proceedings” substitute—

““disciplinary proceedings” means, in relation to an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum, any proceedings or management process, other than criminal proceedings or an investigation under paragraphs 16 to 19 of Schedule 3, in which the conduct of such a person is considered in order to determine whether a sanction or punitive measure is to be imposed against him in relation to that conduct;”;

(d) after the definition of “document” insert—

““immigration decision” has the meaning given in section 82(2) of the Nationality, Immigration and Asylum Act 2002;”;

(e) for the definition of “local resolution” substitute—

““local resolution” in relation to a complaint, means the handling of that complaint in accordance with a procedure which does not involve a formal investigation by the Secretary of State;”;

(f) omit the definition of “relevant force”.

(g) omit the definition of “senior officer”.

(h) omit the definition of “serving with the police”.

(3) For (1A) and (1B) insert—

“(1A) In this Part “specified enforcement functions” means, subject to subsections (1B) and (1C)—

(a) powers of entry;

(b) powers to search persons and property;

(c) powers to seize or detain property;

(d) powers to arrest persons;

(e) powers to detain persons;

(f) powers to examine persons or otherwise obtain information (including powers to take fingerprints or to acquire other personal data); and

(g) powers in connection with the removal of persons from the United Kingdom.

(1B) The following shall not be regarded as an enforcement function—

(i) the making of an immigration decision;

(ii) the making of any decision to grant or refuse asylum; or

(iii) the giving of any directions to remove persons from the United Kingdom.

(1C) For the avoidance of doubt, references to “specified enforcement functions” in subsection (1A) include their exercise in connection with any authorisation granted under Part 2 of the Regulation of Investigatory Powers Act 2000.”.

(4) In subsection (3)—

(a) for paragraph (a) substitute—

“(a) an immigration officer exercising specified enforcement functions; or”;

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- (b) for paragraph (b) substitute—
“(b) an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum”; and
- (c) omit paragraphs (c) and (d).
- (5) In subsection (4)—
 - (a) in paragraph (a) for “chief officer” substitute “person”; and
 - (b) for “to (d)” substitute “or (b)”.
- (6) In subsection (6), for “17, 18” substitute “17, 17A, 18, 18A”.
- (7) Omit subsection (7).

Appointment

Specified date: 25 February 2008: see reg 1.

SCHEDULE 2 MODIFICATION OF SCHEDULE 3 TO THE 2002 ACT

Regulation 5(b)

1 Schedule 3 to the 2002 Act is modified as follows.

2 (1) Paragraph 1 (duties to preserve evidence relating to complaints) is modified as follows.

(2) Omit sub-paragraph (1).

(3) For sub-paragraph (2) substitute—

“(2) Where—

- (a) a complaint is made to the appropriate authority about the conduct of an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum, or
- (b) the appropriate authority becomes aware that a complaint about an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum has been made to the Commission;

the appropriate authority shall take all such steps as appear to it to be appropriate for the purposes of Part 2 of this Act for obtaining and preserving evidence relating to the conduct complained of.”

(4) In sub-paragraph (3), for “chief officer’s” substitute “appropriate authority’s”.

(5) In sub-paragraph (4)—

- (a) for “he shall” substitute “the appropriate authority shall”;
- (b) for “he is” substitute “it is”; and
- (c) for “him” substitute “it”.

(6) In sub-paragraph (5), for “a police authority” substitute “the appropriate authority”.

(7) In sub-paragraph (6)—

- (a) for “a chief officer” substitute “the appropriate authority”;
- (b) for “he” substitute “it”; and
- (c) omit “by the police authority maintaining his force or”.

3 (1) Paragraph 2 (initial handling and recording of complaints) is modified as follows.

(2) In sub-paragraph (1)(a), omit “police authority or chief officer who is the”.

(3) Omit sub-paragraphs (2) and (3).

(4) For sub-paragraph (5) substitute—

“(5) Where the Commission gives notification of a complaint under sub-paragraph (1) or the Commission brings any matter to the appropriate authority’s attention under sub-paragraph (4), the Commission shall notify the complainant—

- (a) that the notification has been given and of what it contained; or
- (b) that the matter has been brought to the appropriate authority’s attention to be dealt with otherwise than as a complaint.”.

(5) For sub-paragraph (6) substitute—

“(6) Where the appropriate authority receives a complaint made to it, or a complaint is notified to the appropriate authority, the authority shall record the complaint.”.

4 (1) Paragraph 3 (failures to notify or record a complaint) is modified as follows.

(2) In sub-paragraph (1), for “a police authority or chief officer” substitute “the appropriate authority”.

(3) In sub-paragraph (2)—

- (a) for “police authority or chief officer” substitute “appropriate authority”; and
- (b) for “authority or chief officer” substitute “appropriate authority”.

(4) In sub-paragraph (3)—

- (a) for “any” substitute “a”;
- (b) for “police authority or chief officer” substitute “appropriate authority”; and
- (c) at the end insert “where that failure concerns a complaint falling within regulation 2(2) of the Complaints Regulations”.

(5) In sub-paragraph (4)—

- (a) for “police authority or chief officer” substitute “appropriate authority”; and
- (b) for “a police authority or chief officer” substitute “the appropriate authority”.

(6) In sub-paragraph (6)(a), for “police authority or, as the case may be, the chief officer” substitute “appropriate authority”.

(7) In sub-paragraph (6)(b), for “police authority or chief officer” substitute “appropriate authority”.

5 (1) Paragraph 4 (reference of complaints to the Commission) is modified as follows.

(2) For sub-paragraph (3) insert—

“(3) In a case where—

- (a) the Commission has notified the appropriate authority that it requires a complaint to be referred to it for its consideration; or
- (b) a complaint has been referred to the Commission on the grounds that it would be appropriate to do so by reason of the gravity of the subject matter or complaint, or any exceptional circumstances;

the Commission may give such direction to the appropriate authority as it considers appropriate for recording the complaint.”.

(3) After sub-paragraph (3) insert—

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“(3A) Directions under sub-paragraph (3) may require action taken in pursuance of the directions to be treated as taken in accordance with any such provision of paragraph 2 as may be specified in the direction.”.

(4) In sub-paragraph (5)(b)—

- (a) for “a police authority or chief officer” substitute “the appropriate authority”; and
- (b) omit “or (3)”.

(5) In sub-paragraph (6)—

- (a) for “A police authority or chief officer” substitute “The appropriate authority”; and
- (b) in paragraph (b), omit “or chief officer”.

6 In paragraph 5 (duties of Commission on references under paragraph 4), in sub-paragraph (1), for “a police authority or chief officer” substitute “the appropriate authority”.

7 (1) Paragraph 6 (handling of complaints by the appropriate authority) is modified as follows.

(2) For sub-paragraph (2) substitute—

“(2) The appropriate authority shall determine whether or not the complaint is suitable for being subjected to local resolution, and if it determines that it is so suitable it shall be so subjected.”.

(3) Omit sub-paragraphs (3) to (7).

8 Paragraphs 7 (dispensation by the Commission from requirements of Schedule), 8 (local resolution of complaints) and 9 (appeals relating to local resolution) are omitted.

9 (1) Paragraph 10 (conduct matters arising in civil proceedings) is modified as follows.

(2) In sub-paragraph (1)—

- (a) for “a police authority or chief officer” substitute “the appropriate authority” (in each place that it occurs);
- (b) in paragraph (a), for “that authority or chief officer” substitute “the Secretary of State”; and
- (c) in paragraph (b), for “that authority or chief officer” substitute “the appropriate authority”.

(3) Omit sub-paragraph (2).

(4) For sub-paragraph (3) substitute—

“(3) Where the appropriate authority considers that sub-paragraph (1) applies it shall record that conduct matter.”.

10 In paragraph 11 (recording etc of conduct matters in other cases), in sub-paragraph (1), omit “police authority or chief officer who is the”.

11 (1) Paragraph 12 (duties to preserve evidence relating to conduct matters) is modified as follows.

(2) Omit sub-paragraph (1).

(3) In sub-paragraph (2)—

- (a) for “a chief officer” substitute “the appropriate authority”;

- (b) for “a person under his direction and control” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum”;
 - (c) for “his” substitute “its”; and
 - (d) for “him” substitute “it”.
- (4) In sub-paragraph (3)—
- (a) for “chief officer’s” substitute “appropriate authority’s”; and
 - (b) for “he” substitute “it”.
- (5) In sub-paragraph (4)—
- (a) for “he shall” substitute “the appropriate authority shall”;
 - (b) for “he is” substitute “it is”; and
 - (c) for “him” substitute “it”.
- (6) In sub-paragraph (5), for “a police authority” substitute “the appropriate authority”.
- (7) In sub-paragraph (6)—
- (a) for “chief officer” substitute “appropriate authority”;
 - (b) for “he” substitute “it”; and
 - (c) omit “the police authority maintaining his force or by”.
- 12 (1) Paragraph 13 (reference of conduct matters to the Commission) is modified as follows.
- (2) In sub-paragraph (1)—
- (a) for “a police authority or a chief officer” substitute “the appropriate authority”; and
 - (b) omit “in which the authority or chief officer is the appropriate authority”.
- (3) Omit sub-paragraph (3).
- (4) In sub-paragraph (5)(b)—
- (a) for “a police authority or chief officer” substitute “the appropriate authority”; and
 - (b) omit “or (3)”.
- (5) In sub-paragraph (6)—
- (a) for “a police authority or chief officer” substitute “the appropriate authority”; and
 - (b) omit “or chief officer” (in each place that it occurs).
- 13 In paragraph 14 (duties of Commission on references under paragraph 13), in sub-paragraph (1), for “a police authority or chief officer” substitute “the appropriate authority”.
- 14 In paragraph 14A (duty to record DSI matters), in sub-paragraph (1), omit “police authority or chief officer who is the”.
- 15 (1) Paragraph 14B (duty to preserve evidence relating to DSI matters) is modified as follows.
- (2) In sub-paragraph (1)—
- (a) for “a police authority, and” substitute “the appropriate authority”; and
 - (b) omit sub-paragraph (b).
- (3) Omit sub-paragraph (2).

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(4) In sub-paragraph (3)—

- (a) for “chief officer’s” substitute “appropriate authority’s”;
- (b) for “(2)” substitute “(1)”; and
- (c) for “he” substitute “it”.

(5) In sub-paragraph (4)—

- (a) for “he shall” substitute “the appropriate authority shall”;
- (b) for “he” substitute “it”; and
- (c) for “him” substitute “it”.

(6) In sub-paragraph (5), for “a police authority” substitute “the appropriate authority”.

(7) In sub-paragraph (6)—

- (a) for “chief officer” substitute “appropriate authority”;
- (b) for “he” substitute “it”; and
- (c) omit “the police authority maintaining his force or by”.

16 In paragraph 14D (duties of Commission on references under paragraph 14C), in sub-paragraph (1), for “a police authority or a chief officer” substitute “the appropriate authority”.

17 In paragraph 15 (power of the Commission to determine the form of an investigation) in sub-paragraph (4)—

- (a) after paragraph (b) insert—
“(ba)an investigation by a police force under the supervision of the Commission;”;
- (b) after paragraph (c) insert—
“(ca)an investigation by a police force under the management of the Commission;”.

18 (1) Paragraph 16 (investigations by the appropriate authority on its own behalf) is modified as follows.

(2) for sub-paragraph (3) substitute—

“(3) It shall be the duty of the appropriate authority to appoint an immigration officer or an official of the Secretary of State to investigate the complaint or matter.”.

(3) Omit sub-paragraphs (4) and (5).

19 (1) Paragraph 17 (investigations supervised by the Commission) is modified as follows.

(2) For sub-paragraph (2) substitute—

“(2) On being given notice of that determination, the appropriate authority shall, if it has not already done so, appoint an immigration officer or an official of the Secretary of State to investigate the complaint or matter.”.

(3) In sub-paragraph (4)(a), for “sub-paragraph (2)(a), (b) or (c)” substitute “sub-paragraph (2)”.

(4) Omit sub-paragraphs (6) and (6A).

20 After paragraph 17 insert—

“17A Investigations by a police force under the supervision of the Commission

(1) This paragraph applies where the Commission determines that there should be an investigation by a police force under the supervision of the Commission.

(2) The appropriate authority shall—

- (a) identify the police force for the police area which includes the geographical area to which the subject matter of the complaint, recordable conduct matter or DSI matter most closely relates; and
 - (b) take steps to obtain the agreement of the chief officer of police of that force, to the appointment of that force to carry out the investigation.
- (3) In the event that no agreement is reached under sub-paragraph (2) the appropriate authority or the Commission may require the chief officer of police of any police force it considers appropriate to carry out the investigation.
- (4) A chief officer of police of a police force who agrees to or is required to carry out an investigation shall, if he has not already done so, appoint a person serving with the police who is a member of that force to investigate that complaint or matter.
- (5) The Commission may require that no appointment is made under sub-paragraph (4) unless it has given notice to the chief officer that it approves the person serving with the police whom he proposes to appoint.
- (6) Sub-paragraphs (4) and (5) and (7) of paragraph 17 shall apply as they apply to an investigation by the appropriate authority which the Commission has determined is one that it should supervise and for that purpose any references to the appropriate authority in those sub-paragraphs shall be treated as references to the chief officer of police concerned.
- (7) An appointment of a person under sub-paragraph (4) or under paragraph 17(5) as applied by sub-paragraph (6) shall be notified by the chief officer of police concerned to the appropriate authority.”.

21 In paragraph 18 (investigations managed by the Commission), in sub-paragraph(2) for “(2) to (6A)” substitute “(2) to (5)”.

22 After paragraph 18 insert—

“18A Investigations by a police force under the management of the Commission

- (1) This paragraph applies where the Commission determines that there should be an investigation by a police force under the management of the Commission.
- (2) The appropriate authority shall—
- (a) identify the police force for the police area which includes the geographical area to which the subject matter of the complaint, recordable conduct matter or DSI matter most closely relates; and
 - (b) take steps to obtain the agreement of—
 - (i) the chief officer of police of that force, and
 - (ii) the appropriate authority,to the appointment by the appropriate authority of that force to carry out the investigation.
- (3) In the event that no agreement is reached under sub-paragraph (2) the Commission may require the chief officer of police of any police force it considers appropriate to carry out the investigation.
- (4) A chief officer of police of a police force who agrees to or is required to carry out an investigation shall, if he has not already done so, appoint a person serving with the police who is a member of that force to investigate that complaint or matter.
- (5) The Commission may require that no appointment is made under sub-paragraph (4) unless it has given notice to the chief officer that it approves the person serving with the police whom he proposes to appoint.

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(5) Sub-paragraphs (4) and (5) of paragraph 17 shall apply as they apply to an investigation by the appropriate authority which the Commission has determined is one that it should manage and for that purpose any references to the appropriate authority in those sub-paragraphs shall be treated as references to the chief officer of police concerned.

(6) An appointment of a person under sub-paragraph (4) or 17(5) as applied by sub-paragraph (5) shall be notified by the chief officer of police concerned to the appropriate authority.

(7) The person appointed to investigate the complaint or matter shall, in relation to an investigation, be under the direction and control of the Commission.”.

23 In paragraph 19 (investigations by the Commission itself), sub-paragraphs (3) and (3A) are omitted.

24 (1) Paragraph 20 (restrictions on proceedings pending the conclusion of an investigation) is modified as follows.

(2) For sub-paragraph (1) substitute—

“(1) No criminal proceedings shall be brought in relation to any matter which is the subject of an investigation in accordance with the provisions of this Schedule until a report on that investigation has been submitted to the Commission or to the appropriate authority under paragraph 22 or 24A.”.

(3) In sub-paragraph (2) omit “or disciplinary proceedings”.

(4) After sub-paragraph (3) insert—

“(4) Where disciplinary proceedings are brought in relation to any matter which is the subject of an investigation in accordance with paragraph 17, 17A, 18, 18A or 19 of this Schedule the appropriate authority shall notify the Commission of that fact before such proceedings are brought.”.

25 Omit paragraphs 20A to 20I (accelerated procedure in special cases).

26 (1) Paragraph 21 (power of the Commission to discontinue an investigation) is modified as follows.

(2) In sub-paragraph (1), at the beginning insert “Subject to paragraph (1A),”.

(3) After sub-paragraph (1) insert—

“(1A) The Commission may only discontinue an investigation in respect of a complaint or matter specified in section 10(3) if—

- (a) the appropriate authority has applied to it for the purpose of discontinuing that investigation and;
- (b) the Commission has previously determined the form that investigation into the complaint or matter should take in accordance with paragraph 15 of this Schedule.”.

27 (1) Paragraph 21A (procedure where conduct matter is revealed during investigation of DSI matter) is modified as follows.

(2) In sub-paragraphs (1) and (3), for “a person serving with the police” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum.”.

(3) In sub-paragraph (2)(a), omit “in relation to the DSI matter and (if different) the appropriate authority in relation to the person whose conduct is in question of its determination”.

- (4) In sub-paragraph (2)(b), omit “(or each of them)”.
- (5) In sub-paragraph (3), omit “in relation to the DSI matter”.
- (6) In sub-paragraph (4), omit paragraph (a).
- (7) In sub-paragraph (5)—
 - (a) in paragraph (a), at the end insert “or”;
 - (b) in paragraph (b)—
 - (i) omit “(in a case where it is also the appropriate authority in relation to the DSI matter)”;
 - (ii) at the end omit “or”; and
 - (c) omit paragraph (c).

28 (1) Paragraph 22 (final reports on investigations: complaints, conduct matters and certain DSI matters) is modified as follows.

- (2) In sub-paragraph (3) for “17 or 18” substitute “17, 17A, 18 or 18A”; and
- (3) Sub-paragraph (4) is omitted.

29 (1) Paragraph 24A (final reports on investigations: other DSI matters) is amended as follows.

- (2) In sub-paragraph (2), for “17 or 18” substitute “17, 17A, 18 or 18A”.
- (3) In sub-paragraph (4), for “a person serving with the police” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum”.

30 (1) Paragraph 24B (action by the Commission in response to an investigation report under paragraph 24A) is modified as follows.

- (2) In sub-paragraph (1), for “a person serving with the police” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum”.
- (3) In sub-paragraphs (1) and (2), omit “in relation to the person whose conduct is in question”.

31 In paragraph 24C (action by the Commission in response to an investigation report under paragraph 24A), in sub-paragraph (1), for “a person serving with the police” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum”.

32 (1) Paragraph 25 (appeals to the Commission with respect to an investigation), is modified as follows

- (2) In sub-paragraph (2), at the beginning insert “In cases where the complaint in question is specified in section 10(3) and the Commission has determined the form of the investigation into that complaint in accordance with paragraph 15 of this Schedule,”.
- (3) After sub-paragraph (6) insert—

“(6A) The Commission shall consult the appropriate authority before giving it directions in accordance with sub-paragraph (6), and shall have regard to any representations made to it by the appropriate authority.”.

33 In paragraph 27 (duties with respect to disciplinary proceedings), in sub-paragraph (3), for “any person serving with the police” substitute “an immigration

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officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum.”.

34 (1) Paragraph 28 (information for complainant about disciplinary recommendations) is modified as follows.

(2) In sub-paragraph (3), at the beginning insert “Subject to sub-paragraph (4),”.

(3) After sub-paragraph (3) insert—

“(4) The Commission shall consult the appropriate authority before notifying the complainant and every person entitled to be kept properly informed in accordance with sub-paragraph (1) or (3), and shall have regard to any representations made to it by the appropriate authority.”.

Appointment

Specified date: 25 February 2008: see reg 1.

SCHEDULE 3 MODIFICATION OF THE COMPLAINTS REGULATIONS

Regulation 6(a)

1 The Complaints Regulations are modified as follows.

2 (1) Regulation 1 (citation, commencement and interpretation) is modified as follows.

(2) In paragraph (2),—

(a) after the definition of “the 2002 Act” insert—

““appropriate authority” means a person nominated by the Secretary of State;”;

(b) after the definition of “the Commission” insert—

““immigration decision” has the meaning given in section 82(2) of the Nationality, Immigration and Asylum Act 2002;”;

(c) omit the definition of “a relevant offence”.

(3) After paragraph (2) insert—

“(3) In these Regulations “specified enforcement functions” means, subject to paragraphs (4) and (5) the exercise of—

(a) powers of entry;

(b) powers to search persons and property;

(c) powers to seize or detain property;

(d) powers to arrest persons;

(e) powers to detain persons;

(f) powers to examine persons or otherwise obtain information (including powers to take fingerprints or to acquire other personal data); and

(g) powers in connection with the removal of persons from the United Kingdom.

(4) The following shall not be regarded as an enforcement function—

(i) the making of an immigration decision;

(ii) the making of any decision to grant or refuse asylum; or

(iii) the giving of any directions to remove persons from the United Kingdom.

(5) For the avoidance of doubt, references to “specified enforcement functions” in paragraph (3) include their exercise in connection with any authorisation granted under Part 2 of the Regulation of Investigatory Powers Act 2000.”.

3 (1) Regulation 2 (reference of complaints to the Commission) is modified as follows.

(2) In paragraph (2)(a)(iii), after “Commission” insert “, arising in connection with the exercise of a specified enforcement function by an immigration officer or the exercise of a specified enforcement function by an official of the Secretary of State in relation to immigration or asylum”.

(3) In paragraph (2)(a)(iv)—

- (a) for “or behaviour which is liable to lead to a disciplinary sanction and which in either case was” substitute “which is”; and
- (b) at the end insert “or”.

(4) Omit paragraph (2)(a)(v).

(5) At the end of paragraph (2)(b) insert “, or” and insert—

- “(c) complaints which refer to an allegation of an infringement of Article 2 or 3 of the European Convention on Human Rights.”.

4 Regulation 3 (dispensation by the Commission) and regulation 4 (local resolution of complaints) are omitted.

5 (1) Regulation 5 (recording and reference of conduct matters) is modified as follows.

(2) In paragraph (1)(c), after “Commission” insert “, arising in connection with the exercise of a specified enforcement function by an immigration officer or the exercise of a specified enforcement function by an official of the Secretary of State in relation to immigration or asylum”.

(3) In paragraph (1)(d) for “or behaviour which is liable to lead to a disciplinary sanction and which in either case was” substitute “which is”.

(4) For paragraph (1)(e) substitute—

- “(e) conduct which is alleged to have infringed Article 2 or 3 of the European Convention on Human Rights.”.

6 (1) Regulation 6 (power of Commission to impose requirements in relation to an investigation which it is supervising) is modified as follows.

(2) In paragraph (1) after “17(7)” insert “and 17A”.

(3) In paragraph (3), after “available by a chief officer” insert “the Secretary of State or a chief officer, as appropriate,”.

7 (1) Regulation 8 (appeals to the Commission: failures to notify or record a complaint) is modified as follows.

(2) In paragraph (1)—

- (a) omit “a police authority or chief officer to determine who is”; and
- (b) after “appropriate authority” omit “or”.

(3) In paragraph (2)(c), for “police force or police authority” substitute “appropriate authority”.

(4) In paragraph (3)(a), for “police authority or chief officer concerned” substitute “appropriate authority”.

(5) In paragraph (5), for “A police authority or chief officer” substitute “The appropriate authority”.

(6) In paragraph (7), for “police authority or chief officer concerned” substitute “appropriate authority”.

8 Regulation 9 (appeals to the Commission: local resolution) shall be omitted.

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9 (1) Regulation 11 (manner in which duties to provide information are to be performed) is modified as follows.

(2) After paragraph 7 insert—

“(7A) Before notifying a complainant or interested person of the outcome of a hearing or action further to sub-paragraph (7) the Commission shall consult the appropriate authority and shall have regard to any representations made to it.”.

10 (1) Regulation 18 (appointment of persons to carry out investigations) is modified as follows.

(2) In paragraph (1)—

- (a) for “17 or 18” substitute “17, 17A, 18, or 18A”; and
- (b) omit sub-paragraph (d).

(3) Omit paragraphs (2) and (3).

11 (1) Regulation 21 (complaints against a person who has subsequently ceased to serve with the police) is modified as follows.

(2) For the heading of this section substitute “Complaints against a person who has subsequently ceased to serve as an immigration officer or an official of the Secretary of State in a capacity relating to immigration or asylum”.

(3) For “a person serving with the police” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum”.

(4) In regulation 24 (keeping of records), in sub-paragraph (1), for “Every police authority and chief officer” substitute “The appropriate authority”.

12 (1) Regulation 25 (register to be kept by the Commission) is modified as follows.

(2) In paragraph (1), for “a police authority or chief officer” substitute “the Secretary of State”.

(3) After paragraph (3) insert—

“(4) Before disclosing information under paragraph (2) the Commission shall consult the appropriate authority, and shall have regard to any representations made by it.”.

13 Regulations 26 (delegation of powers and duties by chief officer), 28 (application to contracted-out staff) and 30 (disciplinary proceedings for police staff) are omitted.

Appointment

Specified date: 25 February 2008: see reg 1.

SCHEDULE 4 MODIFICATION TO THE STAFF CONDUCT REGULATIONS

Regulation 6(b)

1 (1) The Staff Conduct Regulations are modified as follows.

(2) Regulation 1 (citation, commencement and interpretation), is modified as follows.

(3) For paragraph (2) substitute—

“(2) In these Regulations—

“the Commission” means the Independent Police Complaints Commission; and
“immigration decision” has the meaning given in section 82(2) of the Nationality, Immigration and Asylum Act 2002.

(3) In these Regulations “specified enforcement functions” means, subject to paragraphs (4) and (5)—

- (a) powers of entry;
- (b) powers to search persons and property;
- (c) powers to seize or detain property;
- (d) powers to arrest persons;
- (e) powers to detain persons;
- (f) powers to examine persons or otherwise obtain information (including powers to take fingerprints or to acquire other personal data); and
- (g) powers in connection with the removal of persons from the United Kingdom.

(4) The following shall not be regarded as an enforcement function—

- (i) the making of an immigration decision;
- (ii) the making of any decision to grant or refuse asylum; or
- (iii) the giving of directions to remove persons from the United Kingdom.

(5) For the avoidance of doubt, references to “specified enforcement functions” include their exercise in connection with any authorisation granted under Part 2 of the Regulation of Investigatory Powers Act 2000.”

2 (1) Regulation 2 (conduct of Commission’s staff) is modified as follows.

(2) In paragraph (3)(a)(i), for “a person serving with the police” substitute “an immigration officer exercising specified enforcement functions or an official of the Secretary of State exercising specified enforcement functions in relation to immigration or asylum.

Appointment

Specified date: 25 February 2008: see reg 1.

IMMIGRATION, ASYLUM AND NATIONALITY ACT 2006 (COMMENCEMENT NO 8 AND TRANSITIONAL AND SAVING PROVISIONS) ORDER 2008

2008 No 310

Made 8th February 2008

The Secretary of State makes the following Order in exercise of the powers conferred by section 62 of the Immigration, Asylum and Nationality Act 2006.

1 Citation and interpretation

(1) This Order may be cited at the Immigration, Asylum and Nationality Act 2006 (Commencement No 8 and Transitional and Saving Provisions) Order 2008.

(2) In this Order—

- “the 2006 Act” means the Immigration, Asylum and Nationality Act 2006;
- “the 2002 Act” means the Nationality, Immigration and Asylum Act 2002;
- “the 1999 Act” means the Immigration and Asylum Act 1999;
- “the 1996 Act” means the Asylum and Immigration Act 1996; and

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“immigration rules” means rules made under section 3(2) of the Immigration Act 1971.

Appointment

Date made: 8 February 2008: (no specific commencement provision).

2 Commencement

(1) Subject to article 5 the following provisions of the 2006 Act shall come into force on 29th February 2008—

- (a) sections 15 to 18 to the extent to which they are not already in force (penalty for employment of adult subject to immigration control);
- (b) sections 21 and 22 (offence of employing adult subject to immigration control);
- (c) section 24 (employment of adult subject to immigration control: temporary admission);
- (d) section 26 (repeal); and
- (e) in Schedule 3, the entries relating to the 1996 Act.

(2) The following provisions of the 2006 Act shall come into force on 29th February 2008—

- (a) section 50(3)(a) (repeal); and
- (b) in Schedule 3, the entries relating to section 31A of the Immigration Act 1971.

Appointment

Date made: 8 February 2008: (no specific commencement provision).

3

The following provisions of the 2006 Act shall come in to force on 1st April 2008—

- (a) subject to article 4, section 4 (entry clearance);
- (b) section 33 (freight information: police powers) for the purposes of making an order under subsection (5)(a); and
- (c) section 47 (removal: person with statutorily extended leave).

Appointment

Date made: 8 February 2008: (no specific commencement provision).

4 Saving and Transitional Provision

Notwithstanding the commencement of section 4 of the 2006 Act and the substitution of section 88A of the 2002 Act and section 23 of the 1999 Act, section 4(1) (appeals: entry clearance) and section 4(2) of the 2006 Act (monitoring refusals of entry clearance) shall have effect only so far as they relate to applications of a kind identified in immigration rules as requiring to be considered under a “Points Based System”.

Appointment

Date made: 8 February 2008: (no specific commencement provision).

5

(1) Notwithstanding the commencement of section 26 of the 2006 Act (repeal) the following provisions and instruments continue to have effect in relation to employment which commenced before 29th February 2008, including employment which continued on or after that date—

- (a) sections 8 (restrictions on employment) and 8A (code of practice) of the 1996 Act;

- (b) any Code of Practice in force immediately before 29th February 2008 under section 8A of the 1996 Act;
- (c) the Immigration (Restrictions on Employment) Order 2004; and
- (d) the Immigration (Restrictions on Employment) (Code of Practice) Order 2001.

(2) Sections 15 to 18, 21, 22, 24, 25 and 26 of the 2006 Act are of no effect in relation to employment of a kind mentioned in paragraph (1).

Appointment

Date made: 8 February 2008: (no specific commencement provision).

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IMMIGRATION SERVICES COMMISSIONER (DESIGNATED PROFESSIONAL BODY) (FEES) ORDER 2008

2008 No 505

Made 21st February 2008

Laid before Parliament 27th February 2008

Coming into force 21st March 2008

The Secretary of State, in exercise of the power conferred by sections 86(10) and (12) of the Immigration and Asylum Act 1999, makes the following Order:

1 Citation and commencement

This Order may be cited as the Immigration Services Commissioner (Designated Professional Body) (Fees) Order 2008 and shall come into force on 21st March 2008.

Appointment

Specified date: 21 March 2008: see above.

2 Fees

(1) The fee to be paid to the Immigration Services Commissioner by each designated professional body for the year 1st April 2007 to 31st March 2008 shall be the sum specified in the Schedule to this Order.

(2) The fee shall be paid on or before 31st March 2008.

Appointment

Specified date: 21 March 2008: see art 1.

SCHEDULE

Article 2

Designated Professional Body

Fee to be paid

The Law Society

£104,320

<i>Designated Professional Body</i>	<i>Fee to be paid</i>
The Law Society of Scotland	£8,900
The Law Society of Northern Ireland	£1,790
The Institute of Legal Executives	£15,560
The General Council of the Bar	£11,070
The Faculty of Advocates	£2,440
The General Council of the Bar of Northern Ireland	£1,790

Appointment

Specified date: 21 March 2008; see art 1.

IMMIGRATION, ASYLUM AND NATIONALITY ACT 2006 (DUTY TO SHARE INFORMATION AND DISCLOSURE OF INFORMATION FOR SECURITY PURPOSES) ORDER 2008

2008 No 539

Made 28th February 2008

Coming into force 1st March 2008

The Secretary of State and the Treasury make the following Order in exercise of the powers conferred by sections 36(4) and 38(4) of the Immigration, Asylum and Nationality Act 2006.

In accordance with sections 36(8) and 38(7) of that Act, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

The Secretary of State and the Treasury are satisfied that the sharing of information pursuant to article 2 or 3 of this Order is likely to be of use for immigration purposes, police purposes or Revenue and Customs purposes and that the nature of the information shared pursuant to either of those articles is such that there are likely to be circumstances in which it can be shared without breaching Convention rights (within the meaning of the Human Rights Act 1998).

1 Citation, commencement and interpretation

(1) This Order may be cited as the Immigration, Asylum and Nationality Act 2006 (Duty to Share Information and Disclosure of Information for Security Purposes) Order 2008 and shall come into force on 1st March 2008.

(2) In this Order—

“the 2006 Act” means the Immigration, Asylum and Nationality Act 2006; and
“shuttle train”, “through train” and “international service” have the same meanings as in the Channel Tunnel (International Arrangements) Order 1993.

(3) Any power specified in this Order for the purposes of section 36(4)(a) or section 38(4)(a) of the 2006 Act should be read as including a reference to that power

as modified under section 11 of the Channel Tunnel Act 1987 (regulation of the tunnel system: application and enforcement of law, etc).

Appointment

Specified date: 1 March 2008: see para (1) above.

2 Duty to share information obtained or held under specified powers

(1) Subject to paragraphs (2) and (3), the powers contained in the provisions set out in Schedule 1 to this Order are specified for the purposes of section 36(4)(a) of the 2006 Act (duty to share information).

(2) The powers are only specified to the extent to which they relate to—

- (a) passengers on a ship or aircraft or through train or shuttle train;
- (b) crew of a ship or aircraft or through train or shuttle train;
- (c) freight on a ship or aircraft or through train or shuttle train; or
- (d) flights or voyages or international services.

(3) A power shall not be construed as being specified if or in so far as it relates to a matter to which section 7 of the Commissioners for Revenue and Customs Act 2005 (former Inland Revenue matters) applies.

Appointment

Specified date: 1 March 2008: see art 1(1).

3 Duty to share information relating to other matters specified in respect of travel or freight

(1) Subject to paragraph (2), the matters in respect of travel and freight set out in Schedule 2 to this Order are specified for the purposes of section 36(4)(b) of the 2006 Act (duty to share information).

(2) A matter shall not be construed as being specified if or in so far as—

- (a) disclosure of information relating to it may prejudice an investigation or prosecution whether in the United Kingdom or elsewhere;
- (b) the consent of a third party is required for disclosure of information relating to it and that consent has not been obtained;
- (c) disclosure of information relating to it is likely to cause loss of life or serious injury to any person;
- (d) non-disclosure of information relating to it is necessary for the purpose of safeguarding national security; or
- (e) disclosure of information relating to it would be in breach of an obligation of the United Kingdom or Her Majesty's Government under an international or other agreement.

Appointment

Specified date: 1 March 2008: see art 1(1).

4 Disclosure of information for security purposes: information obtained or held under specified powers

(1) Subject to paragraphs (2) and (3), the powers contained in the provisions set out in Schedule 1 to this Order are specified for the purposes of section 38(4)(a) of the 2006 Act (disclosure of information for security purposes).

(2) The powers are only specified to the extent to which they relate to—

- (a) passengers on a ship or aircraft or through train or shuttle train;
- (b) crew of a ship or aircraft or through train or shuttle train;

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- (c) freight on a ship or aircraft or through train or shuttle train; or
- (d) flights or voyages or international services.

(3) A power shall not be construed as being specified if or in so far as it relates to a matter to which section 7 of the Commissioner for Revenue and Customs Act 2005 (former Inland Revenue matters) applies.

Appointment

Specified date: 1 March 2008: see art 1(1).

5 Disclosure of information for security purposes: information relating to other matters specified in respect of travel or freight

The matters in respect of travel and freight set out in Schedule 2 to this Order are specified for the purposes of section 38(4)(b) of the 2006 Act (disclosure of information for security purposes).

Appointment

Specified date: 1 March 2008: see art 1(1).

SCHEDULE 1

POWERS SPECIFIED FOR THE PURPOSES OF SECTIONS 36(4)(A) AND 38(4)(A) OF THE 2006 ACT

Articles 2(1) and 4(1)

1 The provisions are—

- (a) an order made under paragraph 27(2) of Schedule 2 to the Immigration Act 1971 (power to require provision of information in respect of a ship or an aircraft);
- (b) paragraph 27B of Schedule 2 to the Immigration Act 1971 (passenger information);
- (c) paragraph 27C of Schedule 2 to the Immigration Act 1971 (notification of non-EEA arrivals on a ship or aircraft);
- (d) section 32 of the 2006 Act (passenger and crew information: police powers);
- (e) section 35 of the Customs and Excise Management Act 1979 (report inwards) and any directions or regulations made under that provision;
- (f) section 64 of the Customs and Excise Management Act 1979 (clearance outwards of ships and aircraft) and any directions made under that provision;
- (g) section 77 of the Customs and Excise Management Act 1979 (information in relation to goods imported or exported);
- (h) section 9 of the Commissioners for Revenue and Customs Act 2005 (ancillary powers); and
- (i) Articles 181b (entry summary declaration) and 842a (exit summary declaration) and Annex 30A of Regulation (EEC) No 2454/93.

2 Until 1st July 2009 paragraph 1 shall have effect as if sub-paragraph (i) were omitted.

Appointment

Specified date: 1 March 2008: see art 1(1).

SCHEDULE 2

OTHER MATTERS IN RESPECT OF TRAVEL AND FREIGHT SPECIFIED FOR THE PURPOSES OF SECTIONS 36(4)(B) AND 38(4)(B) OF THE 2006 ACT

Articles 3(1) and 5

3 The matters are—

- (a) the behaviour or suspected behaviour of a passenger, member of crew or person involved in the supply chain of a freight movement, whether already undertaken or anticipated, and including any possible connection with another person held by that passenger, member of crew or person;
- (b) the behaviour or suspected behaviour of a person connected or possibly connected to a passenger, member of crew or person involved in the supply chain of a freight movement, whether already undertaken or anticipated, and including any possible connection with another person held by him;
- (c) any action taken, considered or planned in relation to a passenger, member of crew, person involved in the supply chain of a freight movement or any person connected or possibly connected to any of those persons by—
 - (i) the Secretary of State in so far as he has functions under the Immigration Acts;
 - (ii) a chief officer of police; or
 - (iii) Her Majesty's Revenue and Customs.

Appointment

Specified date: 1 March 2008: see art 1(1).

IMMIGRATION (DISPOSAL OF PROPERTY) REGULATIONS 2008

2008 No 786

Made 20th March 2008

Laid before Parliament 26th March 2008

Coming into force 17th April 2008

The Secretary of State makes the following Regulations in exercise of the powers conferred by section 26(5) and section 26(6) of the UK Borders Act 2007.

1 Citation, commencement and interpretation

These Regulations may be cited as the Immigration (Disposal of Property) Regulations 2008 and shall come into force on 17th April 2008.

Appointment

Specified date: 17 April 2008: see above.

2

In these Regulations—

- (a) “the 2007 Act” means the UK Borders Act 2007.

Appointment

Specified date: 17 April 2008: see reg 1.

3 Property to which these Regulations apply

These Regulations apply to property where—

- (a) the owner has not been ascertained,

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- (b) an order under section 26(2) of the 2007 Act (disposal of property: court order) cannot be made because of subsection (4)(a) of that section, or
- (c) a court has declined to make an order under section 26(2) of the 2007 Act on the grounds that the court is not satisfied of the matters specified in subsection (4)(b) of that section.

Appointment

Specified date: 17 April 2008: see reg 1.

4 Restrictions on disposal of property

(1) Subject to regulation 5(2), property to which these Regulations apply, other than money—

- (a) which has been the subject of a forfeiture order under section 25C of the Immigration Act 1971 (forfeiture of vehicle, ship or aircraft) or section 25 of the 2007 Act (forfeiture of detained property) shall not be disposed of until it has remained in the possession of the Secretary of State for six months beginning with the date on which the forfeiture order was made; and
- (b) which has not been the subject of a forfeiture order under section 25C of the Immigration Act 1971 or section 25 of the 2007 Act shall not be disposed of until it has remained in the possession of the Secretary of State for a year.

(2) Money which is property to which these Regulations apply shall be paid into the Consolidated Fund as soon as is reasonably practicable.

Appointment

Specified date: 17 April 2008: see reg 1.

5 Sale of property

(1) Subject to paragraph (2), after the expiration of the relevant period referred to in regulation 4, property to which these Regulations apply other than money may be sold.

(2) Where the property is a perishable article or its custody involves unreasonable expense or inconvenience it may be sold at any time.

(3) Subject to paragraph (4), the proceeds of all sales under these Regulations shall be paid into the Consolidated Fund as soon as is reasonably practicable.

(4) The Secretary of State may apply the proceeds of all sales under these Regulations, and any money which is property to which these Regulations apply, to defray reasonable expenses incurred in the conveyance, storage, and safe custody of the property and in connection with its sale and otherwise in acting pursuant to these Regulations.

Appointment

Specified date: 17 April 2008: see reg 1.

6 Retention of property

After the expiration of the relevant period referred to in regulation 4, if, in the opinion of the Secretary of State, property to which these Regulations apply (other than money) can be used in the course of, or in connection with, a function under the Immigration Acts, the Secretary of State may determine that the property is to be retained by her and the property shall vest in the Secretary of State on the making of the determination.

Appointment

Specified date: 17 April 2008: see reg 1.

7 Other disposal of property in the public interest

If the Secretary of State is satisfied that the nature of any property to which these Regulations apply is such that it is not in the public interest that it should be sold or retained, it shall, after the expiration of the relevant period referred to in regulation 4, be destroyed or otherwise disposed of in accordance with the direction of the Secretary of State.

Appointment

Specified date: 17 April 2008: see reg 1.

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**BRITISH OVERSEAS TERRITORIES CITIZENSHIP
(DESIGNATED SERVICE) (AMENDMENT)
ORDER 2008**

2008 No 1240

Made 30th April 2008

Laid before Parliament 2nd May 2008

Coming into force 30th June 2008

The Secretary of State, in exercise of the powers conferred by section 16(3) of the British Nationality Act 1981, makes the following Order:

1 Citation and commencement

This Order may be cited as the British Overseas Territories Citizenship (Designated Service) (Amendment) Order 2008 and shall come into force on 30th June 2008.

Appointment

Specified date: 30 June 2008: see above.

2 Amendment

In the Schedule to the British Dependent Territories Citizenship (Designated Service) Order 1982 (which specifies descriptions of service designated for the purposes of section 16 of the British Nationality Act 1981), paragraphs 2 and 3 are omitted.

Appointment

Specified date: 30 June 2008: see art 1.

**IMMIGRATION (REGISTRATION CARD)
ORDER 2008**

2008 No 1693

Made 26th June 2008

Coming into force 27th June 2008

The Secretary of State makes the following order in the exercise of powers conferred by section 26A(7)(a) of the Immigration Act 1971;

In accordance with section 26A(8) of that Act, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

1 Citation and commencement

This order may be cited as the Immigration (Registration Card) Order 2008 and shall come into force on the day after the day on which it is made.

Appointment

Specified date: 27 June 2008: see above.

2 Definition of registration card

In section 26A of the Immigration Act 1971, for subsection (1)(b) there shall be substituted the following—

- “(b) is issued by the Secretary of State to the person wholly or partly in connection with—
- (i) a claim for asylum (whether or not made by that person), or
 - (ii) a claim for support under section 4 of the Immigration and Asylum Act 1999 (whether or not made by that person).”

Appointment

Specified date: 27 June 2008: see art 1.

**IMMIGRATION (BIOMETRIC REGISTRATION)
(OBJECTION TO CIVIL PENALTY) ORDER 2008**

2008 No 2830

Made 29th October 2008

Laid before Parliament 31st October 2008

Coming into force 25th November 2008

The Secretary of State makes the following Order in exercise of the powers conferred by sections 10 and 14 of the UK Borders Act 2007.

Citation, commencement and interpretation

1

This Order may be cited as the Immigration (Biometric Registration) (Objection to Civil Penalty) Order 2008 and shall come into force on 25th November 2008.

Appointment

Specified date: 25 November 2008: see above.

2

In this Order—

“the Act” means the UK Borders Act 2007;

“working days” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom where a person objecting to a penalty under section 10 of the Act resides.

Appointment

Specified date: 25 November 2008: see art 1.

Required form and contents of a notice of objection

3

Where a penalty notice is given under section 9(1) of the Act, a notice of objection to the penalty notice under section 10(1) of the Act must be given on the form set out in the Schedule to this Order.

Appointment

Specified date: 25 November 2008: see art 1.

4

The form must be completed in English or Welsh.

Appointment

Specified date: 25 November 2008: see art 1.

5

The notice of objection must include—

- (a) the penalty notice reference number;
- (b) the full name of the person issued with the penalty notice;
- (c) that person's date of birth;
- (d) that person's current residential address including postcode;
- (e) that person's signature;
- (f) the date on which the person signed the notice of objection; and
- (g) a list of any supporting evidence provided with the notice of objection.

Appointment

Specified date: 25 November 2008: see art 1.

6

Where an appeal has been brought under section 11(1) of the Act, the notice of objection must state—

Appendix 1 Legislation and materials

- (a) the name and address of the county court or sheriff to which the grounds for appeal were submitted;
- (b) the date that the appeal was submitted; and
- (c) any court reference number.

Appointment

Specified date: 25 November 2008; see art 1.

7 Period of time for giving a notice of objection

A notice of objection under section 10(1) of the Act must be given to the Secretary of State before the expiry of thirty working days beginning with the date specified on the penalty notice.

Appointment

Specified date: 25 November 2008; see art 1.

8 Period of time for Secretary of State to notify response to notice of objection

The Secretary of State shall notify the response to a notice of objection under section 10(4) of the Act before the expiry of thirty-three working days beginning with the date that the Secretary of State received the notice of objection.

Appointment

Specified date: 25 November 2008; see art 1.

IMMIGRATION (BIOMETRIC REGISTRATION) REGULATIONS 2008

2008 No 3048

Made 24th November 2008

Coming into force 25th November 2008

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 5, 6(3), 6(6), 7, 8 and 15(1)(g) of the UK Borders Act 2007.

In accordance with section 6(6)(e) of that Act, a draft of this instrument was laid before and approved by a resolution of each House of Parliament.

1 Citation, commencement and interpretation

These Regulations may be cited as the Immigration (Biometric Registration) Regulations 2008 and shall come into force on the day after the day on which they are made.

Appointment

Specified date: 25 November 2008; see above.

2

In these Regulations—

“dependant” means a spouse or civil partner, or a child under the age of 18;

“immigration rules” means rules made under section 3(2) of the Immigration Act 1971.

Appointment

Specified date: 25 November 2008: see reg 1.

3 Requirement to apply for a biometric immigration document

(1) A person subject to immigration control must apply for the issue of a biometric immigration document where he satisfies—

- (a) one of the conditions in paragraph (2); and
- (b) the condition in paragraph (3). •

(2) The conditions are that the person makes an application for limited leave to remain—

- (a) under one of the categories of the immigration rules specified in regulation 4; or
- (b) as a dependant of a person who is applying at the same time for limited leave to remain under one of those categories.

(3) The condition is that the person makes the application for limited leave to remain on the form specified for that purpose in accordance with the immigration rules.

Appointment

Specified date: 25 November 2008: see reg 1.

4 Specified categories

The specified categories under the immigration rules are—

- (a) as a student;
- (b) as a student nurse;
- (c) to re-sit an examination;
- (d) to write up a thesis;
- (e) as a prospective student;
- (f) as a sabbatical officer;
- (g) as the spouse or civil partner of a person present and settled in the United Kingdom; or
- (h) as the unmarried or same-sex partner of a person present and settled in the United Kingdom.

Appointment

Specified date: 25 November 2008: see reg 1.

5 Power for an authorised person to require a person to provide biometric information

(1) Subject to regulation 7, where a person makes an application for the issue of a biometric immigration document in accordance with regulation 3, an authorised person may require him to provide a record of his fingerprints and a photograph of his face.

(2) Where an authorised person requires a person to provide biometric information in accordance with paragraph (1), the person must provide it.

Appointment

Specified date: 25 November 2008: see reg 1.

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6 Power for the Secretary of State to use and retain existing biometric information

(1) This regulation applies where—

- (a) a person makes an application for the issue of a biometric immigration document in accordance with regulation 3; and
- (b) the Secretary of State already has a record of the person's fingerprints or a photograph of the person's face in his possession (for whatever reason).

(2) Where this regulation applies the Secretary of State may use or retain that information for the purposes of these Regulations.

Appointment

Specified date: 25 November 2008: see reg 1.

7 Provision in relation to persons under the age of sixteen

(1) A person under the age of sixteen ("the child") must not be required to provide a record of his fingerprints or a photograph of his face in accordance with regulation 5 except where the authorised person is satisfied that the fingerprints or the photograph will be taken in the presence of a person aged eighteen or over who is—

- (a) the child's parent or guardian; or
- (b) a person who for the time being takes responsibility for the child.

(2) The person mentioned in paragraph (1)(b) may not be—

- (a) an officer of the Secretary of State who is not an authorised person;
- (b) an authorised person; or
- (c) any other person acting on behalf of an authorised person under regulation 8(2)(d).

(3) This regulation does not apply if the authorised person reasonably believes that the person who is to be fingerprinted or photographed is aged sixteen or over.

Appointment

Specified date: 25 November 2008: see reg 1.

8 Process by which a person's fingerprints and photograph may be obtained and recorded

(1) An authorised person who requires a person to provide a record of his fingerprints or a photograph of his face under regulation 5 may require the person to submit to any process, or any combination of processes, specified in paragraph (2).

(2) An authorised person may—

- (a) require a person to make an appointment before a specified date, which the person must attend, to enable a record of his fingerprints or a photograph of his face to be taken;
- (b) specify the date, time and place for the appointment;
- (c) specify any documents which the person must bring to the appointment, or action which the person must take, to confirm his appointment and identity; and
- (d) require a person to attend premises where a record of his fingerprints or a photograph of his face is taken by a person on behalf of an authorised person.

(3) An authorised person may require a record of fingerprints or photograph to be of a particular specification.

(4) Where an authorised person requires a person to submit to any process, or any combination of processes, in accordance with paragraph (1), the person must submit to it.

Appointment

Specified date: 25 November 2008: see reg 1.

9 Use and retention of biometric information

Subject to regulations 10 and 11, the Secretary of State may use a record of a person's fingerprints or a photograph of a person's face provided in accordance with these Regulations—

- (a) in connection with the exercise of a function by virtue of the Immigration Acts;
- (b) in connection with the control of the United Kingdom's borders;
- (c) in connection with the exercise of a function related to nationality;
- (d) in connection with the prevention, investigation, or prosecution of an offence;
- (e) for a purpose which appears to the Secretary of State to be required in order to protect national security;
- (f) in connection with identifying victims of an event or situation which has caused loss of human life or human illness or injury;
- (g) for the purpose of ascertaining whether any person has failed to comply with the law or has gained, or sought to gain, a benefit or service, or has asserted an entitlement, to which he is not by law entitled.

Appointment

Specified date: 25 November 2008: see reg 1.

10

Subject to regulation 11, any record of a person's fingerprints or his photograph, or any copy of them, held by the Secretary of State pursuant to these Regulations must be destroyed if the Secretary of State thinks it is no longer likely to be of use in accordance with regulation 9.

Appointment

Specified date: 25 November 2008: see reg 1.

11

If a person proves that he is—

- (a) a British citizen; or
- (b) a Commonwealth citizen who has a right of abode in the United Kingdom as a result of section 2(1)(b) of the Immigration Act 1971 (statement of right of abode in the United Kingdom),

any record of the person's fingerprints or his photograph, or any copy of them, held by the Secretary of State pursuant to these Regulations must be destroyed as soon as reasonably practicable.

Appointment

Specified date: 25 November 2008: see reg 1.

12

(1) The Secretary of State must take all reasonably practicable steps to secure—

Appendix 1 Legislation and materials

- (a) that data held in an electronic form which relate to any record of fingerprints or photograph which has to be destroyed in accordance with regulation 10 or 11 are destroyed or erased; or
 - (b) that access to such data is blocked.
- (2) The person to whom the data relate is entitled, on written request, to a certificate issued by the Secretary of State to the effect that he has taken the steps required by paragraph (1).
- (3) A certificate issued under paragraph (2) must be issued within three months of the date on which the request was received by the Secretary of State.

Appointment

Specified date: 25 November 2008: see reg 1.

13 Issue of a biometric immigration document

- (1) The Secretary of State may issue a biometric immigration document to a person who has applied in accordance with regulation 3, provided the Secretary of State has decided to grant limited leave to remain to the person.
- (2) A biometric immigration document begins to have effect on the date of issue.
- (3) A biometric immigration document ceases to have effect on one of the dates specified in paragraph (4), whichever date occurs earliest.
- (4) The specified dates are—
- (a) the date that the person's leave to remain ceases to have effect, including where the leave to remain is varied, cancelled or invalidated, or is to lapse;
 - (b) in the case of a biometric immigration document which was issued to a person aged eighteen or over, the date after the expiry of ten years beginning with the date of issue; or
 - (c) in the case of a biometric immigration document which was issued to a person aged under eighteen, the date after the expiry of five years beginning with the date of issue.

Appointment

Specified date: 25 November 2008: see reg 1.

14 Requirement to surrender documents connected with immigration and nationality

- (1) On issuing the biometric immigration document, the Secretary of State may require the surrender of other documents connected with immigration or nationality.
- (2) Where the Secretary of State requires the surrender of other documents, the person must comply with the requirement.

Appointment

Specified date: 25 November 2008: see reg 1.

15 Content of a biometric immigration document

- (1) A biometric immigration document may contain some or all of the following information on the face of the document—
- (a) the title of the document;
 - (b) the document number;
 - (c) the name of the holder;
 - (d) the holder's date of birth;
 - (e) the holder's place of birth;

- (f) the holder's nationality;
 - (g) the sex of the holder;
 - (h) the period of leave to remain which the person is granted;
 - (i) the class of leave to remain which the person is granted;
 - (j) any conditions to which the limited leave to remain is subject or remarks relating to those conditions;
 - (k) the place and date of issue of the document;
 - (l) the period for which the document is valid;
 - (m) the holder's facial image;
 - (n) the signature of the holder;
 - (o) a machine readable code;
 - (p) a hologram;
 - (q) an emblem of the United Kingdom^{*} and the words "United Kingdom";
 - (r) the symbol of the International Civil Aviation Organization denoting a machine readable travel document which contains a contactless microchip; and
 - (s) any additional security features.
- (2) A biometric immigration document may contain some or all of the following within a radio frequency electronic microchip embedded in the document—
- (a) any of the information specified in paragraph (1)(a) to (m);
 - (b) information relating to a record of any two of the holder's fingerprints; and
 - (c) any additional security features.

Appointment

Specified date: 25 November 2008: see reg 1.

16 Surrender of a biometric immigration document

(1) The Secretary of State may require the surrender of a biometric immigration document as soon as reasonably practicable if he thinks that—

- (a) information provided in connection with the document was or has become false, misleading or incomplete;
- (b) the document (including any information recorded in it) has been altered, damaged or destroyed (whether deliberately or not);
- (c) an attempt has been made (whether successfully or not) to copy the document or to do anything to enable it to be copied;
- (d) the document should be re-issued (whether because the information recorded in it requires alteration or for any other reason);
- (e) the holder's leave to remain is to be varied, cancelled or invalidated, or is to lapse;
- (f) a person has acquired the biometric immigration document without the consent of the holder or of the Secretary of State;
- (g) the document has ceased to have effect under regulation 13(3) or has been cancelled under regulation 17; or
- (h) the holder has died.

(2) Where a person is required to surrender the biometric immigration document under paragraph (1), the person must comply with the requirement.

Appointment

Specified date: 25 November 2008: see reg 1.

17 Cancellation of a biometric immigration document

The Secretary of State may cancel a biometric immigration document if he thinks that—

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- (a) information provided in connection with the document was or has become false, misleading or incomplete;
- (b) the document has been lost or stolen;
- (c) the document (including any information recorded in it) has been altered, damaged or destroyed (whether deliberately or not);
- (d) an attempt has been made (whether successfully or not) to copy the document or to do anything to enable it to be copied;
- (e) a person has failed to surrender the document when required to do so under regulation 16(a) to (f) or (h);
- (f) the document should be re-issued (whether because the information recorded in it requires alteration or for any other reason);
- (g) a person has acquired the biometric immigration document without the consent of the holder or of the Secretary of State; or
- (h) the holder has died.

Appointment

Specified date: 25 November 2008: see reg 1.

18 Requirement for the holder of a document to notify the Secretary of State

The holder of a biometric immigration document must notify the Secretary of State as soon as reasonably practicable if he—

- (a) knows or suspects that information provided in connection with the document was or has become false, misleading or incomplete;
- (b) knows or suspects that the document has been lost or stolen;
- (c) knows or suspects that the document (including any information recorded in it) has been altered or damaged (whether deliberately or not);
- (d) was given leave to enter or remain in the United Kingdom in accordance with a provision of the immigration rules and knows or suspects that owing to a change of his circumstances he would no longer qualify for leave under that provision; or
- (e) knows or suspects that another person has acquired the biometric immigration document without his consent or the consent of the Secretary of State.

Appointment

Specified date: 25 November 2008: see reg 1.

19 Requirement to apply for a replacement biometric immigration document

(1) A person who has been issued with a biometric immigration document under regulation 13(1) is required to apply for a replacement biometric immigration document where his original document—

- (a) has been cancelled under regulation 17; or
- (b) has ceased to have effect under regulation 13(4)(b) or (c).

(2) A person required to apply for a biometric immigration document under paragraph (1) must do so within 3 months beginning with the date that the original document was cancelled or ceased to have effect.

Appointment

Specified date: 25 November 2008: see reg 1.

20 Application of these Regulations to a person who is required to apply for a replacement biometric immigration document

(1) These Regulations apply to a person who makes an application for a biometric immigration document in accordance with regulation 19 just as they apply to a person who makes an application for a document in accordance with regulation 3, with the modification in paragraph (2).

(2) The Secretary of State may issue a biometric immigration document to a person who has applied in accordance with regulation 19, provided the person has limited leave to remain.

Appointment

Specified date: 25 November 2008: see reg 1. •

21 Requirement to use a biometric immigration document

(1) The holder of a biometric immigration document must provide his document to an immigration officer or the Secretary of State, as applicable,—

- (a) where he is examined by an immigration officer under paragraph 2, 2A or 3 of Schedule 2 to the Immigration Act 1971;
- (b) where he is examined by an immigration officer under Article 7(2) of the Immigration (Leave to Enter and Remain) Order 2000;
- (c) where he is examined by the Secretary of State under Article 3 of the Immigration (Leave to Enter) Order 2001;
- (d) where he makes an application for further leave to remain to the Secretary of State;
- (e) when his dependant makes an application for entry clearance, leave to enter or leave to remain as his dependant; or
- (f) when he is the sponsor under the immigration rules of a person who seeks entry clearance, leave to enter or leave to remain in the United Kingdom.

(2) Where the holder of a biometric immigration document attends premises to take a test known under the immigration rules as the “Life in the UK Test”, he must provide his document to the representative of the educational institution, or other person, who is administering the test.

(3) The holder of a biometric immigration document must provide his document to a prospective employer or employer—

- (a) prior to the commencement of his employment; and
- (b) on the anniversary of the date that the document was first produced, provided he is still working for that employer on that date.

Appointment

Specified date: 25 November 2008: see reg 1.

22 Requirement to provide information for comparison

(1) A person who provides a biometric immigration document in accordance with regulation 21(1) or (2) is required to provide biometric information for comparison with biometric information provided in connection with the application for the document.

(2) Where the document is provided to an authorised person, the authorised person may require the provision of the information in a specified form.

(3) Regulation 8 applies to a person required to provide information under paragraph (1) as it applies to a person who is required to provide biometric information under regulation 5.

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Appointment

Specified date: 25 November 2008: see reg 1.

23 Consequences of a failure to comply with a requirement of these Regulations

(1) Where a person who is required to make an application for the issue of a biometric immigration document fails to comply with a requirement of these Regulations, the Secretary of State—

- (a) may take any, or any combination, of the actions specified in paragraph (2); and
- (b) must consider giving a notice under section 9 of the UK Borders Act 2007.

(2) The actions specified are to—

- (a) refuse an application for a biometric immigration document;
- (b) disregard the person's application for leave to remain;
- (c) refuse the person's application for leave to remain; and
- (d) cancel or vary leave to enter or remain.

(3) Where any person apart from a person referred to in paragraph (1) fails to comply with a requirement of these Regulations, the Secretary of State must consider giving a notice under section 9 of the UK Borders Act 2007.

(4) The Secretary of State may designate an adult as the person responsible for ensuring that a child complies with the requirements of these Regulations.

Appointment

Specified date: 25 November 2008: see reg 1.

24 Revocation and transitional provisions

(1) Subject to paragraph (2), the Immigration (Biometric Registration) (Pilot) Regulations 2008 are revoked.

(2) The Immigration (Biometric Registration) (Pilot) Regulations 2008 continue to apply to a person who was required to apply for a biometric immigration document in accordance with regulation 3 of those Regulations before the coming into force of these Regulations, subject to paragraph (3).

(3) These Regulations apply to any application for leave to remain falling within regulation 3 of these Regulations, which is made by a person referred to in paragraph (2) on or after the coming into force of these Regulations.

Appointment

Specified date: 25 November 2008: see reg 1.

**IMMIGRATION (BIOMETRIC REGISTRATION)
(CIVIL PENALTY CODE OF PRACTICE)
ORDER 2008**

2008 No 3049

Made 24th November 2008

Coming into force 25th November 2008

The Secretary of State makes the following Order in exercise of the powers conferred by sections 13(6) and 14 of the UK Borders Act 2007.

In accordance with section 13(5) of that Act, the Secretary of State published proposals for a code of practice under that section, consulted with members of the public, and laid the draft of that code before Parliament on 11th June 2008.

In accordance with section 14(3) of that Act, a draft of this instrument was laid before and approved by a resolution of each House of Parliament.

1 Citation and commencement

This Order may be cited as the Immigration (Biometric Registration) (Civil Penalty Code of Practice) Order 2008 and shall come into force on the day after the day on which it is made.

Appointment

Specified date: 25 November 2008: see above.

2 Coming into force of the Code of Practice

The code of practice entitled “Code of practice about the sanctions for non-compliance with the biometric registration regulations”, laid before Parliament in draft on 11th June 2008, relating to the imposition of a penalty under section 9(1) of the UK Borders Act 2007, shall come into force on the day that this Order comes into force.

Appointment

Specified date: 25 November 2008: see art 1.

IMMIGRATION (DESIGNATION OF TRAVEL BANS) (AMENDMENT) ORDER 2008

2008 No 3052

Made 20th November 2008

Laid before Parliament 26th November 2008

Coming into force 17 December 2008

The Secretary of State makes the following Order in exercise of the powers conferred by section 8B(5) of the Immigration Act 1971:

1

This Order may be cited as the Immigration (Designation of Travel Bans) (Amendment) Order 2008 and shall come into force on 17 December 2008.

Appointment

Specified date: 17 December 2008: see above.

2

For the Schedule to the Immigration (Designation of Travel Bans) Order 2000 substitute the Schedule to this Order.

Appointment

Specified date: 17 December 2008: see art 1.

3

The Immigration (Designation of Travel Bans) (Amendment) Order 2007 is revoked.

Appointment

Specified date: 17 December 2008: see art 1.

SCHEDULE

Article 2

The Schedule substituted by article 2 is as follows:

“SCHEDULE DESIGNATED INSTRUMENTS

Article 2

PART 1

RESOLUTIONS OF THE SECURITY COUNCIL OF THE UNITED NATIONS

Resolution 1390 (2002) of 16 January 2002 (Al Qaida and the Taliban).

Resolution 1735 (2006) of 22 December 2006 (Al Qaida and the Taliban).

Resolution 1822 (2008) of 30 June 2008 (Al Qaida and the Taliban).

Resolution 1572 (2004) of 15 November 2004 (Côte d’Ivoire).

Resolution 1782 (2007) of 29 October 2007 (Côte d’Ivoire).

Resolution 1596 (2005) of 18 April 2005 (Democratic Republic of the Congo).

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Resolution 1649 (2005) of 21 December 2005 (Democratic Republic of the Congo).
Resolution 1698 (2006) of 31 July 2006 (Democratic Republic of the Congo).
Resolution 1807(2008) of 31 March 2008 (Democratic Republic of the Congo).
Resolution 1718 (2006) of 14 October 2006 (Democratic Republic of North Korea).
Resolution 1737 (2006) of 23 December 2006 (Iran).
Resolution 1747 (2007) of 24 March 2007 (Iran).
Resolution 1803(2008) of 3 March 2008 (Iran).
Resolution 1521 (2003) of 22 December 2003 (Liberia).
Resolution 1792 (2007) of 19 December 2007 (Liberia).
Resolution 1171 (1998) of 5 June 1998 (Sierra Leone).
Resolution 1793 (2007) of 21 December 2007 (Sierra Leone).
Resolution 1591 (2005) of 29 March 2005 (Sudan).
Resolution 1672 (2006) of 25 April 2006 (Sudan).
Resolution 1636 (2005) of 31 October 2005 (Syria and the Lebanon).

PART 2

INSTRUMENTS MADE BY THE COUNCIL OF THE EUROPEAN UNION

Common Position 2002/402/CFSP of 27 May 2002 (Al-Qaida, Usama bin Laden and the Taliban).
Common Position 2006/276/CFSP of 10 April 2006 (Belarus) as implemented by Council Decision 2006/718/CFSP of 23 October 2006 (Belarus) and as amended by Council Common Position 2008/844/CFSP of 10 November 2008 (Belarus).
Common Position 97/193/CFSP of 17 March 1997 (Bosnia-Herzegovina).
Common Position 2006/318/CFSP of 27 April 2006 (Burma) as amended by Common Position 2007/750/CFSP of 19 November 2007 (Burma/Myanmar) and as renewed and amended by Common Position 2008/349/CFSP of 29 April 2008 (Burma/Myanmar).
Common Position 2004/852/CFSP of 13 December 2004 (Côte d'Ivoire) as implemented by Council Decision 2006/483/CFSP of 11 July 2006 (Cote d'Ivoire) and as renewed by Common Position 2007/761/CFSP of 22 November 2007 (Cote d'Ivoire).
Common Position 2006/795/CFSP of 20 November 2006 (Democratic People's Republic of Korea).
Common Position 2008/369/CFSP of 14 May 2008 (Democratic Republic of Congo).
Common Position 2000/696/CFSP of 10 November 2000 (Federal Republic of Yugoslavia) as amended by Common Position 2001/155/CFSP of 26 February 2001 (Federal Republic of Yugoslavia).
Common Position 2004/133/CFSP of 10 February 2004 (Former Yugoslav Republic of Macedonia) as amended by Common Position 2008/104/CFSP of 8 February 2008 (Former Yugoslav Republic of Macedonia).
Common Position 2004/293/CFSP of 30 March 2004 (International Criminal Tribunal for the former Yugoslavia) as implemented by Council Decision 2008/732/CFSP of 15 September 2008 (International Criminal Tribunal for the former Yugoslavia) and as extended by Common Position 2008/223/CFSP of 11 March 2008 (International Criminal Tribunal for the former Yugoslavia).

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Common Position 2007/140/CFSP of 27 February 2007 (Iran) as amended by Common Position 2008/652/CFSP of 7 August 2008 (Iran).

Common Position 2008/109/CFSP of 12 February 2008 (Liberia).

Common Position 2008/160/CFSP of 25 February 2008 (Moldovan Republic).

Common Position 98/409/CFSP of 29 June 1998 (Sierra Leone) as amended by Common Position 2008/81/CFSP of 28 January 2008 (Sierra Leone).

Common Position 2005/411/CFSP of 30 May 2005 (Sudan) as implemented by Common Position 2006/386/CFSP of 1 June 2006 (Sudan).

Common Position 2005/888/CFSP of 12 December 2005 (Syria and the Lebanon).

Common Position 2004/161/CFSP of 19 February 2004 (Zimbabwe) as updated by Council Decision 2007/455/CFSP of 25 June 2007 (Zimbabwe) and as renewed by Common Position 2008/135/CFSP of 18 February 2008 (Zimbabwe) and as implemented by Council Decision 2008/605/CFSP of 22 July 2008 (Zimbabwe) and as amended by Common Position 2008/632/CFSP of 31 July 2008 (Zimbabwe).".

Appointment

Specified date: 17 December 2008: see art 1.

IMMIGRATION AND NATIONALITY (FEES) (AMENDMENT) ORDER 2009

2009 No 420

Made 5th March 2009

Coming into force in accordance with article 1

A draft of this Order has been laid before and approved by a resolution of each House of Parliament, in pursuance of section 52(4)(b) of the Immigration, Asylum and Nationality Act 2006.

In exercise of the powers conferred by section 51(1) and (2)(a) of that Act and with the consent of the Treasury, the Secretary of State makes the following Order:

1 Citation and commencement

This Order may be cited as the Immigration and Nationality (Fees) (Amendment) Order 2009 and shall come into force on the day after the day on which it is made.

2 Amendment

- (1) The Immigration and Nationality (Fees) Order 2007 shall be amended as follows.
- (2) In article 2 (interpretation), after the definition of "certificate of sponsorship" insert—

““Consular premises” means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, ordinarily used for the purposes of any consulate-general, consulate, vice-consulate or consular agency of the United Kingdom;”.

(3) In article 3 (requirement to pay a fee for applications in connection with immigration or nationality)—

- (a) after paragraph (2)(o), omit “and”; and
- (b) after paragraph (2)(p), insert—
“; and
- (q) a letter or other document confirming—
 - (i) a person’s immigration or nationality status; or
 - (ii) that a person is not a British citizen.”.

(4) After article 5, insert—

“6 Requirement to pay a fee in respect of a service in connection with immigration or nationality applications, services and processes. In respect of a service to which this article applies, the fee for the time being specified in regulations made under section 51(3) of the 2006 Act as payable in connection with that service is to be charged by the Secretary of State.

(2) This article applies to the provision of services in connection with any immigration or nationality application, service or process to which this Order applies that require—

- (a) attendance by a representative of the Secretary of State at premises other than an office of the UK Border Agency of the Home Office or Consular premises; or
- (b) services to be provided by a representative of the Secretary of State outside office hours.”.

IMMIGRATION AND NATIONALITY (COST RECOVERY FEES) REGULATIONS 2009

2009 No 421

Made 10th March 2009

Laid before Parliament 10th March 2009

Coming into force in accordance with regulation 1

The Secretary of State makes the following Regulations with the consent of the Treasury in exercise of the powers conferred on her by sections 51(3) and 52(3) of the Immigration, Asylum and Nationality Act 2006.

1 Citation, commencement and interpretation

(1) These Regulations may be cited as the Immigration and Nationality (Cost Recovery Fees) Regulations 2009 and, subject to paragraph (2), shall come into force on 6th April 2009.

(2) Regulations 4, 12(h), 12(i), 12(n), 21(4) and 21(5) shall come into force on 31st March 2009.

2

In these Regulations—

“the 1981 Act” means the British Nationality Act 1981;

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“the 1997 Act” means the British Nationality (Hong Kong) Act 1997;

“the 2007 Order” means the Immigration and Nationality (Fees) Order 2007;

“application for naturalisation” means an application for naturalisation as a:

- (a) British citizen under section 6(1) or (2) of the 1981 Act, or
- (b) British overseas territories citizen under section 18(1) or (2) of the 1981 Act;

“application for registration” means an application for registration as a:

- (c) British citizen under section 1(3) or (4), 3(1), (2) or (5), 4A, 4B, 4C, 10(1) or (2), or 13(1) or (3) of, or paragraph 3, 4 or 5 of Schedule 2 to, the 1981 Act;
- (d) British overseas territories citizen under sections 24 and 13(1), or 15(3) or (4), 17(1), (2) or (5), or 22(1) or (2) of, or paragraph 3, 4, or 5 of Schedule 2 to, the 1981 Act,
- (e) British overseas citizen under section 27(1) of, or paragraph 4 or 5 of Schedule 2 to, the 1981 Act, or
- (f) British subject under section 32 of or paragraph 4 of Schedule 2 to, that Act;

“assistance” means assistance, accommodation or maintenance provided under—

- (g) section 17, 20 or 23 of the Children Act 1989,
- (h) section 22, 25 or 26 of the Children (Scotland) Act 1995, or
- (i) article 18, 21 or 27 of the Children (Northern Ireland) Order 1995;

“certificate of sponsorship” means an authorisation issued by the Secretary of State to a sponsor in respect of one or more applications, or potential applications, for leave to remain or enter the United Kingdom under the immigration rules;

“charity” means an English charity, a Scottish charity or a Northern Ireland charity;

“child” means a person under the age of eighteen;

“claim for asylum” has the same meaning given in section 94(1) of the Immigration and Asylum Act 1999 and a claim for asylum is to be taken to be determined—

- (a) on the day on which the Secretary of State notifies the claimant of her decision on the claim,
- (b) if the claimant has appealed against the Secretary of State’s decision, on the day on which the appeal is disposed of, or
- (c) if the claimant has brought an in-country appeal against an immigration decision under section 82 of the Nationality, Immigration and Asylum Act 2002, or section 2 of the Special Immigration Appeals Commission Act 1997, on the day on which the appeal is disposed of;

“Consular premises” means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, ordinarily used for the purposes of any consulate-general, consulate, vice-consulate or consular agency of the United Kingdom;

“Convention travel document” means a travel document issued in accordance with Article 28 of the Refugee Convention (travel documents) or Article 28 of the Stateless Persons Convention (travel documents);

“Council of Europe Social Charter” means the Council of Europe Treaty establishing social and economic human rights signed in Turin on 18th October 1961;

“Council of Europe Revised Social Charter” means the Council of Europe Treaty signed in Strasbourg on 3rd May 1996;

“dependant” in respect of a person means—

- (a) the spouse, civil partner, unmarried or same-sex partner; or
- (b) a child

of that person;

“document of identity” means a travel document issued in the United Kingdom to a person who is not a British citizen which enables the holder to make one journey out of the United Kingdom;

“English charity” means a charity as defined in section 1 of the Charities Act 2006;

“European Community Association Agreement” means any of the following—

- (a) the Agreement establishing an Association between the European Community and Turkey, signed at Ankara on 12th September 1963,
- (b) the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, signed at Brussels on 8th March 1993, or
- (c) the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Romania, of the other part, signed at Brussels on 1st February 1993;

“Highly Skilled Migrant Programme” means the programme operated by the Secretary of State for highly skilled migrants under the immigration rules;

“immigration rules” means rules made under section 3(2) of the Immigration Act 1971;

“leave to remain” includes variation of leave to enter, or remain;

“Northern Ireland charity” means a charity within the meaning of section 35 of the Charities Act (Northern Ireland) 1964;

“Scottish charity” means a body entered in the Scottish Charity Register;

“small sponsor” means a sponsor that is either—

- (a) a company that qualifies as small in accordance with sections 382 and 383 of the Companies Act 2006; or
- (b) in the case of a person who is not a company for the purposes of sections 382 and 383 of the Companies Act 2006 and therefore does not qualify as small in accordance with those sections, a person who employs no more than 50 employees; or
- (c) a charity;

“sponsor” means a sponsor within the meaning of the immigration rules;

“sponsorship licence” means a sponsor licence as identified within the immigration rules;

“the former nationality Acts” has the same meaning as provided in section 50(1) of the 1981 Act;

“Tier 1 migrant” means a migrant who makes an application of a kind identified in the immigration rules as requiring to be considered under “Tier 1” of the immigration rules’ “Points-Based System”;

“Tier 2 migrant” means a migrant who makes an application of a kind identified in the immigration rules as requiring to be considered under “Tier 2” of the immigration rules’ “Points-Based System”;

“Tier 4 migrant” means a migrant who makes an application of a kind identified in the immigration rules as requiring to be considered under “Tier 4” of the immigration rules’ “Points-Based System”;

“Tier 5 migrant” means a migrant who makes an application of a kind identified in the immigration rules as requiring to be considered under “Tier 5” of the immigration rules’ “Points-Based System”;

“Tier 5 (Temporary Worker) migrant” means a migrant who makes an application of a kind identified in the immigration rules as requiring to be considered under the category “Tier 5 (Temporary Worker)” of the immigration rules’ “Points-Based System”;

“unmarried or same-sex partner” of a person means a person who is living with that other person in a relationship akin to marriage which has subsisted for two years or more.

3 Fees for applications for leave to remain in the United Kingdom

(1) In the case of an application to which article 3(2)(a) or (b) of the 2007 Order applies—

- (a) where the application is for limited leave to remain in the United Kingdom as a Tier 5 migrant, the fee is £125 for an application made by post; or

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- (b) where the application is for limited leave to remain in the United Kingdom as a Tier 5 (Temporary Worker) migrant in respect of a person who is a national of a state which has ratified the Council of Europe Social Charter, for an application made by post, the fee is £110.

(2) This regulation is subject to regulations 6, 7, 8, 9, 10.

4

(1) In the case of an application to which article 3(2)(a) or (b) of the 2007 Order applies, where the application is for limited leave to remain as a Tier 4 migrant, the fee is £357 for an application made by post.

(2) This regulation is subject to regulations 6, 7, 8, 9, 10, and 11.

5 Exceptions in respect of leave to remain applications

No fee is payable in connection with an application for limited leave to remain in the United Kingdom, which is made on the basis that the applicant is—

- (a) a person making a claim for asylum which has not been determined or has been granted;
- (b) a person who has been granted humanitarian protection under the immigration rules;
- (c) a person who has been granted limited leave to enter or remain in the United Kingdom outside the provisions of the immigration rules on the rejection of their claim for asylum; or
- (d) a dependant of a person referred to in sub-paragraphs (a), (b) or (c).

6

No fee is payable in respect of an application referred to in regulation 3 or 4 if the application is made in respect of a person who, at the time of making the application, is a child who is being provided with assistance by a local authority (or, in Northern Ireland, an authority, which has the same meaning given in article 2(2) of the Children (Northern Ireland) Order 1995).

7

No fee is payable in respect of an application referred to in regulation 3 or 4 if the application is made in respect of a person seeking variation of leave to enter or remain in the United Kingdom for a period of up to 6 months where the application is made to an immigration officer on arrival at a port of entry in the United Kingdom.

8

No fee is payable in respect of an application referred to in regulations 3 or 4 if it is made under the terms of a European Community Association Agreement.

9

Where two or more applications for leave to remain in the United Kingdom are made at the same time, or are being considered by the Secretary of State, in respect of the same person and fees are specified in respect of those applications, a single fee shall be payable that being the higher, or as the case may be, the highest of the fees specified in respect of those applications where those fees are different.

10

(1) If the conditions specified in paragraph (2) are met, a single fee is payable in connection with the applications made.

(2) The conditions are—

- (a) an application referred to in regulation 3 or 4 is made by an applicant (A); and
- (b) at the same time A makes a similar application on behalf of one or more of his dependants, in circumstances where such persons are applying as dependants of A.

(3) The fee payable shall be the fee specified for the application in respect of A.

11 Additional fee for dependants applying for leave to remain

The applicant incurs an increase of £50 to the application fee for each person submitted as a dependant to that application whether—

- (a) the dependant is included on the application form; or
- (b) a separate application as a dependant is submitted at the same time.

12 Fees for entry clearance

(1) In the case of an application to which article 3(2)(aa) of the 2007 Order applies—

- (a) subject to sub-paragraph (b), where the application is for entry clearance as a visitor under the immigration rules for a period of—
 - (i) twelve months or less in the case of an academic visitor, or
 - (ii) six months or less in the case of a visitor other than an academic visitor, the fee is £67;
- (b) the fee referred to at sub-paragraph (a) will be reduced to £46 where the Secretary of State decides that the application is one to which the operation of a scheme for such a reduced fee applies;
- (c) subject to sub-paragraph (d), where the application is for entry clearance as a Tier 1 (General) migrant under the immigration rules and is in respect of a person who has been granted an approval letter under the Highly Skilled Migrant Programme that is valid for such an application, the fee is £250;
- (d) where the application is for entry clearance as a Tier 1 (General) migrant under the immigration rules and is in respect of a person who—
 - (i) has been granted an approval letter under the Highly Skilled Migrant Programme that is valid for such an application; and
 - (ii) who is a national of a state which has ratified the Council of Europe Social Charter,

the fee is £230;

- (e) where the application is for entry clearance as the dependant of a Tier 1 (General) migrant who has been granted a valid approval letter under the Highly Skilled Migrant Programme under the immigration rules, the fee is £250;
- (f) where the application is for entry clearance as a Tier 1 (Post Study Work) migrant under the immigration rules, the fee is £265;
- (g) where the application is for entry clearance as the dependant of a Tier 1 (Post Study Work) migrant under the immigration rules, the fee is £265;
- (h) where the application is for entry clearance as a Tier 4 migrant, the fee is £145;
- (i) where the application is for entry clearance as the dependant of a Tier 4 migrant, the fee is £145;
- (j) subject to sub-paragraph (k), where the application is for entry clearance as a Tier 5 migrant, the fee is £125;
- (k) where the application is for entry clearance as a Tier 5 (Temporary Worker) migrant and is in respect of a person who is a national of a state that has ratified the Council of Europe Social Charter, the fee is £110;

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- (l) where the application is for entry clearance as the dependant of a Tier 5 (Temporary Worker) migrant, the fee is £125;
 - (m) where the application is for entry clearance for passing through the United Kingdom, the fee is £46;
 - (n) where the application is for entry clearance as the dependant of a student under paragraphs 76 to 81 of the immigration rules, the fee is £145.
- (2) This regulation is subject to regulations 13 and 14.

13 Exceptions and waivers in respect of fees for entry clearance applications

No fee is payable in relation to an application referred to in regulation 12 where—

- (a) it is in connection with the official duty of any official of Her Majesty's Government;
- (b) it is for the purpose of family reunion under Part 11 of the immigration rules; or
- (c) the Secretary of State determines that the fee should be waived.

14

The official determining the application may waive the payment of a fee or reduce the fee required under regulation 12 where—

- (a) it is made by a candidate for or holder of a scholarship funded by Her Majesty's Government and is in connection with such scholarship; or
- (b) where the official so decides as a matter of international courtesy.

15 Fees for transfer of conditions

(1) In the case of an application to which article 3(2)(c) of the 2007 Order applies, the fee is—

- (a) £75 for an application made outside the UK;
- (b) subject to paragraph (2), £165 for an application made by post or courier within the UK.

(2) Where an application referred to in paragraph (1)(b) is made by an applicant and at the same time he makes a similar application on behalf of one or more of his dependants, a single fee is payable in connection with that application.

16 Fee for a work card in respect of a seasonal agricultural worker

(1) Subject to paragraph (2), in the case of an application to which article 3(2)(d) of the 2007 Order applies, namely an application for an immigration employment document, which is made in respect of a person who is seeking to enter, or remain in, the United Kingdom as a seasonal agricultural worker under the immigration rules, the fee is £12.

(2) No fee is payable in connection with an application referred to in paragraph (1) if it is made in respect of a person who is a national of a state which has ratified the Council of Europe Social Charter or the Council of Europe Revised Social Charter.

17 Fees for travel documents (not including passports)

(1) Subject to paragraph (2), in the case of an application to which article 3(2)(e) of the 2007 Order applies, other than an application referred to in paragraph (3), the fee to be paid is—

- (a) £135 in a case where the person in respect of whom the application is made has not, at the date of the application, attained the age of sixteen; or

(b) £215 in any other case.

(2) No fee is payable in connection with an application referred to in paragraph (1) where the application is stated as being made in order to enable the applicant to participate in a project operated or approved by the Secretary of State for the purpose of enabling a person in the United Kingdom to make a single trip to a country outside the United Kingdom in order to assist the reconstruction of that country or to decide whether to re-settle there.

(3) In the case of an application to which article 3(2)(e) of the 2007 Order applies, where the application is for a Convention travel document or a document of identity, the fee is—

- (a) £46 in a case where the person in respect of whom the application is made has not, at the date of the application, attained the age of sixteen; or
- (b) £72 in any other case.

18 Fee for a direct airside transit visa

In the case of an application to which article 3(2)(la) of the 2007 Order applies, the fee is £46.

19 Fee for a certificate of entitlement to the right to abode

In the case of an application to which article 3(2)(lb) of the 2007 Order applies, and where the application is made in respect of an applicant who is in the United Kingdom, the fee is £140.

20 Fee for permission to marry or form a civil partnership

In the case of an application to which article 3(2)(m) or (n) of the 2007 Order applies, namely an application for permission to marry under section 19(3)(b), 21(3)(b) or 23(3)(b) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 or to form a civil partnership under paragraph 2(1)(b) of Schedule 23 to the Civil Partnership Act 2004, the fee to be paid is £295.

21 Fee for an application for a document recording biometric information

(1) Subject to paragraphs (2) and (3), in the case of an application to which article 3(2)(o) of the 2007 Order applies, namely an application for a document recording biometric information within the meaning of section 5 of the UK Borders Act 2007, where the application is required by regulations made under section 5 of the UK Borders Act 2007, the fee is £30.

(2) No fee is payable in respect of an application referred to in paragraph (1) which is required under the Immigration (Biometric Registration) (Pilot) Regulations 2008.

(3) No fee is payable in respect of an application referred to in paragraph (1) where the application is made in conjunction with an application for leave to remain in the United Kingdom.

(4) Subject to paragraph (5), where the application is for a document recording biometric information within the meaning of section 5 of the UK Borders Act 2007, in order to transfer data previously contained in a stamp, sticker or other attachment on a passport or other document which indicates that a person has been granted leave to enter or remain in the UK, the fee is £165.

(5) Where an application referred to in paragraph (4) is made by an applicant and at the same time he makes a similar application on behalf of one or more of his dependants, a single fee is payable in connection with that application.

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22 Fees for sponsorship licences

In the case of an application to which article 3(2)(p) of the 2007 Order applies, where such application is in respect of a person who, if granted a sponsorship licence, would be a small sponsor and the application is for a sponsorship licence in respect of Tier 2 migrants, the fee is £300.

23

Subject to regulation 24, in the case of an application to which article 3(2)(p) of the 2007 Order applies, where the application is—

- (a) for a sponsorship licence in respect of Tier 4 migrants;
- (b) for a sponsorship licence in respect of Tier 5 migrants;
- (c) for a sponsorship licence in respect of Tier 4 migrants and Tier 5 migrants;
- (d) in respect of a person who, if granted a sponsorship licence, would be a small sponsor and is for—
 - (i) a sponsorship licence in respect of Tier 2 migrants and Tier 4 migrants;
 - (ii) a sponsorship licence in respect of Tier 2 migrants and Tier 5 migrants;
 - or
 - (iii) a sponsorship licence in respect of Tier 2 migrants, Tier 4 migrants, and Tier 5 migrants

the fee is £400.

24

In the case of an application to which article 3(2)(p) of the 2007 Order applies, where the application is for a licence referred to in sub-paragraphs (a) to (c) of regulation 23 and is in respect of a person who—

- (a) holds a valid sponsorship licence in respect of Tier 2 migrants; and
- (b) is a small sponsor

the fee is £100.

25 Fee for the process of issuing a certificate of sponsorship

(1) Subject to paragraph (2), in the case of a process to which article 5 of the 2007 Order applies, where the process is the issuing of a certificate of sponsorship in respect of an application or applications or a potential application or applications for leave to remain or enter the United Kingdom as—

- (a) a Tier 5 migrant; or
- (b) a Tier 4 migrant,

the fee is £10.

(2) No fee is payable in respect of the process for which a fee is specified in paragraph (1) where the certificate is issued in respect of an application or applications or a potential application or applications for leave to remain or enter the United Kingdom as a Tier 5 (Temporary Worker) made by a person who is a national of a state which has ratified the Council of Europe Social Charter or the Council of Europe Revised Social Charter.

26 Fee for arranging a citizenship ceremony

(1) In respect of a service to which article 4(2)(e) of the 2007 Order applies, namely the arrangement of a citizenship ceremony (including the administration of a citizenship oath and pledge at the ceremony), the fee to be paid for the provision of this service is £80.

(2) The fee referred to in paragraph (1) shall be payable on submission of an application for registration or for naturalisation by an applicant who is required by section 42 of the 1981 Act to make a citizenship oath and pledge at a citizenship ceremony.

(3) Where the fee referred to in paragraph (1) is paid in accordance with paragraph (2) and—

- (a) the Secretary of State refuses the application; or
- (b) the Secretary of State decides that the registration should be effected or the certificate of naturalisation should be granted, but disappplies the requirement to attend a citizenship ceremony because of the special circumstances of the case,

the fee paid in respect of the arrangement of a citizenship ceremony shall be refunded.

(4) Where the fee referred to in paragraph (1) is to be paid in accordance with paragraph (2), and the fee is not paid in accordance with that paragraph, the Secretary of State will not consider the application for registration or naturalisation.

27 Fee for the administration of a citizenship oath, or oath and pledge

(1) In respect of a service to which article 4(2)(f) of the 2007 Order applies, namely the administration of a citizenship oath, or oath and pledge (where not administered at a citizenship ceremony), the fee to be paid for the provision of this service is £5.

(2) No fee is payable under these Regulations where the oath, or oath and pledge, is administered by a justice of the peace.

28 Fee for the supply of certified copy

In respect of a service to which article 4(2)(g) of the 2007 Order applies, namely the supply of a certified copy of a notice, certificate, order, declaration or entry given, granted or made under the 1981 Act, any of the former Nationality Acts or the 1997 Act, the fee to be paid for the provision of this service is £75.

29 Fee for technical changes to a work permit document

In the case of an application to which article 3(2)(d) of the 2007 Order applies, for a letter to confirm the amendment to information held by the UK Border Agency relating to employment within the terms of the work permit arrangements, which does not constitute a change requiring a new application for permission to work, the fee is £20.

30 Fee for letter or other document confirming immigration or nationality status

In the case of an application to which article 3(2)(q) of the 2007 Order applies, namely an application for a letter or other document confirming—

- (a) a person's immigration or nationality status; or
- (b) that a person is not a British citizen,

the fee is £75.

31 Fee for services in connection with immigration or nationality applications

(1) Subject to paragraph (2), in respect of a service to which article 6(2) of the 2007 Order applies, namely the provision of services in connection with any immigration or nationality application requiring a representative of the Secretary of State to—

- (a) attend premises other than an office of the UK Border Agency of the Home Office or Consular premises; or
- (b) provide services outside of office hours,

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the fee is £128 per hour up to a maximum of £922 a day.

(2) The official determining provision of these services may waive the payment of the fee in paragraph (1) where the official considers it is appropriate in the particular circumstances of the case.

32 Consequences of failing to pay the fee

Where an application to which these Regulations refer is to be accompanied by a specified fee, the application is not validly made unless it has been accompanied by that fee.

33 Revocation

The following Regulations are revoked—

- (a) the Immigration and Nationality (Cost Recovery Fees) Regulations 2007.
- (b) the Immigration and Nationality (Cost Recovery Fees) (Amendment) Regulations 2008.
- (c) the Immigration and Nationality (Cost Recovery Fees) (Amendment No 2) Regulations 2008.
- (d) the Immigration and Nationality (Cost Recovery Fees) (Amendment No 3) Regulations 2008.

IMMIGRATION SERVICES COMMISSIONER (DESIGNATED PROFESSIONAL BODY) (FEES) ORDER 2009

2009 No 458

Made 3rd March 2009

Laid before Parliament 5th March 2009

Coming into force 31st March 2009

The Secretary of State, in exercise of the powers conferred by section 86(10) and (12) of the Immigration and Asylum Act 1999, makes the following Order:

1 Citation and commencement

This Order may be cited as the Immigration Services Commissioner (Designated Professional Body) (Fees) Order 2009 and shall come into force on 31st March 2009.

Appointment

Specified date: 31 March 2009: see above.

2 Fees

(1) The fee to be paid to the Immigration Services Commissioner by each designated professional body for the year 1st April 2008 to 31st March 2009 shall be the sum specified in the Schedule to this Order.

(2) The fee shall be paid on or before 7 April 2009.

Appointment

Specified date: 31 March 2009: see art 1.

SCHEDULE

Article 2

<i>Designated Professional Body</i>	<i>Fee to be paid</i>
The Law Society	£101, 010
The Law Society of Scotland	£ 10, 650
The Law Society of Northern Ireland	£ 1, 310
The Institute of Legal Executives	£ 11, 650
The General Council of the Bar	£ 10, 830
The Faculty of Advocates	£ 1, 310
The General Council of the Bar of Northern Ireland	£ 1, 310

Appointment

Specified date: 31 March 2009: see art 1.

IMMIGRATION AND ASYLUM ACT 1999 (PART V EXEMPTION: LICENSED SPONSORS TIERS 2 AND 4) ORDER 2009

2009 No 506

Made 6th March 2009

Laid before Parliament 9th March 2009

Coming into force 31st March 2009

The Secretary of State, in exercise of the powers conferred by sections 84(4)(d) and 166 of the Immigration and Asylum Act 1999, hereby makes the following Order:

1 Citation and Commencement

This Order may be cited as the Immigration and Asylum Act 1999 (Part V Exemption: Licensed Sponsors Tiers 2 and 4) Order 2009 and shall come into force on 31 March 2009.

Appointment

Specified date: 31 March 2009: see above.

2 Interpretation

In this Order—

“the Act” means the Immigration and Asylum Act 1999;

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- “immediate family” means a Tier 2 or Tier 4 migrant’s spouse, civil partner, unmarried partner, same sex partner, dependant child under 18 or parent of a Tier 4 (Child) Student;
- “immigration advice” and “immigration services” have the same meanings as in section 82 of the Act;
- “immigration rules” means rules made under section 3(2) of the Immigration Act 1971;
- “licensed sponsor” means a person who has been granted a sponsor licence;
- “Points-based system” means the Points-based system under Part 6A of the immigration rules;
- “sponsor licence” means a licence granted by the Secretary of State to a person who, by virtue of such a grant, is licensed as a Sponsor under Tiers 2, 4 or 5 of the Points-based System;
- “Tier 2 migrant” means a migrant who (i) makes an application of a kind identified in the immigration rules as requiring to be considered under “Tier 2” of the immigration rules’ Points-based system or (ii) has been granted leave under the relevant paragraphs of the immigration rules;
- “Tier 4 migrant” means a migrant who (i) makes an application of a kind identified in the immigration rules as requiring to be considered under “Tier 4” of the immigration rules’ Points-based system or (ii) has been granted leave under the relevant paragraphs of the immigration rules;

Appointment

Specified date: 31 March 2009; see art 1.

3 Exemption of licensed sponsors

- (1) Subject to paragraphs (2) and (3) and for the purposes of section 84(4)(d) of the Act the following persons shall be specified, namely persons who are licensed sponsors of Tier 2 and Tier 4 migrants and who provide immigration advice or immigration services free of charge to those migrants or their immediate family.
- (2) The immigration advice or services given must be restricted to matters relating to the migrant’s application under Tier 2 or Tier 4 of the Points-based system or to an application for entry clearance, leave to enter or leave to remain made by that person’s immediate family and which is dependent on the migrant’s application under Tier 2 or Tier 4 of the Points-based system.
- (3) For the purposes of paragraph (1), the person providing the immigration advice or immigration services must be the licensed sponsor.

Appointment

Specified date: 31 March 2009; see art 1.

Appendix 5

IMMIGRATION RULES

STATEMENT OF CHANGES IN IMMIGRATION RULES (HC 395)

Date Laid before Parliament 23 May 1994.

Authority Immigration Act 1971, s 3(2).

Note

Please go to <http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/> to view the current consolidated Rules.

Note

This incorporates amending Statements laid before, or presented to, Parliament on 20 September 1994 (Cmnd 2663), 26 October 1995 (HC 797), 4 January 1996 (Cmnd 3073), 7 March 1996 (HC 274), 2 April 1996 (HC 329), 30 August 1996 (Cmnd 3365), 31 October 1996 (HC 31), 27 February 1997 (HC 338), 29 May 1997 (Cmnd 3669), 5 June 1997 (HC 26), 30 July 1997 (HC 161), 11 May 1998 (Cmnd 3953), 8 October 1998 (Cmnd 4065), 18 November 1999 (HC 22), 28 July 2000 (HC 704), 20 September 2000 (Cmnd 4851), 27 August 2001 (Cmnd 5253), 16 April 2002 (HC 735), 27 August 2002 (Cmnd 5597), 7 November 2002 (HC 1301), 26 November 2002 (HC 104), 8 January 2003 (HC 180), 10 February 2003 (HC 389), 31 March 2003 (HC 538), 30 May 2003 (Cmnd 5829), 25 August 2003 (Cm 5949), 12 November 2003 (HC 1224), 17 December 2003 (HC 95), 12 January 2004 (HC 176), 26 February 2004 (HC 370), 31 March 2004 (HC 464), 1 May 2004 (HC 523), 3 August 2004 (Cm 6297), 24 September 2004 (Cm 6339), 18 October 2004 (HC 1112), 20 December 2004 (HC 164), 11 January 2005 (HC 194), 7 February 2005 (HC 302), 22 February 2005 (HC 346), 24 March 2005 (HC 486), 15 June 2005 (HC 104), 12 July 2005 (HC 299), 24 October 2005 (HC 582), 9 November 2005 (HC 645), 21 November 2005 (HC 697), 19 December 2005 (HC 769), 23 January 2006 (HC 819), 1 March 2006 (HC 949), 30 March 2006 (HC 1016), 20 April 2006 (HC 1053), 19 July 2006 (HC 1337), 18 September 2006 (Cmnd 69180), 7 November 2006 (HC 1702), 11 December 2006 (HC 130), 19 March 2007 (HC 398), April 2007 (Cmnd 7074), April 2007 (Cmnd 7075), 7 November 2007 (HC 28), 13 November 2007 (HC 40), 19 November 2007 (HC 82), 6 February 2008 (HC 321), 17 March 2008 (HC 420), 9 June 2008 (HC 607), 22 July 2008 (HC 971), 4 November 2008 (HC 1113), 9 February 2009 (HC 227), 9 March 2009 (HC 314).

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Introduction

1 The Home Secretary has made changes in the Rules laid down by him as to the practice to be followed in the administration of the Immigration Acts for regulating entry into and the stay of

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persons in the United Kingdom and contained in the statement laid before Parliament on 23 March 1990 (HC 251) (as amended). This statement contains the Rules as changed and replaces the provisions of HC 251 (as amended).

2 Immigration Officers, Entry Clearance Officers and all staff of the Home Office Immigration and Nationality [Directorate] will carry out their duties without regard to the race, colour or religion of persons seeking to enter or remain in the United Kingdom [and in compliance with the provisions of the Human Rights Acts 1998].

3 In these Rules words importing the masculine gender include the feminine unless the contrary intention appears.

Note

Words in square brackets inserted by Cm 4851.

Implementation and transitional provisions

4 These Rules come into effect on 1 October 1994 and will apply to all decisions taken on or after that date save that any application made before 1 October 1994 for entry clearance, leave to enter or remain or variation of leave to enter or remain [, other than an application for leave by a person seeking asylum,] shall be decided under the provisions of HC 251, as amended, as if these Rules had not been made.

Application

[5 Save where expressly indicated, these Rules do not apply to those persons who are entitled to enter or remain in the United Kingdom by virtue of the provisions of [the 2006 EEA Regulations]. But any person who is not entitled to rely on the provisions of those Regulations is covered by these Rules.]

Note

Substituted by Cm 4851. Reference to the 2006 EEA Regulations inserted by HC 1053.

Interpretation

6 In these Rules the following interpretations apply:

‘the Immigration Acts’ mean the Immigration Act 1971 and the Immigration Act 1988.

‘the 1993 Act’ is the Asylum and Immigration Appeals Act 1993.

[‘the 1996 Act’ is the Asylum and Immigration Act 1996.]

[‘the 2006 EEA Regulations’ means the Immigration (European Economic Area) Regulations 2006.]

[...]

[‘EEA national’ has the meaning given in regulation 2(1) of the 2006 EEA Regulations.]

[‘an external student’ is a student studying for a degree from a UK degree awarding body without any requirement to attend the UK degree awarding body’s premises or a UK Listed Body’s premises for lectures and tutorials.]

[‘adoption’ unless the contrary intention appears, includes a de facto adoption in accordance with the requirements of paragraph 309A of these Rules, and ‘adopted’ and ‘adoptive parent’ should be construed accordingly.]

[‘Approved Destination Status Agreement with China’ means the Memorandum of Understanding on visa and related issues concerning tourist groups from the People’s Republic of China to the United Kingdom as a approved destination, signed on 21 January 2005.]

[a ‘*bona fide* private education institution’ is a private education institution which:

- a) maintains satisfactory records of enrolment and attendance of students, and supplies these to the Border and Immigration Agency when requested;
- b) provides courses which involve a minimum of 15 hours organised daytime study per week;
- c) ensures a suitably qualified tutor is present during the hours of study to offer teaching and instruction to the students;
- d) offers courses leading to qualifications recognised by the appropriate accreditation bodies;
- e) employs suitably qualified staff to provide teaching, guidance and support to the students;
- f) provides adequate accommodation, facilities, staffing levels and equipment to support the numbers of students enrolled at the institution; and
- g) if it offers tuition support to external students at degree level, ensures that such students are registered with the UK degree awarding body.]

[‘civil partner’ means a civil partnership which exists under or by virtue of the Civil Partnership Act 2004 (and any reference to a civil partner is to be read accordingly);]

[‘degree level study’ means a course which leads to a recognised United Kingdom degree at bachelor’s level or above, or an equivalent qualification at level 6 or above of the revised National Qualifications Framework, or levels 9 or above of the Scottish Credit and Qualifications Framework;]

‘United Kingdom passport’ bears the meaning it has in the Immigration Act 1971.

[‘a UK Bachelors degree’ means –

- (a) A programme of study or research which leads to the award, by or on behalf of a university, college or other body which is authorised by Royal Charter or by or under an Act of Parliament to grant degrees, of a qualification designated by the awarding institution to be of Bachelors degree level; or
- (b) A programme of study or research, which leads to a recognised award for the purposes of section 214(2)(c) of the Education Reform Act 1988, of a qualification designated by the awarding institution to be of Bachelors degree level.]

‘Immigration Officer’ includes a Customs Officer acting as an Immigration Officer.

[‘public funds’ means

- (a) housing under Part VI or VII of the Housing Act 1996 and under Part II of the Housing Act 1985, Part I or II of the Housing (Scotland) Act 1987, Part II of the Housing (Northern Ireland) Order 1981 or Part II of the Housing (Northern Ireland) Order 1988;
- (b) attendance allowance, severe disablement allowance, [carer’s allowance] and disability living allowance under Part III of the Social Security Contribution and Benefits Act 1992; income support ... council tax benefit ... and housing benefit under Part VII of that Act; a social fund payment under Part VIII of that Act; child benefit under Part IX of that Act; income based jobseeker’s allowance under the Jobseekers Act 1995; state pension credit under the State Pension Credit Act 2002; or child tax credit and working tax credit under Part 1 of the Tax Credits Act 2002].
- (c) attendance allowance, severe disablement allowance, [carer’s allowance] and disability living allowance under Part III of the Social Security

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Contribution and Benefits (Northern Ireland) Act 1992; income support ... council tax benefit ... housing benefit under Part VII of that Act; a social fund payment under Part VIII of that Act; child benefit under Part IX of that Act; or income based jobseeker's allowance under the Jobseekers (Northern Ireland) Order 1995.

(d) ...]

[...]

'settled in the United Kingdom' means that the person concerned:

- (a) is free from any restriction on the period for which he may remain save that a person entitled to an exemption under Section 8 of the Immigration Act 1971 (otherwise than as a member of the home forces) is not to be regarded as settled in the United Kingdom except in so far as Section 8(5A) so provides; and
- (b) is either:
 - (i) ordinarily resident in the United Kingdom without having entered or remained in breach of the immigration laws; or
 - (ii) despite having entered or remained in breach of the immigration laws, has subsequently entered lawfully or has been granted leave to remain and is ordinarily resident.

'a parent' includes:

- (a) the stepfather of a child whose father is dead [and the reference to stepfather includes a relationship arising through civil partnership];
- (b) the stepmother of a child whose mother is dead [and the reference to stepmother includes a relationship arising through civil partnership];
- (c) the father as well as the mother of an illegitimate child where he is proved to be the father;
- [(d) an adoptive parent, where a child was adopted in accordance with a decision taken by the competent administrative authority or court in a country whose adoption orders are recognised by the United Kingdom or where a child is the subject of a de facto adoption in accordance with the requirements of paragraph 309A of these Rules (except that an adopted child or child who is the subject of a de facto adoption may not make an application for leave to enter or remain in order to accompany, join or remain with an adoptive parent under paragraphs 297–303); and]
- (e) in the case of a child born in the United Kingdom who is not a British citizen, a person to whom there has been a genuine transfer of parental responsibility on the ground of the original parent(s)' inability to care for the child.

['intention to live permanently with the other' means an intention to live together, evidenced by a clear commitment from both parties that they will live together permanently in the United Kingdom immediately following the outcome of the application in question or as soon as circumstances permit thereafter, and 'intends to live permanently with the other' shall be construed accordingly;]

['present and settled' means that the person concerned is settled in the United Kingdom, and, at the time that an application under these Rules is made, is physically present here or is coming here with or to join the applicant and intends to make the United Kingdom their home with the applicant if the application is successful;]

['sponsor' means the person in relation to whom an applicant is seeking leave to enter or remain as their [spouse, fiancé, civil partner, proposed civil partner, unmarried partner, same-sex partner] or dependent relative, as the case may be, under paragraphs 277 to 295O or 317 to 319;]

'visa nationals' are the persons specified in the [Appendix 1] to these Rules who need a visa for the United Kingdom.

['Non-visa nationals' are persons who are not specified in Appendix 1 to these Rules.]
[...]

‘employment’, unless the contrary intention appears, includes paid and unpaid employment, [paid and unpaid work placements undertaken as part of a course or period of study,] self-employment and engaging in business or any professional activity.
[...]

‘the Human Rights Convention’ means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the United Kingdom.]

‘Immigration employment document’ means a work permit or any other document which relates to employment and is issued for the purpose of these Rules or in connection with leave to enter or remain in the United Kingdom.]

‘Employment as a Doctor in Training’ means employment in a medical post or programme offered by the National Health Service which has been approved by the Postgraduate Medical Education and Training Board as a training programme or post. ‘these Rules’ means these immigration rules (HC 395) made under section 3(2) of the Immigration Act 1971.

‘Tier 1 (General) Migrant’ means a migrant who is granted leave under paragraphs 245A to 245D of these Rules.]

Under Part 6A of these Rules, ‘Highly Skilled Migrant’ means a migrant [granted leave under paragraphs 135A to 135G of the Rules in force before 30th June 2008.]

Under Part 6A of these Rules, ‘Highly Skilled Migrant Programme Approval Letter’ means a letter issued by the Home Office confirming that the applicant meets the criteria specified by the Secretary of State for entry to or stay in the UK under the Highly Skilled Migrant Programme.

Under Part 6A of these Rules, ‘Innovator’ means a migrant [granted leave under paragraphs 210A to 210F of the Rules in force before 30th June 2008.]

Under Part 6A of these Rules, ‘Lawfully’ means with valid leave.

Under Part 6A of these Rules, ‘Participant in the Fresh Talent Working in Scotland Scheme’ means a migrant [granted leave under paragraphs 143A to 143F of the Rules in force before 30th June 2008.]

Under Part 6A of these Rules, ‘Participant in the International Graduates Scheme’ means a migrant [granted leave under paragraphs 135O to 135T of the Rules in force before 30th June 2008.]

Under Part 6A of these Rules, ‘Postgraduate Doctor or Dentist’ means a migrant who is granted leave under paragraphs 70 to 75 of these Rules.

Under Part 6A of these Rules, ‘Self-Employed’ means an applicant is registered as self-employed with HM Revenue & Customs, or is employed by a company of which the applicant is a controlling shareholder.

Under Part 6A of these Rules, ‘Student’ means a migrant who is granted leave under paragraphs 57 to 62 of these Rules.

Under Part 6A of these Rules, ‘Student Nurse’ means a migrant who is granted leave under paragraphs 63 to 69 of these Rules.

Under Part 6A of these Rules, ‘Student Re-Sitting an Examination’ means a migrant who is granted leave under paragraphs 69A to 69F of these Rules.

Under Part 6A of these Rules, ‘Student Writing-Up a Thesis’ means a migrant who is granted leave under paragraphs 69G to 69L of these Rules.

Under Part 6A of these Rules, ‘Work Permit Holder’ means a migrant who is granted leave under paragraphs 128 to 133 of these Rules.]

‘Prospective Student’ means a migrant who is granted leave under paragraphs 82 to 87 of these Rules.]

[Under Part 6A of these Rules, an ‘A-rated Sponsor’ is a Sponsor which is recorded as being ‘A-rated’ on the register of licensed Sponsors maintained by the United Kingdom Border Agency.

Under Part 6A of these Rules, ‘Certificate of Sponsorship’ means an authorisation issued by the Secretary of State to a Sponsor in respect of one or more applications, or potential applications, for entry clearance, leave to enter or remain in accordance with these Rules.

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Under Part 6A of these Rules, 'Certificate of Sponsorship Checking Service' means a computerised interface with the Points Based System computer database which allows a United Kingdom Border Agency caseworker or entry clearance officer assessing a migrant's application for entry clearance, leave to enter or leave to remain to access and review details of the migrant's Certificate of Sponsorship, including details of the migrant's Sponsor, together with details of the job or course of study and other details associated with the circumstances in which the Certificate of Sponsorship was issued. Under Part 6A of these Rules, 'Established Entertainer' means an applicant who is applying for leave to remain as a Tier 2 (General) Migrant or a Tier 2 (Intra-Company Transfer) Migrant in respect of whom the following conditions are satisfied:

- (a) the Certificate of Sponsorship Checking Service entry to which the applicant's Certificate of Sponsorship reference number relates, records that the applicant is being sponsored in an occupation which is defined in the United Kingdom Border Agency's Transitional Guidance as being a job in the entertainment sector,
- (b) the applicant has, or has previously had, entry clearance, leave to enter or leave to remain in the UK as a Work Permit Holder, and the work permit that led to that grant was issued in the sports and entertainment category to enable him to work in the occupation in which he is, at the date of the application for leave to remain, currently being sponsored,
- (c) the applicant's last grant of leave was as:
 - (i) a Work Permit Holder in the sports and entertainment category, provided the work permit that led to that grant was issued in the sports and entertainment category to enable him to work either in the occupation in which he is, at the date of the current application for leave to remain, currently being sponsored, or in another occupation which is defined in the United Kingdom Border Agency's Transitional Guidance as being a job in the entertainment sector, or
 - (ii) a Tier 2 (General) Migrant or a Tier 2 (Intra-Company Transfer) Migrant, provided (in either case) that at the time of that last grant of leave points were awarded under the transitional arrangements provisions in Table 11 of Appendix A, and provided (again in either case) that that grant was made to enable him to work either in the occupation in which he is currently being sponsored or in another occupation which is defined in the United Kingdom Border Agency's Transitional Guidance as being a job in the entertainment sector,
- (d) the Certificate of Sponsorship Checking Service entry to which the applicant's Certificate of Sponsorship reference number relates records:
 - (i) that the applicant will be paid a salary for the job that is at or above the appropriate entertainments industry rate, as listed in the United Kingdom Border Agency's Transitional Guidance; and
 - (ii) that before agreeing to employ the applicant, the Sponsor consulted with such bodies as the United Kingdom Border Agency's Transitional Guidance indicates that it should consult with before employing someone in this capacity, and
- (e) the applicant has not spent a period of 5 years or more in the UK, beginning with the last grant of entry clearance, as a Qualifying Work Permit Holder, Tier 2 (General) Migrant or Tier 2 (Intra-Company Transfer) Migrant, or in any combination of these.

Under Part 6A of these Rules, 'Qualifying Work Permit Holder' means a Work Permit Holder who was issued a work permit in the business and commercial or sports and entertainment work permit categories.

Under Part 6A of these Rules, 'Senior Care Worker' means an applicant who is applying for leave to remain as a Tier 2 (General) Migrant or a Tier 2 (Intra-Company Transfer) Migrant in respect of whom the following conditions are satisfied:

- (a) the Certificate of Sponsorship Checking Service entry to which the applicant's Certificate of Sponsorship reference number relates, records that the applicant is being sponsored in an occupation which is defined in the United Kingdom Border Agency's Guidance as being a senior care worker role,
- (b) the applicant's last grant of leave was as:
 - (i) a Qualifying Work Permit Holder, or
 - (ii) a Tier 2 (General) Migrant or a Tier 2 (Intra-Company Transfer) Migrant, provided (in either case) that at the time of that last grant of leave points* were awarded under the transitional arrangements provisions in Table 11 of Appendix A.
- (c) the work permit or Certificate of Sponsorship that led to the last grant of leave was issued to enable the applicant to work as a senior care worker, and
- (d) the applicant has not spent a period of 5 years or more in the UK, beginning with the last grant of entry clearance, as a Qualifying Work Permit Holder, Tier 2 (General) Migrant or Tier 2 (Intra-Company Transfer) Migrant, or in any combination of these.

Under Part 6A of these Rules, 'Sponsor' means the person or Government that the Certificate of Sponsorship Checking Service records as being the Sponsor for a migrant. Under Part 6A of these Rules, a reference to a 'sponsor licence' means a licence granted by the Secretary of State to a person who, by virtue of such a grant, is licensed as a Sponsor under Tiers 2, 4 or 5 of the Points Based System.

Under Part 6A of these Rules, 'supplementary employment' means other employment in the same profession and at the same professional level as that which the migrant is being sponsored to do provided that:

- (a) the migrant remains working for the Sponsor in the employment that the Certificate of Sponsorship Checking Service records that the migrant is being sponsored to do,
- (b) the other employment does not exceed 20 hours per week and takes place outside of the hours when the migrant is contracted to work for the Sponsor in the employment the migrant is being sponsored to do.]

['Businessperson' means a migrant granted leave under paragraphs 200 to 208 of the Rules in force before 30th June 2008.

'Investor' means a migrant granted leave under paragraphs 224 to 229 of the Rules in force before 30th June 2008.

'Self-employed Lawyer' means a migrant granted entry clearance, or leave to enter or remain, outside the Rules under the concession for Self-employed lawyers that formerly appeared in Chapter 6, Section 1 Annex D of the Immigration Directorate Instructions.

'Tier 1 (General) Migrant' means a migrant who is granted leave under paragraphs 245B to 245F of these Rules.

'Tier 1 (Entrepreneur) Migrant' means a migrant who is granted leave under paragraphs 245H to 245N of these Rules.

'Tier 1 (Investor) Migrant' means a migrant who is granted leave under paragraphs 245O to 245U of these Rules.

'Tier 1 (Post-Study Work) Migrant' means a migrant who is granted leave under paragraphs 245V to 245ZA of these Rules.

'Tier 1 Migrant' means a migrant who is granted leave as a Tier 1 (General) Migrant, a Tier 1 (Entrepreneur) Migrant, a Tier 1 (Investor) Migrant or a Tier 1 (Post-Study Work) Migrant.]

['Points Based system Migrant' means a migrant applying for or granted leave as a Tier 1 Migrant, a Tier 2 Migrant[, Tier 4 Migrant] or a Tier 5 Migrant.

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'Tier 2 (General) Migrant' means a migrant granted leave under paragraphs 245ZB to 245ZH of these rules and who obtains points under paragraphs 59 to 84 of Appendix A but who does not obtain points under the intra-company transfer provisions in Table 10 of that Appendix.

'Tier 2 (intra-Company Transfer) Migrant' means a migrant granted leave under paragraphs 245ZB to 245ZH of these rules and who obtains points under paragraphs 59 to 84 of Appendix A including points under the intra-company transfer provisions of that Appendix.

'Tier 2 (Minister of religion) Migrant' means a migrant granted leave under paragraphs 245ZB to 245ZH of these rules and who obtains points under paragraphs 85 to 92 of Appendix A.

'Tier 2 (sportsperson) Migrant' means a migrant granted leave under paragraphs 245ZB to 245ZH of these rules and who obtains points under paragraphs 93 to 100 of Appendix A.

'Tier 2 Migrant' means a migrant granted leave under paragraphs 245ZB to 245ZH of these rules.

'Tier 4 (General) Student' means a migrant granted leave under paragraphs 245ZT to 245ZY of these Rules.

'Tier 4 (Child) Student' means a migrant granted leave under paragraphs 245ZZ to 245ZZD of these Rules.

'Tier 4 Migrant' means a Tier 4 (General) Student or a Tier 4 (Child) Student.

'Tier 5 (youth Mobility) Temporary Migrant' means a migrant granted leave under paragraphs 245ZI to 245ZL of these rules.

'Tier 5 (Temporary Worker) Migrant' means a migrant granted leave under paragraphs 245ZM to 245ZR of these rules.

'Tier 5 Migrant' means a migrant who is either a Tier 5 (Temporary Worker) Migrant or a Tier 5 (youth Mobility) Temporary Migrant.

'Jewish agency employee' means a migrant granted leave outside of these rules under the concession that formerly appeared in Chapter 17 section 5 Part 2 of the immigration directorate instructions.

'Member of the operational Ground staff of an overseas-owned airline' means a migrant granted leave under paragraphs 178 to 185 of the rules in force before 27 November 2008.

'Minister of religion, Missionary or Member of a religious order' means a migrant granted leave under paragraphs 170 to 177A of the rules in force before 27 November 2008.

'overseas Qualified nurse or Midwife' means a migrant granted leave under paragraphs 69M to 69r of the rules in force before 27 November 2008.

'Participant in the science and engineering Graduates scheme' means a migrant granted leave under paragraphs 135O to 135T of the rules in force before 1 May 2007.

'representative of an overseas newspaper, news agency or Broadcasting organisation' means a migrant granted leave under paragraphs 136 to 143 of the rules in force before 27 November 2008.

'student Union sabbatical officer' means a migrant granted leave under paragraphs 87A to 87f of the rules in force before 27 November 2008.

'Working Holidaymaker' means a migrant granted leave under paragraphs 95 to 97 of the rules in force before 27 November 2008.

a 'Business Visitor' is a person granted leave to enter or remain in the UK under paragraphs 46G-46I, 75A- or 75G-M of these rules.

an 'academic Visitor' is a person who is from an overseas academic institution or who is highly qualified within his own field of expertise seeking leave to enter the UK to carry out research and associated activities for his own purposes.

a 'Visiting Professor' is a person who is seeking leave to enter the UK as an academic professor to accompany students who are studying here on study abroad Programmes.

a 'sports Visitor' is a person granted leave to enter or remain in the UK under paragraphs 46M-46R of these rules.

an 'amateur' is a person who engages in a sport or creative activity solely for personal enjoyment and who is not seeking to derive a living from the activity.

a 'series of events' is two or more linked events, such as a tour, or rounds of a competition, which do not add up to a league or a season.

an 'entertainer Visitor' is a person granted leave to enter or remain in the UK under paragraphs 46S–46X of these rules.

a 'special Visitor' is a person granted leave for a short-term visit in the following circumstances:

- (a) a person granted leave to enter or remain in the UK as a visitor for private medical treatment under paragraphs 51 – 56 of these rules
- (b) a person granted leave to enter or remain in the UK for the purpose of marriage [or to enter into a civil partnership] under paragraphs 56D – 56F of these rules
- (c) a person granted leave to enter or remain in the UK as a Parent of a child at school under paragraphs 56A – 56C of these rules
- (d) a person granted leave to enter or remain in the UK as a Child Visitor under paragraphs 46A – 46F of these rules
- (e) a person granted leave to enter or remain in the UK as a student Visitor under paragraphs 56K – 56M of these rules
- (f) a person granted leave to enter or remain in the UK as a Prospective student under paragraphs 82–87 of these rules
- (g) a person granted leave to enter the UK as a Visitor in transit under paragraphs 47–50 of these rules.

a 'Permissible activity' means a business activity of a type listed in United Kingdom Border agency guidance specifying the activities that a business person may undertake during a short-term business visit to the UK.]

['Writer, Composer or Artist' means a migrant granted leave under paragraphs 232 to 237 of the Rules in force before 30th June 2008.]

[[In paragraph 320(7B) and paragraph 320(11) of these Rules]:

'Deception' means making false representations or submitting false documents (whether or not material to the application), or failing to disclose material facts.

'Illegal Entrant' has the same definition as in section 33(1) of the Immigration Act 1971.

'Overstayed' or 'Overstaying' means the applicant has stayed in the UK beyond the time limit attached to his leave, or beyond the period that his leave was extended under sections 3C or 3D of the Immigration Act 1971.]

Note

Frequent amendments to this paragraph makes it important to note the following. Before 4 April 1996 the definition covered: housing under the Housing Act 1985; income support family credit, council tax benefit and housing benefit. After 3 April 1996, HC 329 added: attendance allowance, severe disablement allowance, invalid care allowance, disability living allowance, disability working allowance. The position (as at March 1997) is that since 30 October 1996 HC 31 has added child benefit. It also replaces income support with income-based jobseeker's allowance (JSA). This definition does not include contributions-based JSA. The definition of 'visa national' was amended with effect from 11 May 1998 (Cmnd 3953). On each occasion the definitions have included the equivalent provisions under legislation for Scotland and Northern Ireland.

Words in square brackets beginning 'the 2006 EEA Regulations' substituted by HC 1053.

Definition of 'family member' omitted by Cm 4851.

Words in square brackets beginning 'the Human Rights Convention' inserted by Cm 4851.

Definition of 'Department of Employment' following definition of 'public funds' deleted by Cmnd 5253.

Definitions of 'Immigration employment document' and 'Public funds' inserted by Cm 5597.

In definition 'Public funds' words in square brackets inserted and words deleted by HC 346.

Definition of 'adoption' inserted and sub-paragraph (d) in definition of 'a parent' substituted by HC 538.

Definitions of 'intention to live permanently with the other' and 'present and settled' inserted by HC 538.

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Definition of 'specified national' inserted by HC 1224.

Definition of 'Accession State national' deleted by HC 1053.

Definition of 'degree level study' inserted and definition of 'sponsor' substituted by Cm 6339.

Definition of 'Approved Destination Status Agreement with China' inserted by HC 486.

Definition of 'civil partner' inserted by HC 582.

In definitions 'parent' and 'sponsor' words in square brackets substituted by HC 582.

Definition of 'specified national' deleted by HC 645.

Definition of 'non-visa nationals' inserted by HC 1016.

Definition of 'EEA national' amended by HC 1053.

Definition of 'a UK Bachelors degree' inserted by HC 1702.

Definitions of a 'bona fide private education institution' and 'an external student' inserted by Cm 7073.

Definition of 'employment' amended by HC 40.

Words beginning 'Employment as a Doctor in Training' inserted by HC 321.

Definition of 'Tier 1 (General) Migrant' substituted, and words beginning 'In paragraph 320(7B) of these Rules' inserted, by HC 321.

In definition of 'Highly Skilled Migrant' words in square brackets substituted by HC 607.

In definition of 'Innovator' words in square brackets substituted by HC 607.

In definition of 'Participant in the Fresh Talent: Working in Scotland Scheme' words in square brackets substituted by HC 607.

In definition of 'Participant in the International Graduates Scheme' words in square brackets substituted by HC 607.

Words 'In paragraph 320(7B) and paragraph 320(11) of these Rules' substituted by HC 607.

Definitions in square brackets from 'Businessperson' to 'Tier 1 Migrant' inserted by HC 607.

Definitions in square brackets from 'Points Based system Migrant' to 'Permissible activity' inserted by HC 1113. Words 'Tier 4 Migrant' inserted by HC 314.

Definition 'Writer, Composer and Artist' inserted by HC 607.

Text Under Part 6A of these Rules, an 'A-rated Sponsor' to 'the employment the migrant is being sponsored to do.' Inserted by HC 1113.

Definition of 'Prospective student' inserted by HC 314.

In definition 'Special Visitor' words in square brackets inserted by HC 314.

6A For the purpose of these Rules, a person (P) is not to be regarded as having (or potentially having) recourse to public funds merely because P is (or will be) reliant in whole or in part on public funds provided to P's sponsor unless, as a result of P's presence in the United Kingdom, the sponsor is (or would be) entitled to increased or additional public funds (save where such entitlement to increased or additional public funds is by virtue of P and the sponsor's joint entitlement to benefits under the regulations referred to in paragraph 6B).

6B Subject to paragraph 6C, a person (P) shall not be regarded as having recourse to public funds if P is entitled to benefits specified under section 115 of the Immigration and Asylum Act 1999 by virtue of regulations made under sub-sections (3) and (4) of that section or section 42 of the Tax Credits Act 2002.

6C A person (P) making an application from outside the United Kingdom will be regarded as having recourse to public funds where P relies upon the future entitlement to any public funds that would be payable to P or to P's sponsor as a result of P's presence in the United Kingdom, (including those benefits to which P or the sponsor would be entitled as a result of P's presence in the United Kingdom under the regulations referred to in to paragraph 6B).².

Note

Paragraphs 6A–6C substituted by HC 314.

PART 1

GENERAL PROVISIONS REGARDING LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM

Leave to enter the United Kingdom

[7 A person who is neither a British citizen nor a Commonwealth citizen with the right of abode nor a person who is entitled to enter or remain in the United Kingdom by virtue of the provisions of [the 2006 EEA Regulations] requires leave to enter the United Kingdom.]

Note

Substituted by Cm 4851. Reference to the 2006 EEA Regulations amended by HC 1053.

[8 Under Sections 3 and 4 of the Immigration Act 1971 an Immigration Officer when admitting to the United Kingdom a person subject to control under that Act may give leave to enter for a limited period and, if he does, may impose all or any of the following conditions:

- (i) a condition restricting employment or occupation in the United Kingdom;
- (ii) a condition requiring the person to maintain and accommodate himself, and any dependants of his, without recourse to public funds; and
- (iii) a condition requiring the person to register with the police.

He may also require him to report to the appropriate Medical Officer of Environmental Health. Under Section 24 of the 1971 Act it is an offence knowingly to remain beyond the time limit or to fail to comply with such a condition or requirement.]

[9 The time limit and any conditions attached will normally be made known to the person concerned:

- (i) by written notice given to him or endorsed by the immigration officer in his passport or travel document; or
- (ii) in any other manner permitted by the Immigration (Leave to Enter and Remain) Order 2000.]

Note

Paragraph 9 substituted by HC 704.

[Exercise of the power to refuse leave to enter the United Kingdom or to cancel leave to enter or remain which is in force]

10 The power to refuse leave to enter the United Kingdom [or to cancel leave to enter or remain which is already in force] is not to be exercised by an Immigration Officer acting on his own. The authority of a Chief Immigration Officer or of an Immigration Inspector must always be obtained.

[Suspension of leave to enter or remain in the United Kingdom

10A Where a person has arrived in the United Kingdom with leave to enter or remain which is in force but which was given to him before his arrival he may be examined by an Immigration Officer under paragraph 2A of Schedule 2 to the Immigration

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Act 1971. An Immigration Officer examining a person under paragraph 2A may suspend that person's leave to enter or remain in the United Kingdom until the examination is completed.

Cancellation of leave to enter or remain in the United Kingdom

10B Where a person arrived in the United Kingdom with leave to enter or remain in the United Kingdom which is already in force, an Immigration Officer may cancel that leave.]

Note

Sub-heading of paragraph 10 substituted, words in square brackets in paragraph 10 inserted and paragraphs 10A and 10B inserted by HC 704.

Requirement for persons arriving in the United Kingdom or seeking entry through the Channel Tunnel to produce evidence of identity and nationality

11 A person must, on arrival in the United Kingdom or when seeking entry through the Channel Tunnel, produce on request by the Immigration Officer:

- (i) a valid national passport or other document satisfactorily establishing his identity and nationality; and
- (ii) such information as may be required to establish whether he requires leave to enter the United Kingdom and, if so, whether and on what terms leave to enter should be given.

Note

This paragraph reproduces the powers of Immigration Officers contained in the Immigration Act 1971, Sch 2, para 4.

Requirement for a person not requiring leave to enter the United Kingdom to prove that he has the right of abode

12 A person claiming to be a British citizen must prove that he has the right of abode in the United Kingdom by producing either:

- (i) a United Kingdom passport describing him as a British citizen or as a citizen of the United Kingdom and Colonies having the right of abode in the United Kingdom; or
- (ii) a certificate of entitlement duly issued by or on behalf of the Government of the United Kingdom certifying that he has the right of abode.

13 A person claiming to be a Commonwealth citizen with the right of abode in the United Kingdom must prove that he has the right of abode by producing a certificate of entitlement duly issued to him by or on behalf of the Government of the United Kingdom certifying that he has the right of abode.

14 A Commonwealth citizen who has been given limited leave to enter the United Kingdom may later claim to have the right of abode. The time limit on his stay may be removed if he is able to establish a claim to the right of abode, for example by showing that:

- (i) immediately before the commencement of the British Nationality Act 1981 he was a Commonwealth citizen born to or legally adopted by a parent who at the time of his birth had citizenship of the United Kingdom and Colonies by his birth in the United Kingdom or any of the Islands; and
- (ii) he has not ceased to be a Commonwealth citizen in the meanwhile.

Common Travel Area

15 The United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland collectively form a common travel area. A person who has been examined for the purpose of immigration control at the point at which he entered the area does not normally require leave to enter any other part of it. However certain persons subject to the Immigration (Control of Entry through the Republic of Ireland) Order 1972 (as amended) who enter the United Kingdom through the Republic of Ireland do require leave to enter. This includes:

- (i) those who merely passed through the Republic of Ireland;
- (ii) persons requiring visas;
- (iii) persons who entered the Republic of Ireland unlawfully;
- (iv) persons who are subject to directions given by the Secretary of State for their exclusion from the United Kingdom on the ground that their exclusion is conducive to the public good;
- (v) persons who entered the Republic from the United Kingdom and Islands after entering there unlawfully or overstaying their leave.

Admission of certain British passport holders

16 A person in any of the following categories may be admitted freely to the United Kingdom on production of a United Kingdom passport issued in the United Kingdom and Islands or the Republic of Ireland prior to 1 January 1973, unless his passport has been endorsed to show that he was subject to immigration control:

- (i) a British Dependent Territories citizen;
- (ii) a British National (Overseas);
- (iii) a British Overseas citizen;
- (iv) a British protected person;
- (v) a British subject by virtue of Section 30(a) of the British Nationality Act 1981, (who, immediately before the commencement of the 1981 Act, would have been a British subject not possessing citizenship of the United Kingdom and Colonies or the citizenship of any other Commonwealth country or territory).

17 British Overseas citizens who hold United Kingdom passports wherever issued and who satisfy the Immigration Officer that they have, since 1 March 1968, been given indefinite leave to enter or remain in the United Kingdom may be given indefinite leave to enter.

[Persons outside the United Kingdom]

17A Where a person is outside the United Kingdom but wishes to travel to the United Kingdom an Immigration Officer may give or refuse him leave to enter. An Immigration Officer may exercise these powers whether or not he is, himself, in the United

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Kingdom. However, an Immigration Officer is not obliged to consider an application for leave to enter from a person outside the United Kingdom.

17B Where a person, having left the common travel area, has leave to enter the United Kingdom which remains in force under article 13 of the Immigration (Leave to Enter and Remain) Order 2000, an Immigration Officer may cancel that leave. An Immigration Officer may exercise these powers whether or not he is, himself, in the United Kingdom. If a person outside the United Kingdom has leave to remain in the United Kingdom which is in force in this way, the Secretary of State may cancel that leave.]

Note

Paragraphs 17A and B inserted by HC 704.

RETURNING RESIDENTS

18 A person seeking leave to enter the United Kingdom as a returning resident may be admitted for settlement provided the Immigration Officer is satisfied that the person concerned:

- (i) had indefinite leave to enter or to remain in the United Kingdom when he last left; and
- (ii) has not been away from the United Kingdom for more than 2 years; and
- (iii) did not receive assistance from public funds towards the cost of leaving the United Kingdom; and
- (iv) now seeks admission for the purpose of settlement.

19 A person who does not benefit from the preceding paragraph by reason only of having been away from the United Kingdom too long may nevertheless be admitted as a returning resident if, for example, he has lived here for most of his life.

[**19A** Where a person who has indefinite leave to enter or remain in the United Kingdom accompanies, on a tour of duty abroad, a [spouse, civil partner, unmarried partner or same-sex partner] who is a member of HM Forces serving overseas, or a permanent member of HM Diplomatic Service, or a comparable United Kingdom-based staff member of the British Council, or a staff member of the Department for International Development who is a British Citizen or is settled in the United Kingdom, sub-paragraphs (ii) and (iii) of paragraph 18 shall not apply.]

Note

Substituted by Cm 5597.

Words 'spouse, civil partner, unmarried partner or same-sex partner' in square brackets substituted by HC 582.

20 The leave of a person whose stay in the United Kingdom is subject to a time limit lapses on his going to a country or territory outside the common travel area [if the leave was given for a period of six months or less or conferred by a visit visa. In other cases, leave lapses on the holder remaining outside the United Kingdom for a continuous period of more than two years]. [A person whose leave has lapsed and] who returns after a temporary absence abroad within the period of this earlier leave has no claim to admission as a returning resident. His application to re-enter the United Kingdom should be considered in the light of all the relevant circumstances. The same time limit and any conditions attached will normally be reimposed if he meets the requirements of these Rules, unless he is seeking admission in a different capacity from the one in which he was last given leave to enter or remain.

Note

Words in first set of square brackets in paragraph 20 inserted and those in second set of square brackets substituted by HC 704.

[NON-LAPSING LEAVE

20A Leave to enter or remain in the United Kingdom will usually lapse on the holder going to a country or territory outside the common travel area. However, under article 13 of the Immigration (Leave to Enter and Remain) Order 2000 such leave will not lapse where it was given for a period exceeding six months or where it was conferred by means of an entry clearance (other than a visit visa).]

Note

Inserted by HC 704.

HOLDERS OF RESTRICTED TRAVEL DOCUMENTS AND PASSPORTS

21 The leave to enter or remain in the United Kingdom of the holder of a passport or travel document whose permission to enter another country has to be exercised before a given date may be restricted so as to terminate at least 2 months before that date.

22 If his passport or travel document is endorsed with a restriction on the period for which he may remain outside his country of normal residence, his leave to enter or remain in the United Kingdom may be limited so as not to extend beyond the period of authorised absence.

23 The holder of a travel document issued by the Home Office should not be given leave to enter or remain for a period extending beyond the validity of that document. This paragraph and paragraphs 21–22 do not apply to a person who is eligible for admission for settlement or to a spouse [or civil partner] who is eligible for admission under paragraph 282 or to a person who qualifies for the removal of the time limit on his stay.

Note

Words in square brackets inserted by HC 582.

[**23A** A person who is not a visa national and who is seeking leave to enter on arrival in the United Kingdom for a period not exceeding 6 months for a purpose for which prior entry clearance is not required under these Rules may be granted such leave, for a period not exceeding 6 months. This paragraph does not apply where the person is a British National (Overseas), a British overseas territories citizen, a British Overseas citizen, a British protected person, or a person who under the British Nationality Act 1981 is a British subject.]

Note

Paragraph 23A substituted by HC 645.

[**23B** A person who is a British National (Overseas), a British overseas territories citizen, a British Overseas citizen, a British protected person, or a person who under the British Nationality Act 1981 is a British subject, and who is seeking leave to enter on arrival in the United Kingdom for a purpose for which prior entry clearance is not required under these Rules may be granted such leave, irrespective of the period of time for which he seeks entry, for a period not exceeding 6 months.]

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Note

Paragraph 23B inserted by HC 645.

Entry clearance

24 The following must produce to the Immigration Officer a valid passport or other identity document endorsed with a United Kingdom entry clearance issued to him for the purpose for which he seeks entry:

- (i) a visa national;
- (ii) any other person (other than British Nationals (Overseas), a British overseas territories citizen, a British Overseas citizen, a British protected person or a person who under the British Nationality Act 1981 is a British subject) who is seeking entry for a period exceeding six months or is seeking entry for a purpose for which prior entry clearance is required under these Rules.

Such a person will be refused leave to enter if he has no such current entry clearance. Any other person who wishes to ascertain in advance whether he is eligible for admission to the United Kingdom may apply for the issue of an entry clearance.

Note

Paragraph 24 substituted by HC 645.

25 Entry clearance takes the form of a visa (for visa nationals) or an entry certificate (for non-visa nationals). These documents are to be taken as evidence of the holder's eligibility for entry into the United Kingdom, and accordingly accepted as 'entry clearances' within the meaning of the Immigration Act 1971.

[25A An entry clearance which satisfies the requirements set out in article 3 of the Immigration (Leave to Enter and Remain) Order 2000 will have effect as leave to enter the United Kingdom. The requirements are that the entry clearance must specify the purpose for which the holder wants to enter the United Kingdom and should be endorsed with the conditions to which it is subject or with a statement that it has effect as indefinite leave to enter the United Kingdom. The holder of such an entry clearance will not require leave to enter on arrival in the United Kingdom and, for the purposes of the Rules, will be treated as a person who has arrived in the United Kingdom with leave to enter the United Kingdom which is in force but which was given to him before his arrival.]

Note

Words in square brackets in paragraph 24 inserted by HC 1224. Paragraph 25A inserted by HC 704.

26 An application for entry clearance will be considered in accordance with the provisions in these Rules governing the grant or refusal of leave to enter. Where appropriate, the term 'Entry Clearance Officer' should be substituted for 'Immigration Officer'.

27 An application of entry clearance is to be decided in the light of the circumstances existing at the time of the decision, except that an applicant will not be refused an entry clearance where entry is sought in one of the categories contained in paragraphs 296–316 solely on account of his attaining the age of 18 years between receipt of his application and the date of the decision on it.

An applicant for an entry clearance must be outside the United Kingdom and Islands at the time of the application. An applicant for an entry clearance who is seeking entry as a visitor must apply to a post designated by the Secretary of State to accept applications for entry clearance for that purpose and from that category of applicant. [Subject to paragraph 28A, any other application] must be made to the post in the country or territory where the applicant is living which has been designated by the Secretary of State to accept applications for entry clearance for that purpose and from that category of applicant. Where there is no such post the applicant must apply to the appropriate designated post outside the country or territory where he is living.

Note

Words in square brackets substituted by HC 1113.

[28A

- (a) an application for entry clearance as a Tier 5 (Temporary Worker) Migrant in the creative and sporting sub-category of Tier 5 may also be made at the post in the country or territory where the applicant is situated at the time of the application, provided that:
 - (i) the post has been designated by the secretary of state to accept applications for entry clearance for that purpose and from that category of applicant,
 - (ii) the applicant is in that country or territory for a similar purpose to the activity he proposes to undertake in the UK, and
 - (iii) the applicant is able to demonstrate to the entry Clearance officer that he has authority to be living in that country or territory in accordance with its immigration laws. Those applicants who are known to the authorities of that country or territory but who have not been given permission to live in that country or territory will not be eligible to make an application.
- (b) an application for entry clearance as a Tier 5 (youth Mobility scheme) Temporary Migrant may also be made at the post in the country or territory where the applicant is situated at the time of the application, provided that:
 - (i) the post has been designated by the secretary of state to accept applications for entry clearance for that purpose and from that category of applicant, and
 - (ii) the applicant is able to demonstrate to the entry Clearance officer that he has authority to be living in that country or territory in accordance with its immigration laws and that when he was given authority to live in that country or territory he was given authority to live in that country or territory for a period of more than 6 months. Those applicants who are known to the authorities of that country or territory but who have not been given permission to live in that country or territory will not be eligible to make an application.]

Note

Paragraph 24 substituted by HC 1113.

29 For the purposes of paragraph 28 [and 28A] 'post' means a British Diplomatic Mission, British Consular post or the office of any person outside the United Kingdom and Islands who has been authorised by the Secretary of State to accept applications for entry clearance. A list of designated posts is published by the Foreign and Commonwealth Office.

Note

Words in square brackets inserted by HC 1113.

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30 An application for an entry clearance is not made until any fee required to be paid under the Consular Fees Act 1980 (including any Regulations or Orders made under that Act) has been paid.

[30A An entry clearance may be revoked if the Entry Clearance Officer is satisfied that:

- (i) whether or not to the holder's knowledge, false representations were employed or material facts were not disclosed, either in writing or orally, for the purpose of obtaining the entry clearance; or
- (ii) a change in circumstances since the entry clearance was issued has removed the basis of the holder's claim to be admitted to the United Kingdom, except where the change of circumstances amounts solely to his exceeding the age for entry in one of the categories contained in paragraphs 296–316 of these Rules since the issue of the entry clearance; or
- (iii) the holder's exclusion from the United Kingdom would be conducive to the public good.]

[30B An entry clearance shall cease to have effect where the entry clearance has effect as leave to enter and an Immigration Officer cancels that leave in accordance with paragraph 2A(8) of Schedule 2 to the Immigration Act 1971.

30C An Immigration Officer may cancel an entry clearance which is capable of having effect as leave to enter if the holder arrives in the United Kingdom before the day on which the entry clearance becomes effective or if the holder seeks to enter the United Kingdom for a purpose other than the purpose specified in the entry clearance.]

Note

Paragraph 30A inserted by HC 31. Paragraphs 30B and 30C inserted by HC 704.

Variation of leave to enter or remain in the United Kingdom

31 Under Section 3(3) of the 1971 Act a limited leave to enter or remain in the United Kingdom may be varied by extending or restricting its duration, by adding, varying or revoking conditions or by removing the time limit (whereupon any condition attached to the leave ceases to apply). When leave to enter or remain is varied an entry is to be made in the applicant's passport or travel document (and his registration certificate where appropriate) or the decision may be made known in writing or some other appropriate way.

[31A Where a person has arrived in the United Kingdom with leave to enter or remain in the United Kingdom which is in force but was given to him before his arrival, he may apply, on arrival at a port of entry in the United Kingdom, for variation of that leave. An Immigration Officer acting on behalf of the Secretary of State may vary the leave at the port of entry but is not obliged to consider an application for variation made at the port of entry. If an Immigration Officer acting on behalf of the Secretary of State has declined to consider an application for variation of leave at a port of entry but the leave has not been cancelled under paragraph 2A(8) of Schedule 2 to the Immigration Act 1971, the person seeking variation should apply to the Home Office under paragraph 32.]

Note

Paragraph 31A inserted by HC 704.

32 [...]

33 [...]

Note

Paragraphs 32 and 33 deleted by HC 321.

[33A Where a person, having left the common travel area, has leave to enter or remain in the United Kingdom which remains in force under article 13 of the Immigration (Leave to Enter and Remain) Order 2000, his leave may be varied (including any conditions to which it is subject) in such form and manner as permitted for the giving of leave to enter. However, the Secretary of State is not obliged to consider an application for variation of leave to enter or remain from a person outside the United Kingdom.]

Note

Words in first set of square brackets in paragraph 32 added by HC 329, para 2 with effect from 3 June 1996. Words in square brackets within first set in paragraph 32, and the whole of paragraph 33A, inserted by HC 704. Words in square brackets in paragraph 33 substituted by Cmnd 5253.

[Knowledge of language and life in the United Kingdom]

33B A person has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom for the purpose of an application for indefinite leave to remain under these rules if—

- (a) he has attended a course which used teaching materials derived from the document entitled ‘Citizenship Materials for ESOL Learners’ (ISBN 1-84478-5424) and he has thereby attained a relevant accredited qualification; or
- (b) he has passed the test known as the ‘Life in the UK Test’ administered by an educational institution or other person approved for this purpose by the Secretary of State; or
- (c) in the case of a person who is the spouse or civil partner or unmarried or same sex partner of:
 - i) a permanent member of HM Diplomatic Service; or
 - ii) a comparable UK-based staff member of the British Council on a tour of duty abroad; or
 - iii) a staff member of the Department for International Development who is a British citizen or is settled in the UK, a person designated by the Secretary of State certifies in writing that he has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom for this purpose.

33C In these rules, a ‘relevant accredited qualification’ is—

- (a) an ESOL ‘Skills for Life’ qualification in speaking and listening at Entry Level approved by the Qualifications and Curriculum Authority; or
- (b) two ESOL units at Access Level under the Scottish Credit and Qualifications Framework approved by the Scottish Qualifications Authority.

33D If in the special circumstances of any particular case the Secretary of State thinks fit, he may waive the need to fulfil the requirement to have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom if he considers that, because of the applicant’s physical or mental condition, it would be unreasonable to expect him to fulfil that requirement.

33E ...

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33F ...]

Note

Paragraphs 33B to 33F inserted by HC 398.

Paragraphs 33E and 33F deleted by HC 314.

[Specified forms and procedures for applications or claims in connection with immigration

34 An application form is specified when:

- (i) it is posted on the website of the [United Kingdom Border agency] of the Home Office,
- (ii) it is marked on the form that it is a specified form for the purpose of the immigration rules,
- (iii) it comes into force on the date specified on the form and/or in any accompanying announcement.

Note

Words in square brackets substituted by HC 398.

34A Where an application form is specified, the application or claim must also comply with the following requirements:

- (i) the application or claim must be made using the specified form,
- (ii) any specified fee in connection with the application or claim must be paid in accordance with the method specified in the application form, separate payment form and/or related guidance notes, as applicable,
- (iii) any section of the form which is designated as mandatory in the application form and/or related guidance notes must be completed as specified,
- (iv) if the application form and/or related guidance notes require the applicant to provide biographical [...] information, such information must be provided as specified,
- (v) an appointment for the purposes stated in subparagraph (iv) must be made and must take place by the dates specified in any subsequent notification by the Secretary of State following receipt of the application, or as agreed by the Secretary of State,
- (vi) where the application or claim is made by post or courier, or submitted in person:
 - (a) the application or claim must be accompanied by the photographs and documents specified as mandatory in the application form and/or related guidance notes, [...]
 - [(ab) those photographs must be in the same format specified as mandatory in the application form and/or related guidance notes, and]
 - (b) the form must be signed by the applicant, and where applicable, the applicant's spouse, civil partner, same-sex partner or unmarried partner, save that where the applicant is under the age of eighteen, the form may be signed by the parent or legal guardian of the applicant on his behalf,
- (vii) where the application or claim is made online:
 - (a) the photographs and documents specified as mandatory must be submitted in the manner directed in the application form and/or related online guidance notes and by such date as is specified in the acknowledgement of the online application, and
 - (b) the confirmation box (which states that the information contained in the application form is true and complete) must be completed by the

- applicant or, if the form is completed by an immigration adviser on the applicant's behalf, by the immigration adviser on specific instructions from the applicant that the information given is true and complete, and
- (viii) the application or claim must be delivered in accordance with paragraph 34B.

Note

Words deleted by HC 1113.

Words in square brackets inserted by HC 1113.

34B Where an application form is specified, it must be sent by prepaid post to the [United Kingdom Border agency] of the Home Office, or submitted in person at a public enquiry office of the Border and Immigration Agency of the Home Office, save for the following exceptions:

- (i) an application may not be submitted at a public enquiry office of the Border and Immigration Agency of the Home Office if it is an application for:
 - (a) limited or indefinite leave to remain as a [...], sole representative, retired person of independent means, [...] [...],
 - [(ba) limited or indefinite leave to remain as a Tier 1 (Investor) Migrant or Tier 1 (Entrepreneur) Migrant,]
 - (b) indefinite leave to remain as a victim of domestic violence,
 - (c) a certificate of approval for a marriage or civil partnership, [...]
 - (d) a Tier 2[, Tier 4 or Tier 5 (Temporary Worker)] sponsorship licence, [...]
 - (e) Indefinite leave to remain as a businessperson, investor or innovator[or]]
 - [(f) ...]
- (ii) an application may be sent by courier to the Border and Immigration Agency of the Home Office if it is an application for:
 - (a) limited or indefinite leave to remain as a [...], sole representative, retired person of independent means, [...], or as a [Tier 1 Migrant or Tier 2 Migrant.], [...]
 - (b) limited leave to remain for work permit employment, as a seasonal agricultural worker, for the purpose of employment under the Sectors-Based Scheme[... . [...]

Indefinite leave to remain as a businessperson, investor or innovator[, or]]

 - [(d) limited leave to remain as a Tier 5 (Temporary Worker) Migrant.]
- [(iii) an application may not be sent by pre-paid post, and must be made online, if it is an application for a Tier 2, Tier 4 or Tier 5 (Temporary Worker) sponsorship licence.]

Note

Words beginning 'United Kingdom' in square brackets substituted by HC 1113.

In paragraph 34B(i)(a) words in square brackets inserted by HC 1113. First and second deletions by HC 607, third deletion by HC 314.

Paragraph 34B(i)(ba) inserted by HC 314.

In paragraph 34B(i) words in square brackets beginning 'or (e) Indefinite leave' inserted by HC 607.

In paragraph 34B(i)(c) words removed by HC 607.

In paragraph 34B(i)(d) words in square brackets beginning 'Tier 2' inserted by HC 1113; words deleted by HC 1113.

In paragraph 34B(i)(e) words in square brackets inserted by HC 1113.

Paragraph 34B(i)(f) inserted by HC 1113., subsequently deleted by HC 314.

In paragraph 34B(ii)(a) words removed and words in square brackets substituted by HC 607, words further substituted by HC 1113.

In paragraph 34B(ii)(b) words deleted by HC 1113.

In paragraph 34B(ii)(c) words in square brackets beginning '(c) Indefinite leave' inserted by HC 607.

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In paragraph 34B(ii)(c) words substituted by HC 1113.

Paragraph 34B(ii)(d) substituted by HC 1113.

Paragraph 34B(iii) inserted by HC 1113.

34C Where an application or claim in connection with immigration for which an application form is specified does not comply with the requirements in paragraph 34A, such application or claim will be invalid and will not be considered.

34D Where the main applicant wishes to include applications or claims by any members of his family as his dependants on his own application form, the applications or claims of the dependants must meet the following requirements or they will be invalid and will not be considered:

- (i) the application form must expressly permit the applications or claims of dependants to be included, and
- (ii) such dependants must be the spouse, civil partner, unmarried or same-sex partner and/or children under the age of 18 of the main applicant.

Variation of Applications or Claims for Leave to Remain

34E If a person wishes to vary the purpose of an application or claim for leave to remain in the United Kingdom and an application form is specified for such new purpose, the variation must comply with the requirements of paragraph 34A (as they apply at the date the variation is made) as if the variation were a new application or claim, or the variation will be invalid and will not be considered.

34F Any valid variation of a leave to remain application will be decided in accordance with the immigration rules in force at the date such variation is made.

DETERMINATION OF THE DATE OF AN APPLICATION OR CLAIM (OR VARIATION OF AN APPLICATION OR CLAIM) IN CONNECTION WITH IMMIGRATION

34G For the purposes of these rules, the date on which an application or claim (or a variation in accordance with paragraph 34E) is made is as follows:

- (i) where the application form is sent by post, the date of posting,
- (ii) where the application form is submitted in person, the date on which it is accepted by a public enquiry office of the [United Kingdom Border Agency] of the Home Office,
- (iii) where the application form is sent by courier, the date on which it is delivered to the Border and Immigration Agency of the Home Office, or
- (iv) where the application form is submitted online, the date on which it is so submitted.

Note

Words beginning in square brackets substituted by HC 1113.

34H Applications or claims for leave to remain made before 29 February 2008 for which a form was prescribed prior to 29 February 2008 shall be subject to the forms and procedures as in force on the date on which the application or claim was made.

34I Where an application or claim is made no more than 21 days after the date on which a form is specified under the immigration rules and on a form that was

permitted for such application or claim immediately prior to the date of such specification, the application or claim shall be deemed to have been made on the specified form.

Withdrawn applications or claims for leave to remain in the United Kingdom

34J Where a person whose application or claim for leave to remain is being considered requests the return of his passport for the purpose of travel outside the common travel area, the application for leave shall, provided it has not already been determined, be treated as withdrawn as soon as the passport is returned in response to that request.

Note

Paragraph 34 substituted, and 34A–34J inserted, by HC 321.

Undertakings

35 A sponsor of a person seeking leave to enter or variation of leave to enter or remain in the United Kingdom may be asked to give an undertaking in writing to be responsible for that person's maintenance and accommodation for the period of any leave granted, including any further variation. Under the Social Security Administration Act 1992 and the Social Security Administration (Northern Ireland) Act 1992, the Department of Social Security or, as the case may be, the Department of Health and Social Services in Northern Ireland may seek to recover from the person giving such an undertaking any income support paid to meet the needs of the person in respect of whom the undertaking has been given.

[Under the Immigration and Asylum Act 1999 the Home Office may seek to recover from the person giving such an undertaking amounts attributable to any support provided under section 95 of the Immigration and Asylum Act 1999 (support for asylum seekers) to, or in respect of, the person in respect of whom the undertaking has been given. Failure by the sponsor to maintain that person on accordance with the undertaking, may also be an offence under section 105 of the Social Security Administration Act 1992 and/or under section 108 of the Immigration and Asylum Act 1999 if, as a consequence asylum support and/or income support is provided to or in respect of, that person.]

Note

Words in square brackets inserted by Cm 4851.

Medical

36 A person who intends to remain in the United Kingdom for more than 6 months should normally be referred to the Medical Inspector for examination. If he produces a medical certificate he should be advised to hand it to the Medical Inspector. Any person seeking entry who mentions health or medical treatment as a reason for his visit, or who appears not to be in good mental or physical health, should also be referred to the Medical Inspector; and the Immigration Officer has discretion, which should be exercised sparingly, to refer for examination in any other case.

37 Where the Medical Inspector advises that a person seeking entry is suffering from a specified disease or condition which may interfere with his ability to support himself or his dependants, the Immigration Officer should take account of this, in conjunction

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with other factors, in deciding whether to admit that person. The Immigration Officer should also take account of the Medical Inspector's assessment of the likely course of treatment in deciding whether a person seeking entry for private medical treatment has sufficient means at his disposal.

38 A returning resident should not be refused leave to enter [or have existing leave to enter or remain cancelled] on medical grounds. But where a person would be refused leave to enter [or to cancel existing leave to enter or remain] on medical grounds if he were not a returning resident, or in any case where it is decided on compassionate grounds not to exercise the power to refuse leave to enter, or in any other case where the Medical Inspector so recommends, the Immigration Officer should give the person concerned a notice requiring him to report to the Medical Officer of Environmental Health designated by the Medical Inspector with a view to further examination and any necessary treatment.

39 The Entry Clearance Officer has the same discretion as an Immigration Officer to refer applicants for entry clearance for medical examination and the same principles will apply to the decision whether or not to issue an entry clearance.

Note

Paragraphs 7–39 replace HC 251, paras 6–21 and 58–60. Words in square brackets in paragraph 38 inserted by HC 704.

[Students

39A An application for a variation of leave to enter or remain made by a student who is sponsored by a government or international sponsorship agency may be refused if the sponsor has not given written consent to the proposed variation.]

PART 2

PERSONS SEEKING TO ENTER OR REMAIN IN THE UNITED KINGDOM FOR VISITS

Visitors

[REQUIREMENTS FOR LEAVE TO ENTER AS A GENERAL VISITOR]

[40 For the purposes of paragraphs 41–46 a general visitor includes a person living and working outside the United Kingdom who comes to the United Kingdom as a tourist. a person seeking leave to enter the United Kingdom as a Business Visitor, which includes academic Visitors, must meet the requirements of paragraph 46G. a person seeking entry as a sports Visitor must meet the requirements of paragraph 46M.

[A visitor seeking leave to enter for the purpose of marriage or to enter into a civil partnership must meet the requirements of paragraph 56D.]]

41 The requirements to be met by a person seeking leave to enter the United Kingdom as a [general visitor] are that he:

- (i) is genuinely seeking entry as a [general visitor] for a limited period as stated by him, not exceeding 6 months [or not exceeding 12 months in the case of a person seeking entry to accompany an academic visitor, provided in the latter case the visitor accompanying the academic visitor has entry clearance]; and

- (ii) intends to leave the United Kingdom at the end of the period of the visit as stated by him; and
- (iii) does not intend to take employment in the United Kingdom; and
- (iv) does not intend to produce goods or provide services within the United Kingdom, including the selling of goods or services direct to members of the public; and
- (v) does not intend to [undertake a course of study]; and
- (vi) will maintain and accommodate himself and any dependants adequately out of resources available to him without recourse to public funds or taking employment; or will, with any dependants, be maintained and accommodated adequately by relatives or friends; and
- (vii) can meet the cost of the return or onward journey; and
- [(viii) is not a child under the age of 18^{*}; and]]
- [(ix) does not intend to do any of the activities provided for in paragraphs 46G (iii), 46M (iii) or 46s (iii); and
- (x) does not, during his visit, intend to marry or form a civil partnership, or to give notice of marriage or civil partnership; and
- (xi) does not intend to receive private medical treatment during his visit; and
- (xii) is not in transit to a country outside the common travel area.]

[LEAVE TO ENTER AS A GENERAL VISITOR]

[42 A person seeking leave to enter to the United Kingdom as a general visitor may be admitted for a period not exceeding 6 months [or not exceeding 12 months in the case of a person accompanying an academic visitor], subject to a condition prohibiting employment, provided the immigration officer is satisfied that each of the requirements of paragraph 41 is met.]

[REFUSAL OF LEAVE TO ENTER AS A GENERAL VISITOR]

[43 Leave to enter as a general visitor is to be refused if the immigration officer is not satisfied that each of the requirements of paragraph 41 is met.]

[REQUIREMENTS FOR AN EXTENSION OF STAY AS A GENERAL VISITOR]

- [44 Six months is the maximum permitted leave which may be granted to a general visitor. The requirements for an extension of stay as a general visitor are that the applicant:
- (i) meets the requirements of paragraph 41 (ii)–(vii) and (ix)–(xii); and
 - (ii) has not already spent, or would not as a result of an extension of stay spend, more than 6 months in total in the United Kingdom [or not more than 12 months in the case of a person accompanying an academic visitor] as a general visitor. Any periods spent as a child visitor are to be counted as a period spent as a general visitor; and
 - (iii) has, or was last granted, entry clearance, leave to enter or leave to remain as a general visitor or as a child visitor.]

[EXTENSION OF STAY AS A GENERAL VISITOR]

[45 An extension of stay as a general visitor may be granted, subject to a condition prohibiting employment, provided the secretary of state is satisfied that each of the requirements of paragraph 44 is met.]

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[REFUSAL OF EXTENSION OF STAY AS A GENERAL VISITOR]

[46 An extension of stay as a general visitor is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 44 is met.]

[Child visitors]

[REQUIREMENTS FOR LEAVE TO ENTER AS A CHILD VISITOR]

46A The requirements to be met by a person seeking leave to enter the United Kingdom as a child visitor are that he:

- [(i) is genuinely seeking entry as a child visitor for a limited period as stated by him not exceeding 6 months or not exceeding 12 months to accompany an academic visitor, provided in the latter case the child visitor has entry clearance;]
- [(ii) meets the requirements of paragraph 41(ii)–(iv), (vi)–(vii) and (x)–(xii);]
- (iii) is under the age of 18; and
- (iv) can demonstrate that suitable arrangements have been made for his travel to, and reception and care in the United Kingdom; and
- (v) has a parent or guardian in his home country or country of habitual residence who is responsible for his care; and
- (vi) if a visa national:
 - (a) holds a valid United Kingdom entry clearance for entry as an accompanied child visitor and is travelling in the company of the adult identified on his entry clearance, who is on the same occasion being admitted to the United Kingdom; or
 - (b) holds a valid United Kingdom entry clearance for entry as an unaccompanied child visitor; and
- (vii) if he has been accepted for a course of study, this is to be provided by [an institution which is:
 - i) the holder of a Sponsor Licence for Tier 4 of the Points Based System, or
 - ii) accredited by a United Kingdom Border Agency approved accreditation body, or
 - iii) an independent fee paying school registered with the Department for Children, Schools and Families’].]

Note

Paragraphs 40–46A substituted by HC 1113.

Words beginning ‘A visitor seeking leave’ in para 40 inserted by HC 314.

Words in square brackets in para 41 inserted by HC 314.

Words in square brackets in para 42 inserted by HC 314.

Words in square brackets in para 44 inserted by HC 314.

Paragraphs 46A(i) and (ii) substituted by HC 314.

Words in square brackets in para 46A(vii) inserted by HC 314.

LEAVE TO ENTER AS A CHILD VISITOR

46B A person seeking leave to enter the United Kingdom as a child visitor may be admitted for a period not exceeding 6 months [or not exceeding 12 months in the case of a child visitor accompanying an academic visitor], subject to a condition prohibiting employment, providing that the Immigration Officer is satisfied that each of the requirements of paragraph 46A is met.

REFUSAL OF LEAVE TO ENTER AS A CHILD VISITOR

46C Leave to enter as a child visitor is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 46A is met.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A CHILD VISITOR

46D Six months is the maximum permitted leave which may be granted to a child visitor. The requirements for an extension of stay as a child visitor are that the applicant:

- [(i) meets the requirements of paragraph 41 (ii)–(vii) and (x)–(xii);]
- (ii) is under the age of 18; and
- (iii) can demonstrate that there are suitable arrangements for his care in the United Kingdom; and
- (iv) has a parent or guardian in his home country or country of habitual residence who is responsible for his care; and
- (v) has not already spent, or would not as a result of an extension of stay spend, more than 6 months in total in the United Kingdom [or not more than 12 months in total in the case of a child visitor accompanying an academic visitor] as a child visitor; and]
- [(vi) has, or was last granted, entry clearance, leave to enter or leave to remain as a child visitor.]

EXTENSION OF STAY AS A CHILD VISITOR

46E An extension of stay as a child visitor may be granted, subject to a condition prohibiting employment, provided the Secretary of State is satisfied that each of the requirements of paragraph 46D is met.

REFUSAL OF EXTENSION OF STAY AS A CHILD VISITOR

46F An extension of stay as a child visitor is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 46D is met.]

Note

Paragraphs 46A–46F inserted by HC 819, para 46A substituted by HC 1113.

Paragraph 46B – words in square brackets inserted by HC 314.

Paragraph 46D – first words in square brackets inserted by HC 314.

Paragraph 46D – second words in square brackets inserted by HC 1113.

Paragraph 46D(i) substituted by HC 314.

[Business Visitors]

[REQUIREMENTS FOR LEAVE TO ENTER AS A BUSINESS VISITOR]

46G The requirements to be met by a person seeking leave to enter the United Kingdom as a business visitor are that he:

- (i) is genuinely seeking entry as a Business Visitor for a limited period as stated by him:
 - (a) not exceeding 6 months; or

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- (b) not exceeding 12 months if seeking entry as an academic Visitor
- (ii) meets the requirements of paragraphs 41(ii)–(viii) and (x)–(xii)
- (iii) intends to do one or more of the following during his visit:
 - (a) to carry out a ‘Permissible activity’ as defined in paragraph 6;
 - (b) to take part in a location shoot as a member of a film crew;
 - (c) to represent overseas news media including as a journalist, correspondent, producer or cameraman provided he is employed or paid by an overseas company and is gathering information for an overseas publication;
 - (d) to act as an academic Visitor but only if he has been working as an academic in an institution of higher education overseas, or in the field of their academic expertise immediately prior to seeking entry;
 - (e) to act as a Visiting Professor;
 - [(f) To be a secondee to a UK company which is directly contracted with the visitor’s overseas company, with which it has no corporate relationship, to provide goods or services, provided the secondee remains employed and paid by the overseas company throughout the secondee’s visit.]
 - (g) to undertake some preaching or pastoral work as a religious worker, provided his base is abroad and he is not taking up an office, post or appointment;
 - [(h) To act as an adviser, consultant, trainer or trouble shooter, to the UK branch of the same group of companies as the visitor’s overseas company, provided the visitor remains employed and paid by the overseas company and does not undertake work, paid or unpaid with the UK company’s clients.]
 - [(i) Specific, one-off training on techniques and work practices used in the UK where:
 - a. the training is to be delivered by the UK branch of the same group of companies to which the individual’s employer belongs; or
 - b. the training is to be provided by a UK company contracted to provide goods or services to the overseas company; or
 - c. a UK company is contracted to provide training facilities only, to an overseas company.]]

[LEAVE TO ENTER AS A BUSINESS VISITOR]

46H A person seeking leave to enter to the United Kingdom as a Business Visitor may be admitted for a period not exceeding 6 months, subject to a condition prohibiting employment, provided the immigration officer is satisfied that each of the requirements of paragraph 46G is met. a person seeking leave to enter the United Kingdom as an academic Visitor who does not have entry clearance may, if otherwise eligible, be admitted for a period not exceeding 6 months, subject to a condition prohibiting employment, provided the immigration officer is satisfied that each of the requirements of paragraph 46G are met. an academic Visitor who has entry clearance may be admitted for up to 12 months subject to a condition prohibiting employment.]

[REFUSAL OF LEAVE TO ENTER AS A BUSINESS VISITOR]

46I Leave to enter as a Business Visitor is to be refused if the immigration officer is not satisfied that each of the requirements of paragraph 46G are met.]

[REQUIREMENTS FOR AN EXTENSION OF STAY AS A BUSINESS VISITOR]

46J Twelve months is the maximum permitted leave which may be granted to an academic Visitor and six months is the maximum that may be granted to any other form of Business Visitor. The requirements for an extension of stay as a Business Visitor are that the applicant:

- (i) meets the requirements of paragraph 46G(ii)–(iii); and
- (ii) if he is a Business Visitor other than an academic Visitor, has not already spent, or would not as a result of an extension of stay spend, more than 6 months in total in the United Kingdom as a Business Visitor; and
- (iii) if he is an academic Visitor, has not already spent, or would not as a result of an extension of stay spend, more than 12 months in total in the United Kingdom as a Business Visitor; and
- (iv) has, or was last granted, entry clearance, leave to enter or leave to remain as a Business Visitor.]

[EXTENSION OF STAY AS A BUSINESS VISITOR]

46K An extension of stay as a Business Visitor may be granted, subject to a condition prohibiting employment, provided the secretary of state is satisfied that each of the requirements of paragraph 46J is met.]

[REFUSAL OF EXTENSION OF STAY AS A BUSINESS VISITOR]

46L An extension of stay as a Business Visitor is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 46J is met.]

[Sports Visitors]

REQUIREMENTS FOR LEAVE TO ENTER AS A SPORTS VISITOR

46M The requirements to be met by a person seeking leave to enter the United Kingdom as a sports Visitor are that he:

- (i) is genuinely seeking entry as a sports Visitor for a limited period as stated by him, not exceeding six months; and
- (ii) meets the requirements of paragraphs 41(ii)–(viii) and (x)–(xii); and
- (iii) intends to do one or more of the following during his visit:
 - a. To take part in a particular sporting event as defined in guidance published by the United Kingdom Border agency, tournament or series of events;
 - b. To take part in a specific one off charity sporting event, provided no payment is received other than for travelling and other expenses;
 - c. To join, as an amateur, a wholly or predominantly amateur team provided no payment is received other than for board and lodging and reasonable expenses;
 - d. To serve as a member of the technical or personal staff, or as an official, attending the same event as a visiting sportsperson coming for one or more of the purposes listed in (a), (b) or (c).]

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[LEAVE TO ENTER AS A SPORTS VISITOR]

46N A person seeking leave to enter to the United Kingdom as a sports Visitor may be admitted for a period not exceeding 6 months, subject to a condition prohibiting employment, provided the immigration officer is satisfied that each of the requirements of paragraph 46M is met.]

[REFUSAL OF LEAVE TO ENTER AS A SPORTS VISITOR]

46O Leave to enter as a sports Visitor is to be refused if the immigration officer is not satisfied that each of the requirements of paragraph 46M is met.]

[REQUIREMENTS FOR AN EXTENSION OF STAY AS A SPORTS VISITOR]

46P Six months is the maximum permitted leave which may be granted to a sports Visitor. The requirements for an extension of stay as a sports visitor are that the applicant:

- (i) meets the requirements of paragraph 46M(ii)–(iii); and
- (ii) has not already spent, or would not as a result of an extension of stay spend, more than 6 months in total in the United Kingdom as a sports Visitor; and
- (iii) has, or was last granted, entry clearance, leave to enter or leave to remain as a sports Visitor.]

[EXTENSION OF STAY AS A SPORTS VISITOR]

46Q An extension of stay as a sports Visitor may be granted, subject to a condition prohibiting employment, provided the secretary of state is satisfied that each of the requirements of paragraph 46P is met.]

[REFUSAL OF EXTENSION OF STAY AS A SPORTS VISITOR]

46R An extension of stay as a sports Visitor is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 46P is met.]

[Entertainer Visitors]

REQUIREMENTS FOR LEAVE TO ENTER AS AN ENTERTAINER VISITOR

46S The requirements to be met by a person seeking leave to enter the United Kingdom as an entertainer Visitor are that he:

- (i) is genuinely seeking entry as an entertainer Visitor for a limited period as stated by him, not exceeding six months and
- (ii) meets the requirements of paragraphs 41(ii)–(viii) and (x)–(xii) and
- (iii) intends to do one or more of the following during his visit:
 - a. to take part as a professional entertainer in one or more music competitions; and/or
 - b. to fulfil one or more specific engagements as either an individual amateur entertainer or as an amateur group; and/or

- c. to take part, as an amateur or professional entertainer, in a cultural event (or one or more of such events) that appears in the list of events to which this provision applies that is published in guidance issued by the United Kingdom Border agency; and/or
- d. serve as a member of the technical or personal staff, or of the production team, of an entertainer coming for one or more of the purposes listed in (a), (b), or (c).]

[LEAVE TO ENTER AS AN ENTERTAINER VISITOR]

46T A person seeking leave to enter to the United Kingdom as an entertainer Visitor may be admitted for a period not exceeding 6 months, subject to a condition prohibiting employment, provided the immigration officer is satisfied that each of the requirements of paragraph 46S is met.]

[REFUSAL OF LEAVE TO ENTER AS AN ENTERTAINER VISITOR]

46U Leave to enter as an entertainer Visitor is to be refused if the immigration officer is not satisfied that each of the requirements of paragraph 46S is met.]

[REQUIREMENTS FOR AN EXTENSION OF STAY AS AN ENTERTAINER VISITOR]

46V Six months is the maximum permitted leave which may be granted to an entertainer Visitor. The requirements for an extension of stay as an entertainer Visitor are that the applicant:

- (i) meets the requirements of paragraph 46S(ii)–(iii); and
- (ii) has not already spent, or would not as a result of an extension of stay spend, more than 6 months in total in the United Kingdom as an entertainer Visitor; and
- (iii) has, or was last granted, entry clearance, leave to enter or leave to remain as an entertainer Visitor.]

[EXTENSION OF STAY AS AN ENTERTAINER VISITOR]

46W An extension of stay as an entertainer Visitor may be granted, subject to a condition prohibiting employment, provided the secretary of state is satisfied that each of the requirements of paragraph 46V is met.]

[REFUSAL OF EXTENSION OF STAY AS AN ENTERTAINER VISITOR]

46X An extension of stay as an entertainer Visitor is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 46V is met.]

Note

Paragraphs 46G–46X inserted by HC 1113.

Paragraphs 46G(f), (h) and (i) substituted by HC 314.

Appendix 5 Immigration Rules

Visitors in transit

REQUIREMENTS FOR ADMISSION AS A VISITOR IN TRANSIT TO ANOTHER COUNTRY

47 The requirements to be met by a person (not being a member of the crew of a ship, aircraft, hovercraft, hydrofoil or train) seeking leave to enter the United Kingdom as visitor in transit to another country are that he:

- (i) is in transit to a country outside the common travel area; and
- (ii) has both the means and the intention of proceeding at once to another country; and
- (iii) is assured of entry there; and
- (iv) intends and is able to leave the United Kingdom within 48 hours.

LEAVE TO ENTER AS A VISITOR IN TRANSIT

48 A person seeking leave to enter the United Kingdom as a visitor in transit may be admitted for a period not exceeding 48 hours with a prohibition on employment provided the Immigration Officer is satisfied that each of the requirements of paragraph 47 is met.

REFUSAL OF LEAVE TO ENTER AS A VISITOR IN TRANSIT

49 Leave to enter as a visitor in transit is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 47 is met.

EXTENSION OF STAY AS A VISITOR IN TRANSIT

50 The maximum permitted leave which may be granted to a visitor in transit is 48 hours. An application for an extension of stay beyond 48 hours from a person admitted in this category is to be refused.

Visitors seeking to enter or remain for private medical treatment

REQUIREMENTS FOR LEAVE TO ENTER AS A VISITOR FOR PRIVATE MEDICAL TREATMENT

51 The requirements to be met by a person seeking leave to enter the United Kingdom as a visitor for private medical treatment are that he:

- [(i) meets the requirements set out in paragraph 41 (iii)–(vii), (ix)–(x) and (xii) for entry as a general visitor; and]
- (ii) in the case of a person suffering from a communicable disease, has satisfied the Medical Inspector that there is no danger to public health; and
- (iii) can show, if required to do so, that any proposed course of treatment is of finite duration; and
- (iv) intends to leave the United Kingdom at the end of his treatment; and
- (v) can produce satisfactory evidence, if required to do so, of:
 - (a) the medical condition requiring consultation or treatment; and
 - (b) satisfactory arrangements for the necessary consultation or treatment at his own expense; and

- (c) the estimated costs of such consultation or treatment; and
- (d) the likely duration of his visit; and
- (e) sufficient funds available to him in the United Kingdom to meet the estimated costs of his undertaking to do so.

Note

Paragraph 51(i) substituted by HC 1113.

LEAVE TO ENTER AS A VISITOR FOR PRIVATE MEDICAL TREATMENT

52 A person seeking leave to enter the United Kingdom as a visitor for private medical treatment may be admitted for a period not exceeding 6 months, subject to a condition prohibiting employment, provided the Immigration Officer is satisfied that each of the requirements of paragraph 51 is met.

REFUSAL OF LEAVE TO ENTER AS A VISITOR FOR PRIVATE MEDICAL TREATMENT

53 Leave to enter as a visitor for private medical treatment is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 51 is met.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A VISITOR FOR PRIVATE MEDICAL TREATMENT

54 The requirements for an extension of stay as a visitor to undergo or continue private medical treatment are that the applicant:

- [(i) meets the requirements set out in paragraph 41(iii)–(vii), (ix)–(x) and (xii) and paragraph 51 (ii)–(v); and]
- [(ii) has produced evidence from a registered medical practitioner who holds an NHS consultant post or who appears in the Specialist Register of the General Medical Council of satisfactory arrangements for private medical consultation or treatment and its likely duration; and, where treatment has already begun, evidence as to its progress; and]
- (iii) can show that he has met, out of the resources available to him, any costs and expenses incurred in relation to his treatment in the United Kingdom; and
- (iv) has sufficient funds available to him in the United Kingdom to meet the likely costs of his treatment and intends to meet those costs; [and
- (v) was not last admitted to the United Kingdom under the Approved Destination Status Agreement with China.]

Note

Paragraph 54(i) substituted by HC 1113.

Paragraph 54(ii) substituted by Cm 4851. Paragraph 54(v) inserted by HC 486.

EXTENSION OF STAY AS A VISITOR FOR PRIVATE MEDICAL TREATMENT

55 An extension of stay to undergo or continue private medical treatment may be granted, with a prohibition on employment, provided the Secretary of State is satisfied that each of the requirements of paragraph 54 is met.

Appendix 5 Immigration Rules

REFUSAL OF EXTENSION OF STAY AS A VISITOR FOR PRIVATE MEDICAL TREATMENT

56 An extension of stay as a visitor to undergo or continue private medical treatment is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 54 is met.

[Parent of a child at school]

REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE PARENT OF A CHILD AT SCHOOL

56A The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the parent of a child at school are that:

- [(i) the parent meets the requirements set out in paragraph [41](ii)–(xii); and
- [(ii)
 - (1) if the child has leave under paragraphs 57 to 62 of these Rules, the child is attending an independent fee paying day school and meets the requirements set out in paragraph 57(i) to (ix), or
 - (2) if the child is a Tier 4 (Child) Student, the child is attending an independent fee paying day school and meets the requirements set out in paragraph 245ZZA (if seeking leave to enter) or 245ZZC (if seeking leave to remain); and]
- (iii) the child is under 12 years of age; and
- (iv) the parent can provide satisfactory evidence of adequate and reliable funds for maintaining a second home in the United Kingdom; and
- (v) the parent is not seeking to make the United Kingdom his main home; [and
- (vi) the parent was not last admitted to the United Kingdom under the Approved Destination Status Agreement with China.]

Note

Sub-paragraph (i) substituted by HC 1113.

Sub-paragraph (i), words in square brackets inserted by HC 314.

Sub-paragraph (ii) substituted by HC 314.

Sub-paragraph (vi) inserted by HC 486. Words in brackets in sub-paragraph (ii) amended by HC 40.

LEAVE TO ENTER OR REMAIN AS THE PARENT OF A CHILD AT SCHOOL

56B A person seeking leave to enter or remain in the United Kingdom as the parent of a child at school may be admitted or allowed to remain for a period not exceeding 12 months, subject to a condition prohibiting employment, providing the Immigration Officer or, in the case of an application for limited leave to remain, the Secretary of State is satisfied that each of the requirements of paragraph 56A is met.

REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE PARENT OF A CHILD AT SCHOOL

56C Leave to enter or remain in the United Kingdom as the parent of a child at school is to be refused if the Immigration Office or, in the case of an application for limited leave to remain, the Secretary of State, is not satisfied that each of the requirements of paragraph 56A is met.]

Note

Words in square brackets inserted by Cm 4851.

[Visitors seeking to enter for the purposes of marriage or to enter into a civil partnership]

[REQUIREMENTS FOR LEAVE TO ENTER AS A VISITOR FOR MARRIAGE OR TO ENTER INTO A CIVIL PARTNERSHIP]

[56D The requirements to be met by a person seeking leave to enter the United Kingdom as a visitor for marriage [or civil partnership] are that he:

- (i) meets the requirements set out in paragraph 41[(i)–(ix) and (xi)–(xii)]; and
- (ii) can show that he intends to give notice of marriage [or civil partnership], or marry [or form a civil partnership], in the United Kingdom within the period for which entry is sought; and
- (iii) can produce satisfactory evidence, if required to do so, of the arrangements for giving notice of marriage [or civil partnership], or for his wedding [or civil partnership] [...] to take place, in the United Kingdom during the period for which entry is sought; and
- (iv) holds a valid United Kingdom entry clearance for entry in this capacity.]

Note

Headings substituted by HC 314.

Sub-paragraph (i) – words in square brackets inserted by HC 314.

Inserted by HC 346. References to civil partnerships inserted by HC 582.

Words deleted by HC 314.

[LEAVE TO ENTER AS A VISITOR FOR MARRIAGE [OR CIVIL PARTNERSHIP]]

[56E A person seeking leave to enter the United Kingdom as a visitor for marriage [or civil partnership] may be admitted for a period not exceeding 6 months, subject to a condition prohibiting employment, provided the Immigration Officer is satisfied that each of the requirements of paragraph 56D is met.]

Note

Inserted by HC 346. Reference to civil partnership inserted by HC 582.

[REFUSAL OF LEAVE TO ENTER AS A VISITOR FOR MARRIAGE [OR CIVIL PARTNERSHIP]]

[56F Leave to enter as a visitor for marriage [or civil partnership] is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 56D is met.]

Note

Inserted by HC 346. Reference to civil partnership inserted by HC 582.

Appendix 5 Immigration Rules

[Visitors seeking leave to enter under the Approved Destination Status (ADS) Agreement with China]

[REQUIREMENTS FOR LEAVE TO ENTER AS A VISITOR UNDER THE APPROVED DESTINATION STATUS AGREEMENT WITH CHINA ('ADS AGREEMENT')]

[56G The requirements to be met by a person seeking leave to enter the United Kingdom as a visitor under the ADS agreement with China are that he:

- [(i) meets the requirements set out in paragraph 41(ii)–(xii); and]
- (ii) is a national of the People's Republic of China; and
- (iii) is genuinely seeking entry as a visitor for a limited period as stated by him, not exceeding 30 days; and
- (iv) intends to enter, leave and travel within the territory of the United Kingdom as a member of a tourist group under the ADS agreement; and
- (v) holds a valid ADS agreement visit visa.]

Note

Sub-paragraph (i) substituted by HC 1113,
Inserted by HC 486.

[LEAVE TO ENTER AS A VISITOR UNDER THE ADS AGREEMENT WITH CHINA]

[56H A person seeking leave to enter the United Kingdom as a visitor under the ADS Agreement may be admitted for a period not exceeding 30 days, subject to a condition prohibiting employment, provided they hold an ADS Agreement visit visa.]

Note

Inserted by HC 486.

[REFUSAL OF LEAVE TO ENTER AS A VISITOR UNDER THE ADS AGREEMENT WITH CHINA]

[56I Leave to enter as a visitor under the ADS agreement with China is to be refused if the person does not hold an ADS Agreement visit visa.]

Note

Inserted by HC 486.

[EXTENSION OF STAY AS A VISITOR UNDER THE ADS AGREEMENT WITH CHINA]

[56J Any application for an extension of stay as a visitor under the ADS Agreement with China is to be refused.]

Note

Inserted by HC 486.

[Student visitors]

REQUIREMENTS FOR LEAVE TO ENTER AS A STUDENT VISITOR

56K The requirements to be met by a person seeking leave to enter the United Kingdom as a student visitor are that he:

- (i) is genuinely seeking entry as a student visitor for a limited period as stated by him, not exceeding six months; and
- (ii) has been accepted on a course of study which is to be provided by [an institution which is:
 - i) the holder of a Sponsor Licence for Tier 4 of the Points Based System, or
 - ii) accredited by a UKBA approved accreditation body, or
 - iii) an overseas Higher Education Institution offering only part of their programmes in the United Kingdom, holding their own national accreditation and offering programmes that are of an equivalent level to a United Kingdom degree;] and
- (iii) intends to leave the United Kingdom at the end of his visit as stated by him; and
- (iv) does not intend to take employment in the United Kingdom; and
- (v) does not intend to engage in business, to produce goods or provide services within the United Kingdom, including the selling of goods or services direct to members of the public; and
- (vi) does not intend to study at a maintained school; and
- (vii) will maintain and accommodate himself and any dependants adequately out of resources available to him without recourse to public funds or taking employment; or will, with any dependants, be maintained and accommodated adequately by relatives or friends; and
- (viii) can meet the cost of the return or onward journey; and
- (ix) is not a child under the age of 18;
- [(x) meets the requirements set out in paragraph 41(ix)–(xii).]

LEAVE TO ENTER AS A STUDENT VISITOR

56L A person seeking leave to enter to the United Kingdom as a student visitor may be admitted for a period not exceeding 6 months, subject to a condition prohibiting employment, provided the Immigration Officer is satisfied that each of the requirements of paragraph 56K is met.

REFUSAL OF LEAVE TO ENTER AS A STUDENT VISITOR

56M Leave to enter as a student visitor is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 56K is met.]

Note

Paragraphs 56K–56M inserted by Cm 7074.

Paragraph 56K(ii), words in square brackets substituted by HC 314.

Paragraph 56K(x) inserted by HC 314.

PART 3

PERSONS SEEKING TO ENTER OR REMAIN IN THE UNITED KINGDOM FOR STUDIES

57–69L

...

Note

Paragraphs 57–69L deleted by HC 314.

Appendix 5 Immigration Rules

[Requirements for leave to enter as an overseas qualified nurse or midwife]

69M The requirements to be met by a person seeking leave to enter as an overseas qualified nurse or midwife are that the applicant:

- (i) has obtained confirmation from the Nursing and Midwifery Council that he is eligible:*
 - (a) for admission to the Overseas Nurses Programme; or*
 - (b) to undertake a period of supervised practice; or*
 - (c) to undertake an adaptation programme leading to registration as a midwife; and*
- (ii) has been offered:*
 - (a) a supervised practice placement through an education provider that is recognised by the Nursing and Midwifery Council; or*
 - (b) a supervised practice placement in a setting approved by the Nursing and Midwifery Council; or*
 - (c) a midwifery adaptation programme placement in a setting approved by the Nursing and Midwifery Council; and*
- (iii) did not obtain acceptance of the offer referred to in paragraph 69 (ii) by misrepresentation; and*
- (iv) is able and intends to undertake the supervised practice placement or midwife adaptation programme; and*
- (v) does not intend to engage in business or take employment, except:*
 - (a) in connection with the supervised practice placement or midwife adaptation programme; or*
 - (b) part-time work of a similar nature to the work undertaken on the supervised practice placement or midwife adaptation programme; and*
- (vi) is able to maintain and accommodate himself and any dependants without recourse to public funds.*

LEAVE TO ENTER THE UNITED KINGDOM AS AN OVERSEAS QUALIFIED NURSE OR MIDWIFE

69N Leave to enter the United Kingdom as an overseas qualified nurse or midwife may be granted for a period not exceeding 18 months, provided the Immigration Officer is satisfied that each of the requirements of paragraph 69M is met.

REFUSAL OF LEAVE TO ENTER AS AN OVERSEAS QUALIFIED NURSE OR MIDWIFE

69O Leave to enter the United Kingdom as an overseas qualified nurse or midwife is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 69M is met.

Note

Paragraphs 69M–69O deleted save in so far as they are relevant to paragraph 69P, by HC 1113.

REQUIREMENTS FOR AN EXTENSION OF STAY AS AN OVERSEAS QUALIFIED NURSE OR MIDWIFE

69P The requirements to be met by a person seeking an extension of stay as an overseas qualified nurse or midwife are that the applicant:

- (i) [...]*

- (ii) [...]
- (iii) [...]
- [(iii)(a) has leave to enter or remain in the United Kingdom as a work permit holder in accordance with paragraphs 128 to 135 of these Rules; or]
- (iv) has leave to enter or remain as an overseas qualified nurse or midwife in accordance with paragraphs 69M – 69R of these Rules; and
- (v) meets the requirements set out in paragraph 69M(i)–(vi); and
- (vi) can provide satisfactory evidence of regular attendance during any previous period of supervised practice or midwife adaptation course; and
- (vii) if he has previously been granted leave:
 - (a) as an overseas qualified nurse or midwife under paragraphs 69M–69R of these Rules, or
 - (b) to undertake an adaptation course as a student nurse under paragraphs 63 – 69 of these Rules;is not seeking an extension of stay in this category which, when amalgamated with those previous periods of leave, would total more than 18 months; and
- (viii) if his previous studies, supervised practice placement or midwife adaptation programme placement were sponsored by a government or international scholarship agency, he has the written consent of his official sponsor to remain in the United Kingdom as an overseas qualified nurse or midwife.

Note

Paragraphs (i)–(iii) deleted by HC 1113.

Paragraphs 69P(iii)(a) inserted by HC 1016.

EXTENSION OF STAY AS AN OVERSEAS QUALIFIED NURSE OR MIDWIFE

69Q An extension of stay as an overseas qualified nurse or midwife may be granted for a period not exceeding 18 months, provided that the Secretary of State is satisfied that each of the requirements of paragraph 69P is met.

REFUSAL OF EXTENSION OF STAY AS AN OVERSEAS QUALIFIED NURSE OR MIDWIFE

69R An extension of stay as an overseas qualified nurse or midwife is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 69P is met.]

70–75

...

Note

Paragraphs 69M to 69R inserted by HC 645.

Paragraphs 70–75 deleted by HC 314.

[Postgraduate doctors and dentists]

[REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM TO TAKE THE PLAB TEST]

[75A The requirements to be met by a person seeking leave to enter in order to take the PLAB Test are that the applicant:

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- (i) is a graduate from a medical school and intends to take the PLAB Test in the United Kingdom; and
- (ii) can provide documentary evidence of a confirmed test date or of his eligibility to take the PLAB Test; and
- (iii) meets the requirements of paragraph 41 (iii)–(vii) for entry as a visitor; and
- [(iv) intends to leave the United Kingdom at the end of the leave granted under this paragraph unless he is successful in the PLAB Test and granted leave to remain to undertake a clinical attachment in accordance with paragraphs 75G to 75M of these Rules.]

Note

Paragraphs 75A–75M inserted by HC 346.

Sub-paragraph 75A(iv) substituted by HC 314.

[LEAVE TO ENTER TO TAKE THE PLAB TEST]

[75B A person seeking leave to enter the United Kingdom to take the PLAB Test may be admitted for a period not exceeding 6 months, provided the Immigration Officer is satisfied that each of the requirements of paragraph 75A is met.]

Note

Paragraphs 75A–75M inserted by HC 346.

[REFUSAL OF LEAVE TO ENTER TO TAKE THE PLAB TEST]

[75C Leave to enter the United Kingdom to take the PLAB Test is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 75A is met.]

Note

Paragraphs 75A–75M inserted by HC 346.

[REQUIREMENTS FOR AN EXTENSION OF STAY IN ORDER TO TAKE THE PLAB TEST]

[75D The requirements for an extension of stay in the United Kingdom in order to take the PLAB Test are that the applicant:

- (i) was given leave to enter the United Kingdom for the purposes of taking the PLAB Test in accordance with paragraph 75B of these Rules; and
- (ii) intends to take the PLAB Test and can provide documentary evidence of a confirmed test date; and
- (iii) meets the requirements set out in paragraph 41(iii)–(vii); and
- [(iv) intends to leave the United Kingdom at the end of the leave granted under this paragraph unless he is successful in the PLAB Test and granted leave to remain to undertake a clinical attachment in accordance with paragraphs 75G to 75M of these Rules; and]
- (v) would not as a result of an extension of stay spend more than 18 months in the United Kingdom for the purpose of taking the PLAB Test.]

Note

Paragraphs 75A–75M inserted by HC 346.

Sub-paragraph 75D(iv) substituted by HC 314.

[EXTENSION OF STAY TO TAKE THE PLAB TEST]

[75E A person seeking leave to remain in the United Kingdom to take the PLAB Test may be granted an extension of stay for a period not exceeding 6 months, provided the Secretary of State is satisfied that each of the requirements of paragraph 75D is met.]

Note

Paragraphs 75A–75M inserted by HC 346.

[REFUSAL OF EXTENSION OF STAY TO TAKE THE PLAB TEST]

[75F Leave to remain in the United Kingdom to take the PLAB Test is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 75D is met.

Requirements for leave to enter to undertake a clinical attachment or dental observer post 75G. The requirements to be met by a person seeking leave to enter to undertake a clinical attachment or dental observer post are that the applicant:

- (i) is a graduate from a medical or dental school and intends to undertake a clinical attachment or dental observer post in the United Kingdom; and
- (ii) can provide documentary evidence of the clinical attachment or dental observer post which will:
 - (a) be unpaid; and
 - (b) only involve observation, not treatment, of patients; and
- (iii) meets the requirements of paragraph 41(iii)–(vii) of these Rules; and
- (iv) intends to leave the United Kingdom at the end of his leave granted under this paragraph unless he is granted leave to remain:
 - (a) as a postgraduate doctor, dentist or trainee general practitioner in accordance with paragraphs 70 to 75;
 - (b) as a work permit holder for employment in the United Kingdom as a doctor or dentist in accordance with paragraphs 128 to 135; or
 - (c) as a General Practitioner under the highly skilled migrant programme in accordance with paragraphs 135A to 135H.]

Note

Paragraphs 75A–75M inserted by HC 346.

[REQUIREMENTS FOR LEAVE TO ENTER TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST]

[75G The requirements to be met by a person seeking leave to enter to undertake a clinical attachment

or dental observer post are that the applicant:

- (i) is a graduate from a medical or dental school and intends to undertake a clinical attachment or dental observer post in the United Kingdom; and
- (ii) can provide documentary evidence of the clinical attachment or dental observer post which will:
 - (a) be unpaid; and
 - (b) only involve observation, not treatment, of patients; and
- (iii) meets the requirements of paragraph 41 (iii) – (vii) of these Rules; and

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- [(iv) intends to leave the United Kingdom at the end of the leave granted under this paragraph.]

Note

Paragraphs 75A–75M inserted by HC 346.

Sub-paragraph 75G(iv) substituted by HC 314.

[LEAVE TO ENTER TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST]

[75H A person seeking leave to enter the United Kingdom to undertake a clinical attachment or dental observer post may be admitted for the period of the clinical attachment or dental observer post, [up to a maximum of 6 weeks at a time or 6 months in total in this category], provided the Immigration Officer is satisfied that each of the requirements of paragraph 75G is met.]

Note

Paragraphs 75A–75M inserted by HC 346. Words beginning ‘up to a maximum’ inserted by HC 1016.

[REFUSAL OF LEAVE TO ENTER TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST]

[75J Leave to enter the United Kingdom to undertake a clinical attachment or dental observer post is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 75G is met.]

Note

Paragraphs 75A–75M inserted by HC 346.

[REQUIREMENTS FOR AN EXTENSION OF STAY IN ORDER TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST]

[75K The requirements to be met by a person seeking an extension of stay to undertake a clinical attachment or dental observer post are that the applicant:

- (i) was given leave to enter or remain in the United Kingdom to undertake a clinical attachment or dental observer post or:
 - (a) for the purposes of taking the PLAB Test in accordance with paragraphs 75A to 75F and has passed both parts of the PLAB Test;
 - (b) as a postgraduate doctor, dentist or trainee general practitioner in accordance with paragraphs 70 to 75; or
 - (c) as a work permit holder for employment in the UK as a doctor or dentist in accordance with paragraphs 128 to 135; and
- (ii) is a graduate from a medical or dental school and intends to undertake a clinical attachment or dental observer post in the United Kingdom; and
- (iii) can provide documentary evidence of the clinical attachment or dental observer post which will:
 - (a) be unpaid; and
 - (b) only involve observation, not treatment, of patients; and
- [(iv) intends to leave the United Kingdom at the end of the leave granted under this paragraph; and]
- (v) meets the requirements of paragraph 41(iii)–(vii) of these Rules;] and

- [(vi) if he has previously been granted leave in this category, is not seeking an extension of stay which, when amalgamated with those previous periods of leave, would total more than 6 months.]

Note

Paragraphs 75A–75M inserted by HC 346.

Sub-paragraph (vi) inserted by HC 1016.

Sub-paragraph 75K(iv) substituted by HC 314.

[EXTENSION OF STAY TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST]

[75L A person seeking leave to remain in the United Kingdom to undertake a clinical attachment or dental observer post may be granted an extension of stay for the period of their clinical attachment or dental observer post [up to a maximum of 6 weeks at a time or 6 months in total in this category,], provided that the Secretary of State is satisfied that each of the requirements of paragraph 75K is met.]

Note

Paragraphs 75A–75M inserted by HC 346. Words in brackets in 75L inserted by HC 1016.

[REFUSAL OF EXTENSION OF STAY TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST]

[75M Leave to remain in the United Kingdom to undertake a clinical attachment or dental observer post is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 75K is met.]

Note

Paragraphs 75A–75M inserted by HC 346.

[Spouses or civil partners of students or prospective students granted leave under this part of the Rules]

REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE SPOUSE [OR CIVIL PARTNER] OF A STUDENT [OR PROSPECTIVE STUDENT]

76 The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse of a student are that:

- (i) the applicant is married to [, or the civil partner of,] a person admitted to or allowed to remain in the United Kingdom under paragraphs 57–75 [or 82–87F]; and
- (ii) each of the parties intends to live with the other as his or her spouse [or civil partner] during the applicant's stay and the marriage [or civil partnership] is subsisting; and
- (iii) there will be adequate accommodation for the parties and any dependants without recourse to public funds; and
- (iv) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
- (v) the applicant does not intend to take employment except as permitted under paragraph 77 below; and

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- (vi) the applicant intends to leave the United Kingdom at the end of any period of leave granted to him.

Note

Heading 'Spouses or civil partners of students or prospective students granted leave under this part of the Rules' substituted by HC 314.

References to civil partners and civil partnership inserted by HC 582. Words 'or 82-87F' substituted by HC 40.

LEAVE TO ENTER OR REMAIN AS THE SPOUSE [OR CIVIL PARTNER] OF A STUDENT [OR PROSPECTIVE STUDENT]

77 A person seeking leave to enter or remain in the United Kingdom as the spouse [or civil partner] of a student may be admitted or allowed to remain for a period not in excess of that granted to the student provided the Immigration Officer or, in the case of an application for limited leave to remain, the Secretary of State, is satisfied that each of the requirements of paragraph 76 is met. [Employment may be permitted] where the period of leave being granted is [, or was,] 12 months or more.

Note

Words in square brackets substituted and inserted by Cm 4851. References to civil partners inserted by HC 582.

REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE SPOUSE [OR CIVIL PARTNER] OF A STUDENT [OR PROSPECTIVE STUDENT]

78 Leave to enter or remain as the spouse [or civil partner] of a student is to be refused if the Immigration Officer or, in the case of an application for limited leave to remain, the Secretary of State is not satisfied that each of the requirements of paragraph 76 is met.

Note

References to civil partners inserted by HC 582.

Children of students or prospective students [granted leave under this part of the Rules]

REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE CHILD OF A STUDENT [OR PROSPECTIVE STUDENT]

79 The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the child of a student are that he:

- (i) is the child of a parent admitted to or allowed to remain in the United Kingdom as a student under the paragraphs 57-75 [or 82-87F]; and
- (ii) is under the age of 18 or has current leave to enter or remain in this capacity; and
- (iii) is unmarried, has not formed an independent family unit and is not leading an independent life; and
- (iv) can, and will, be maintained and accommodated adequately without recourse to public funds; [...]
- (v) will not stay in the United Kingdom beyond any period of leave granted to his parent[, and]

[(vi) meets the requirements of paragraph 79A.]

Note

Words in square brackets in heading inserted by HC 314.

Words 'or 82-87F' substituted by HC 40.

Words deleted by HC 314.

Words ', and' in square brackets and para (vi) inserted by HC 314.

[79A Both of the applicant's parents must either be lawfully present in the UK, or being granted entry clearance or leave to remain at the same time as the applicant, unless:

- (i) The student or prospective student is the applicant's sole surviving parent, or
- (ii) The student or prospective student parent has and has had sole responsibility for the applicant's upbringing, or
- (iii) there are serious or compelling family or other considerations which would make it desirable not to refuse the application and suitable arrangements have been made in the UK for the applicant's care.]

Note

Paragraph 79A inserted by HC 314.

LEAVE TO ENTER OR REMAIN AS THE CHILD OF A STUDENT [OR PROSPECTIVE STUDENT]

[80 A person seeking leave to enter or remain in the United Kingdom as the child of a student may be admitted or allowed to remain for a period not in excess of that granted to the student provided the Immigration Officer or, in the case of an application for limited leave to remain, the Secretary of State is satisfied that each of the requirements of paragraph 79 is met. Employment may be permitted where the period of leave being granted is, or was, 12 months or more.]

Note

Substituted by Cm 4851.

REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE CHILD OF A STUDENT [OR PROSPECTIVE STUDENT]

81 Leave to enter or remain in the United Kingdom as the child of a student is to be refused if the Immigration Officer or, in the case of an application for limited leave to remain, the Secretary of State, is not satisfied that each of the requirements of paragraph 79 is met.

Note

[Paragraphs 76-81 replace HC 251, paras 31 and 116.]

Prospective students

REQUIREMENTS FOR LEAVE TO ENTER AS A PROSPECTIVE STUDENT

82 The requirements to be met by a person seeking leave to enter the United Kingdom as a prospective student are that he:

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- [(i) can demonstrate a genuine and realistic intention of undertaking, within 6 months of his date of entry:
 - (a) a course of study which would meet the requirements for an extension of stay as a student under [paragraph 245ZX or paragraph 245ZZC; and]
 - (b) [...]]
- [(ii) intends to leave the United Kingdom on completion of his studies or on the expiry of his leave to enter if he is not able to meet the requirements for an extension of stay:
 - (a) as a student in accordance with [paragraph 245ZX or paragraph 245ZZC; and]
 - (b) [...]]
- (iii) is able without working or recourse to public funds to meet the costs of his intended course and accommodation and the maintenance of himself and any dependants while making arrangements to study and during the course of his studies; [and
- (iv) holds a valid United Kingdom entry clearance for entry in this capacity.]

Note

Sub-paragraphs (i) and (ii) substituted by HC 645. Sub-paragraph (vi) inserted by Cm 7074.

Words 'paragraph 245ZX or paragraph 245ZZC; and' in square brackets substituted by HC 314.

Words deleted by HC 314.

LEAVE TO ENTER AS A PROSPECTIVE STUDENT

[83 A person seeking leave to enter the United Kingdom as a prospective student may be admitted for a period not exceeding 6 months with a condition prohibiting employment, provided he is able to produce to the Immigration Officer on arrival a valid United Kingdom entry clearance for entry in this capacity.]

Note

Substituted by Cm 7074.

REFUSAL OF LEAVE TO ENTER AS A PROSPECTIVE STUDENT

84 Leave to enter as a prospective student is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 82 is met.

REQUIREMENTS FOR EXTENSION OF STAY AS A PROSPECTIVE STUDENT

85 Six months is the maximum permitted leave which may be granted to a prospective student. The requirements for an extension of stay as a prospective student are that the applicant:

- (i) was admitted to the United Kingdom with a valid prospective student entry clearance [...]; and
- (ii) meets the requirements of paragraph 82; and
- (iii) would not, as a result of an extension of stay, spend more than 6 months in the United Kingdom.

Note

Paragraph 85(i) amended with effect from 11 May 1998 (Cmnd 3953). Further amended by Cm 7074.

Paragraph 85(i) of HC 395 of 1994 shall not apply to any application for an extension of stay for the purpose of studying made by a national of the Slovak Republic whose current leave to enter and remain was granted before 8 October 1998 or by a national of the Republic of Croatia whose current leave to enter and remain was granted before 19 November 1999.

EXTENSION OF STAY AS A PROSPECTIVE STUDENT

86 An extension of stay as a prospective student may be granted, with a prohibition on employment, provided the Secretary of State is satisfied that each of the requirements of paragraph 85 is met.

•

REFUSAL OF EXTENSION OF STAY AS A PROSPECTIVE STUDENT

87 An extension of stay as a prospective student is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 85 is met.

87A–87F

...

Note

Paragraphs 87A–87F deleted by HC 314.

PART 4

PERSONS SEEKING TO ENTER OR REMAIN IN THE UNITED KINGDOM IN AN 'AU PAIR' PLACEMENT, AS A WORKING HOLIDAYMAKER, OR FOR TRAINING OR WORK EXPERIENCE

88–97 [...]

Note

Paragraphs 88–97 deleted by HC 1113.

98–100...

Note

Paragraphs 98–100 deleted by HC 302.

101–103 [...]

Note

Paragraphs 101–103 deleted by HC 1113.

[Seasonal workers at agricultural camps]

REQUIREMENTS FOR LEAVE TO ENTER AS A [SEASONAL AGRICULTURAL WORKER]

104 The requirements to be met by a person seeking leave to enter the United Kingdom as a [seasonal agricultural worker] ... are that he:

- (i) is a student in full-time education aged [18 or over]; and

Appendix 5 Immigration Rules

- (ii) holds [an immigration employment document in the form of] a valid Home Office work card issued by the operator of a scheme approved by the Secretary of State; and
- (iii) intends to leave the United Kingdom at the end of his period of leave as a [seasonal agricultural worker]; and
- (iv) does not intend to take employment except [as permitted by his work card and within the terms of this paragraph].
- [(v) is not seeking leave to enter on a date less than 3 months from the date on which an earlier period of leave to enter or remain granted to him in this capacity expired; and]
- [(vi)] is able to maintain and accommodate himself ... without recourse to public funds.

Note

Words deleted by HC 538. Words 'seasonal agricultural worker' and words in square brackets in sub-paragraphs (i), (ii), (iv), (v) and (vi) substituted HC 1224.

LEAVE TO ENTER AS A [SEASONAL AGRICULTURAL WORKER]

[105 A person seeking leave to enter the United Kingdom as a seasonal agricultural worker may be admitted with a condition restricting his freedom to take employment for a period not exceeding 6 months providing the Immigration Officer is satisfied that each of the requirements of paragraph 104 is met.]

Note

Words 'seasonal agricultural worker' and paragraph 105 substituted by HC 1224.

REFUSAL OF LEAVE TO ENTER AS A [SEASONAL AGRICULTURAL WORKER]

106 Leave to enter the United Kingdom as a [seasonal agricultural worker] ... is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 104 is met.

Note

Words deleted by HC 538. Words 'seasonal agricultural worker' substituted by HC 1224.

REQUIREMENTS FOR EXTENSION OF STAY AS A [SEASONAL AGRICULTURAL WORKER]

[107 The requirements for an extension of stay as a seasonal agricultural worker are that the applicant:

- (i) entered the United Kingdom as a seasonal agricultural worker under paragraph 105; and
- (ii) meets the requirements of paragraph 104(iii)–(vi); and
- (iii) would not, as a result of an extension of stay sought, remain in the United Kingdom as a seasonal agricultural worker beyond 6 months from the date on which he was given leave to enter the United Kingdom on this occasion in this capacity.]

Note

Words 'seasonal agricultural worker' and paragraph 107 substituted by HC 1224.

EXTENSION OF STAY AS A [SEASONAL AGRICULTURAL WORKER]

[108 An extension of stay as a seasonal agricultural worker may be granted with a condition restricting his freedom to take employment for a period which does not extend beyond 6 months from the date on which he was given leave to enter the United Kingdom on this occasion in this capacity, provided the Secretary of State is satisfied that the applicant meets each of the requirements of paragraph 107.]

Note

Words 'seasonal agricultural worker' and paragraph 108 substituted by HC 1224.

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REFUSAL OF EXTENSION OF STAY AS A [SEASONAL AGRICULTURAL WORKER]

109 An extension of stay as a [seasonal agricultural worker] ... is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 107 is met.

Note

Words deleted by HC 538. Words 'seasonal agricultural worker' substituted by HC 1224.

110–121 [...]

Note

Paragraphs 110–121 deleted by HC 1113.

Spouses [or civil partners] of persons with limited leave to enter or remain under paragraphs 110–121

REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE SPOUSE [OR CIVIL PARTNER] OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 110–121

122 The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse [or civil partner] of a person with limited leave to enter or remain in the United Kingdom under paragraphs 110–121 are that:

- (i) the applicant is married to [, or the civil partner of,] a person with limited leave to enter or remain in the United Kingdom under paragraphs 110–121; and
- (ii) each or the parties intends to live with the other as his or her spouse [or civil partner] during the applicant's stay and the marriage [or civil partnership] is subsisting; and
- (iii) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
- (iv) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
- (v) the applicant does not intend to stay in the United Kingdom beyond any period of leave granted to his spouse; and
- (vi) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, was admitted with a valid United Kingdom entry clearance for entry in this capacity.

Note

References to civil partners and civil partnership inserted by HC 582.

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LEAVE TO ENTER OR REMAIN AS THE SPOUSE [OR CIVIL PARTNER] OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 110–121

123 A person seeking leave to enter or remain in the United Kingdom as the spouse [or civil partner] of a person with limited leave to enter or remain in the United Kingdom under paragraphs 110–121 may be given leave to enter or remain in the United Kingdom for a period of leave not in excess of that granted to the person with limited leave to enter or remain under paragraphs 110–121 provided that, in relation to an application for leave to enter, he is able, on arrival, to produce to the Immigration Officer a valid United Kingdom entry clearance for entry in this capacity or, in the case of an application for limited leave to remain, was admitted with a valid United Kingdom entry clearance for entry in this capacity and is able to satisfy the Secretary of State that each of the requirements of paragraph 122(i)–(v) is met.

Note

References to civil partners inserted by HC 582.

REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE SPOUSE [OR CIVIL PARTNER] OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 110–121

124 Leave to enter or remain in the United Kingdom as the spouse [or civil partner] of a person with limited leave to enter or remain in the United Kingdom under paragraphs 110–121 is to be refused if, in relation to an application for leave to enter, a valid United Kingdom entry clearance for entry in this capacity is not produced the Immigration Officer on arrival or, in the case of an application for limited leave to remain, if the applicant was not admitted with a valid United Kingdom entry clearance for entry in this capacity or is unable to satisfy the Secretary of State that each of the requirements of paragraph 122(i)–(v) is met.

Note

References to civil partners inserted by HC 582.

Children of persons admitted or allowed to remain under paragraphs 110–121

REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE CHILD OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 110–121

125 The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the child of a person with limited leave to enter or remain in the United Kingdom under paragraphs 110–121 are that:

- (i) he is the child of a parent who has limited leave to enter or remain in the United Kingdom under paragraphs 110–121; and
- (ii) he is under the age of 18 or has current leave to enter or remain in this capacity; and
- (iii) he is unmarried [and is not a civil partner], has not formed an independent family unit and is not leading an independent life; and
- (iv) he can, and will, be maintained and accommodated adequately without recourse to public funds in accommodation which his parent(s) own or occupy exclusively; and

- (v) he will not stay in the United Kingdom beyond any period of leave granted to his parent(s); and
- (vi) both parents are being or have been admitted to or allowed to remain in the United Kingdom save where:
 - (a) the parent he is accompanying or joining is his sole surviving parent; or
 - (b) the parent he is accompanying or joining has had sole responsibility for his upbringing; or
 - (c) there are serious and compelling family or other considerations which make exclusion from the United Kingdom undesirable and suitable arrangements have been made for his care; and
- (vii) if seeking leave to enter, he holds a valid United Kingdom entry clearance for entry in this capacity of, if seeking leave to remain, was admitted with a valid United Kingdom entry clearance for entry in this capacity.

Note

Words in square brackets inserted by HC 582.

LEAVE TO ENTER OR REMAIN AS THE CHILD OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 110–121

126 A person seeking leave to enter or remain in the United Kingdom as the child of a person with limited leave to enter or remain in the United Kingdom under paragraphs 110–121 may be given leave to enter or remain in the United Kingdom for a period of leave not in excess of that granted to the person with limited leave to enter or remain under paragraphs 110–121 provided that, in relation to an application for leave to enter, he is able, on arrival, to produce to the Immigration Officer a valid United Kingdom entry clearance for entry in this capacity or, in the case of an application for limited leave to remain, he was admitted with a valid United Kingdom entry clearance for entry in this capacity and is able to satisfy the Secretary of State that each of the requirements of paragraph 125(i)–(vi) is met.

REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE CHILD OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 110–121

127 Leave to enter or remain in the United Kingdom as the child of a person with limited leave to enter or remain in the United Kingdom under paragraphs 110–121 is to be refused if, in relation to an application for leave to enter, a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival or, in the case of an application for limited leave to remain, if the applicant was not admitted with a valid United Kingdom entry clearance for entry in this capacity or is unable to satisfy the Secretary of State that each of the requirements of paragraph 125(i)–(vi) is met.

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PART 5

PERSONS SEEKING TO ENTER OR REMAIN IN THE UNITED KINGDOM FOR EMPLOYMENT

Work permit employment

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM FOR WORK PERMIT EMPLOYMENT

128 The requirements to be met by a person coming to the United Kingdom to seek or take employment (unless he is otherwise eligible for admission for employment under these Rules or is eligible for admission as a seaman under contract to join a ship due to leave British waters) are that he:

- (i) holds a valid [Home Office] work permit; and
- (ii) is not of an age which puts him outside the limits for employment; and
- (iii) is capable of undertaking the employment specified in the work permit; and
- (iv) does not intend to take employment except as specified in his work permit; and
- (v) is able to maintain and accommodate himself and any dependants adequately without recourse to public funds; and
- (vi) in the case of a person in possession of a work permit which is valid for a period of 12 months or less, intends to leave the United Kingdom at the end of his approved employment[; and]
- [(vii) holds a valid United Kingdom entry clearance for entry in this capacity except where he holds a work permits valid for 6 months' or less [...] [or he is a British National (Overseas), a British overseas territories citizen, a British Overseas citizen, a British protected person or a person who under the British Nationality Act 1981 is a British subject].]

Note

Words 'Home Office' in square brackets substituted by Cmnd 5253. Sub-paragraph (vii) inserted by HC 1224. Words in square brackets within sub-paragraph (vii) inserted by HC 176. Words in sub-paragraph (vii) deleted by HC 523.

LEAVE TO ENTER FOR WORK PERMIT EMPLOYMENT

[129 A person seeking leave to enter the United Kingdom for the purpose of work permit employment may be admitted for a period not exceeding the period of employment approved by the Home Office (as specified in his work permit), subject to a condition restricting him to that approved employment, provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity or, where entry clearance is not required, provided the Immigration Officer is satisfied that each of the requirements of paragraph 128(i)–(vi) is met.]

Note

Paragraph 129 substituted by HC 1224.

REFUSAL OF LEAVE TO ENTER FOR EMPLOYMENT

[130 Leave to enter for the purpose of work permit employment is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the

Immigration Officer on arrival or, where entry clearance is not required, if the Immigration Officer is not satisfied that each of the requirements of paragraph 128(i)–(vi) is met.]

Note

Paragraph 130 substituted by HC 1224.

REQUIREMENTS FOR AN EXTENSION OF STAY FOR WORK PERMIT EMPLOYMENT

131 The requirements for an extension of stay to seek or take employment (unless the applicant is otherwise eligible for an extension of stay for employment under these Rules) are that the applicant:

- (i) entered the United Kingdom with a valid work permit under paragraph 129 [...]; and
- (ii) has written approval from the [Home Office] for the continuation of his employment; and
- (iii) meets the requirements of paragraph 128(ii)–(v).

Note

Words in first square brackets deleted by Cmnd 5829. Words in second square brackets substituted by Cmnd 5253.

[131A] The requirements for an extension of stay to take employment (unless the applicant is otherwise eligible for an extension of stay for employment under these Rules) for a student are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a student in accordance with paragraphs 57 to 62 of these Rules; and
- (ii) has [obtained a degree qualification on] a recognised degree course at either a United Kingdom publicly funded further or higher education institution or a bona fide [United Kingdom] private education institution which maintains satisfactory records of enrolment and attendance; and
- (iii) holds a valid Home Office immigration employment document for employment; and
- (iv) has the written consent of his official sponsor to such employment if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing or has recently come to an end at the time of the requested extension; and
- (v) meets each of the requirements of paragraph 128 (ii) to (vi).]

Note

Paragraph 131A inserted by Cmnd 5597. Words in square brackets in sub-paragraph (ii) substituted by HC 104.

[131B] The requirements for an extension of stay to take employment (unless the applicant is otherwise eligible for an extension of stay for employment under these Rules) for a student nurse [overseas qualified nurse or midwife], postgraduate doctor or postgraduate dentist are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a student nurse in accordance with paragraphs 63 to 69 of these Rules; or
- [(ia) entered the United Kingdom or was given leave to remain as an overseas qualified nurse or midwife in accordance with paragraphs 69M to 69R of these Rules; and]

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- (ii) entered the United Kingdom or was given leave to remain as a postgraduate doctor or a postgraduate dentist in accordance with paragraphs 70 to 75 of these Rules; and
- (iii) holds a valid Home Office immigration employment document for employment as a nurse, doctor or dentist; and
- (iv) has the written consent of his official sponsor to such employment if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing or has recently come to an end at the time of the requested extension; and
- (v) meets each of the requirements of paragraph 128 (ii) to (vi).]

Note

Inserted by Cmnd 5597. Words in brackets inserted by HC 645.

[131C The requirements for an extension of stay to take employment for a [International Graduates Scheme] participant are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a [International Graduates Scheme] participant in accordance with paragraphs 135O to 135T of these Rules; and
- (ii) holds a valid Home Office immigration employment document for employment; and
- (iii) meets each of the requirements of paragraph 128 (ii) to (vi).]

Note

Substituted by Cm 6339. The words 'International Graduates Scheme' inserted by Cm 7075.

[131D The requirements for an extension of stay to take employment (unless the applicant is otherwise eligible for an extension of stay for employment under these Rules) for a working holidaymaker are that the applicant:

- (i) entered the United Kingdom as a working holidaymaker in accordance with paragraphs 95 to 96 of these Rules; and
- (ii) he has spent more than 12 months in total in the UK in this capacity; and
- (iii) holds a valid Home Office immigration employment document for employment in an occupation listed on the Work Permits (UK) shortage occupations list; and
- (iv) meets each of the requirements of paragraph 128 (ii) to (vi).]

Note

Substituted by HC 302.

[131E The requirements for an extension of stay to take employment for a highly skilled migrant are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a highly skilled migrant in accordance with paragraphs 135A to 135E of these Rules; and
- (ii) holds a valid work permit; and
- (iii) meets each of the requirements of paragraph 128(ii) to (vi).]

Note

Inserted by Cm 6339.

[131F The requirements for an extension of stay to take employment (unless the applicant is otherwise eligible for an extension of stay for employment under these Rules) for an Innovator are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as an Innovator in accordance with paragraphs 210A to 210E of these Rules; and

- (ii) holds a valid Home Office immigration employment document for employment; and
- (iii) meets each of the requirements of paragraph 128(ii) to (vi).]

Note

Inserted by Cm 6339.

[131G The requirements for an extension of stay to take employment (unless the applicant is otherwise eligible for an extension of stay for employment under these Rules) for an individual who has leave to enter or leave to remain in the United Kingdom to take the PLAB Test or to undertake a clinical attachment or dental observer post are that the applicant:

- (i) entered the United Kingdom or was given leave to remain for the purposes of taking the PLAB Test in accordance with paragraphs 75A to 75F of these Rules; or
- (ii) entered the United Kingdom or was given leave to remain to undertake a clinical attachment or dental observer post in accordance with paragraphs 75G to 75M of these Rules; and
- (iii) holds a valid Home Office immigration employment document for employment as a doctor or dentist; and
- (iv) meets each of the requirements of paragraph 128 (ii) to (vi).]

Note

Inserted by HC 346.

[131H The requirements for an extension of stay to take employment (unless the applicant is otherwise eligible for an extension of stay for employment under these Rules) in the case of a person who has leave to enter or remain as a Fresh Talent: Working in Scotland scheme participant are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a Fresh Talent: Working in Scotland scheme participant in accordance with paragraphs 143A to 143F of these Rules; and
- (ii) holds a valid Home Office immigration employment document for employment in Scotland; and
- (iii) has the written consent of his official sponsor to such employment if the studies which led to him being granted leave under the Fresh Talent: Working in Scotland scheme in accordance with paragraphs 143A to 143F of these Rules, or any studies he has subsequently undertaken, were sponsored by a government or international scholarship agency; and
- (iv) meets each of the requirements of paragraph 128(ii) to (vi).]

Note

Inserted by HC 346.

[131I The requirements for an extension of stay to take employment for a [Tier 1 Migrant] are that the applicant:

- (i) entered the UK or was given leave to remain as a [Tier 1 Migrant], and
- (ii) holds a valid work permit; and
- (iii) meets each of the requirements of paragraph 128(ii) to (vi).]

Note

Inserted by HC 321.

Words 'Tier 1 Migrant' in square brackets substituted by HC 607.

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EXTENSION OF STAY FOR WORK PERMIT EMPLOYMENT

[132 An extension of stay for work permit employment may be granted for a period not exceeding the period of approved employment recommended by the Home Office provided the Secretary of State is satisfied that each of the requirements of paragraphs 131, 131A, 131B, 131C, 131D, 131E, 131F, 131G, [131H or 131I] is met. An extension of stay is to be subject to a condition restricting the applicant to employment approved by the Home Office.]

Note

Substituted by HC 346. Further substituted by HC 104. Words '141H or 131I' inserted by HC 321.

REFUSAL OF EXTENSION OF STAY FOR EMPLOYMENT

[133 An extension of stay for employment is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraphs 131, 131A, 131B, 131C, 131D, 131E, 131F, 131G, [131H or 131I] is met (unless the applicant is otherwise eligible for an extension of stay for employment under these Rules).]

Note

Substituted by HC 346. Further substituted by HC 104. Words '141H or 131I' inserted by HC 321.

[INDEFINITE LEAVE TO REMAIN FOR A WORK PERMIT HOLDER

134 Indefinite leave to remain may be granted on application to a person provided:

- (i) he has spent a continuous period of 5 years lawfully in the UK, of which the most recent period must have been spent with leave as a work permit holder (under paragraphs 128 to 133 of these rules), and the remainder must be made up of [any combination of] leave as a work permit holder or leave as a highly skilled migrant (under paragraphs 135A to 135F of these rules) [or leave as a self-employed lawyer (under the concession that appeared in Chapter 6, Section 1 Annex D of the Immigration Directorate Instructions), or leave as a writer, composer or artist (under paragraphs 232 to 237 of these rules)];
- (ii) he has met the requirements of paragraph 128(i) to (v) throughout his leave as a work permit holder, and has met the requirements of paragraph 135G(ii) throughout any leave as a highly skilled migrant;
- (iii) he is still required for the employment in question, as certified by his employer; and
- (iv) he has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Substituted by HC 321.

In sub-paragraph (i) words 'any combination of' in square brackets inserted by HC 607. Words in square brackets beginning 'or leave as a' inserted by HC 607.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR A WORK PERMIT HOLDER

135 Indefinite leave to remain in the United Kingdom for a work permit holder is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 134 is met.

[Highly skilled migrants]

135A [...]

135B [...]

135C [...]

Note

Paragraphs 135A to 135C deleted by HC 607.

135D [...]

135DA [...]

135DB [...]

135DC [...]

135DE [...]

135DF [...]

135DG [...]

135DH [...]

135E [...]

135F [...]

Note

Paragraphs 135D to 135F deleted by HC 321.

[REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN AS A HIGHLY SKILLED MIGRANT]

135G The requirements for indefinite leave to remain for a person who has been granted leave as a highly skilled migrant are that the applicant:

- (i) has spent a continuous period of 5 years lawfully in the United Kingdom, of which the most recent period must have been spent with leave as a highly skilled migrant (in accordance with paragraphs 135A to 135F of these Rules), and the remainder must be made up of leave as a highly skilled migrant, leave as a work permit holder (under paragraphs 128 to 133 of these Rules), or leave as an Innovator (under paragraphs 210A to 210F of these Rules); and

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- (ii) throughout the five years spent in the United Kingdom has been able to maintain and accommodate himself and any dependants adequately without recourse to public funds; and
- (iii) is lawfully economically active in the United Kingdom in employment, self-employment or a combination of both; and
- [(iv) has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Sub-paragraph (iv) inserted by HC 398.

INDEFINITE LEAVE TO REMAIN AS A HIGHLY SKILLED MIGRANT

135GA Indefinite leave to remain may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 135G is met and that the application does not fall for refusal under paragraph 135HA.

REFUSAL OF INDEFINITE LEAVE TO REMAIN AS A HIGHLY SKILLED MIGRANT

135H Indefinite leave to remain in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 135G is met or if the application falls for refusal under paragraph 135HA.

Note

Paragraphs 135G to 135HA amended by HC 1702.

ADDITIONAL GROUNDS FOR REFUSAL FOR HIGHLY SKILLED MIGRANTS

135HA An application under paragraphs 135A–135C or 135G–135H of these Rules is to be refused, even if the applicant meets all the requirements of those paragraphs, if the Immigration Officer or Secretary of State has cause to doubt the genuineness of any document submitted by the applicant and, having taken reasonable steps to verify the document, has been unable to verify that it is genuine.

Note

Substituted by HC 321.

135I–135N

...

Note

Paragraphs 135L–135N inserted by HC 464.

Paragraphs 135I–135N deleted by HC 314.

International Graduates Scheme

135O [...]

135P [...]

135Q [...]

135R [...]

135S [...]

135T [...]

Note

Paragraphs 135O to 135T deleted by HC 607.

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**Representatives of overseas newspapers, news agencies and
broadcasting organisations**

**REQUIREMENTS FOR LEAVE TO ENTER AS A REPRESENTATIVE OF AN OVERSEAS
NEWSPAPER, NEWS AGENCY OR BROADCASTING ORGANISATION**

136 The requirements to be met by a person seeking leave to enter the United Kingdom as a representative of an overseas newspaper, news agency or broadcasting organisation are that he:

- (i) has been engaged by that organisation outside the United Kingdom and is being posted to the United Kingdom on a long-term assignment as a representative; and*
- (ii) intends to work full-time as a representative of that overseas newspaper, news agency or broadcasting organisation; and*
- (iii) does not intend to take employment except within the terms of this paragraph; and*
- (iv) can maintain and accommodate himself and any dependants adequately without recourse to public funds; and*
- (v) holds a valid United Kingdom entry clearance for entry in this capacity.*

**LEAVE TO ENTER AS A REPRESENTATIVE OF AN OVERSEAS NEWSPAPER, NEWS AGENCY
OR BROADCASTING ORGANISATION**

137 A person seeking leave to enter the United Kingdom as a representative of an overseas newspaper, news agency or broadcasting organisation may be admitted for a period not exceeding [2 years] provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

Note

Words in brackets amended by HC 1016.

**REFUSAL OF LEAVE TO ENTER AS A REPRESENTATIVE OF AN OVERSEAS NEWSPAPER,
NEWS AGENCY OR BROADCASTING ORGANISATION**

138 Leave to enter as a representative of an overseas newspaper, news agency or broadcasting organisation is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

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REQUIREMENTS FOR AN EXTENSION OF STAY AS A REPRESENTATIVE OF AN OVERSEAS NEWSPAPER, NEWS AGENCY OR BROADCASTING ORGANISATION

139 The requirements for an extension of stay as a representative of an overseas newspaper, news agency or broadcasting organisation are that the applicant:

- (i) entered the United Kingdom with a valid United Kingdom entry clearance as a representative of an overseas newspaper, news agency or broadcasting organisation; and*
- (ii) is still engaged in the employment for which his entry clearance was granted; and*
- (iii) is still required for the employment in question, as certified by his employer; and*
- (iv) meets the requirements of paragraph 136(ii)–(iv).*

EXTENSION OF STAY AS A REPRESENTATIVE OF AN OVERSEAS NEWSPAPER, NEWS AGENCY OR BROADCASTING ORGANISATION

140 An extension of stay as a representative of an overseas newspaper, news agency or broadcasting organisation may be granted for a period not exceeding 3 years provided the Secretary of State is satisfied that each of the requirements of paragraph 139 is met.

REFUSAL OF EXTENSION OF STAY AS A REPRESENTATIVE OF AN OVERSEAS NEWSPAPER, NEWS AGENCY OR BROADCASTING ORGANISATION

141 An extension of stay as a representative of an overseas newspaper, news agency or broadcasting organisation is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 139 is met.

Note

Paragraphs 139 to 141 deleted save in so far as they are relevant to paragraphs 142 and 143, by HC 1113.

INDEFINITE LEAVE TO REMAIN FOR A REPRESENTATIVE OF AN OVERSEAS NEWSPAPER, NEWS AGENCY OR BROADCASTING ORGANISATION

142 Indefinite leave to remain may be granted, on application, to a representative of an overseas newspaper, news agency or broadcasting organisation provided:

- (i) he has spent a continuous period of [5 years] in the United Kingdom in this capacity; and
- (ii) he has met the requirements of paragraph 139 throughout the [5 year] period; and
- (iii) he is still required for the employment in question, as certified by his employer; and
- [(iv) he has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Words in brackets amended by HC 1016. Sub-paragraph (iv) inserted by HC 398.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR A REPRESENTATIVE OF AN OVERSEAS NEWSPAPER, NEWS AGENCY OR BROADCASTING ORGANISATION

143 Indefinite leave to remain in the United Kingdom for a representative of an overseas newspaper, news agency or broadcasting organisation is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 142 is met.

143A [...]

143B [...]

143C [...]

143D [...]

143E [...]

143F [...]

Note

Paragraphs 143A to 143F deleted by HC 607.

Representatives of overseas firms which have no branch, subsidiary or other representative in the United Kingdom (sole representatives)

REQUIREMENTS FOR LEAVE TO ENTER AS A SOLE REPRESENTATIVE

144 The requirements to be met by a person seeking leave to enter the United Kingdom as a sole representative are that he:

- (i) has been recruited and taken on as an employee outside the United Kingdom as a representative of a firm which has its headquarters and principal place of business outside the United Kingdom and which has no branch, subsidiary or other representative in the United Kingdom; and
- (ii) seeks entry to the United Kingdom as a senior employee with full authority to take operational decisions on behalf of the overseas firm for the purpose of representing it in the United Kingdom by establishing and operating a registered branch or wholly owned subsidiary of that overseas firm; and
- (iii) intends to be employed full time as a representative of that overseas firm; and
- (iv) is not a majority shareholder in that overseas firm; and
- (v) does not intend to take employment except within the terms of this paragraph; and
- (vi) can maintain and accommodate himself and any dependants adequately without recourse to public funds; and
- (vii) holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER AS A SOLE REPRESENTATIVE

145 A person seeking leave to enter the United Kingdom as a sole representative may be admitted for a period not exceeding [2 years] provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

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Note

Words in brackets amended by HC 1016.

REFUSAL OF LEAVE TO ENTER AS A SOLE REPRESENTATIVE

146 Leave to enter as a sole representative is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A SOLE REPRESENTATIVE

147 The requirements for an extension of stay as a sole representative are that the applicant:

- (i) entered the United Kingdom with a valid United Kingdom entry clearance as a sole representative of an overseas firm; and
- (ii) can show that the overseas firm still has its headquarters and principal place of business outside the United Kingdom; and
- (iii) is employed full-time as a representative of that overseas firm and has established and is in charge of its registered branch or wholly-owned subsidiary; and
- (iv) is still required for the employment in question, as certified by his employer; and
- (v) meets the requirements of paragraph 144(iii)–(vi).

EXTENSION OF STAY AS A SOLE REPRESENTATIVE

148 An extension of stay not exceeding 3 years as a sole representative may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 147 is met.

REFUSAL OF EXTENSION OF STAY AS A SOLE REPRESENTATIVE

149 An extension of stay as a sole representative is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 147 is met.

INDEFINITE LEAVE TO REMAIN FOR A SOLE REPRESENTATIVE

150 Indefinite leave to remain may be granted, on application, to a sole representative provided:

- (i) he has spent a continuous period of [5 years] in the United Kingdom in this capacity; and
- (ii) he has met the requirements of paragraph 147 throughout the [5 year] period; and
- (iii) he is still required for the employment in question, as certified by his employer; and
- [(iv) he has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Words in brackets amended by HC 1016. Sub-paragraph (iv) inserted by HC 398.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR A SOLE REPRESENTATIVE

151 Indefinite leave to remain in the United Kingdom for a sole representative is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 150 is met.

Private servants in diplomatic households *

REQUIREMENTS FOR LEAVE TO ENTER AS A PRIVATE SERVANT IN A DIPLOMATIC HOUSEHOLD

152 *The requirements to be met by a person seeking leave to enter the United Kingdom as a private servant in a diplomatic household are that he:*

- (i) *is aged 18 or over; and*
- (ii) *is employed as a private servant in the household of a member of staff of a diplomatic or consular mission who enjoys diplomatic privileges and immunity within the meaning of the Vienna Convention on Diplomatic and Consular Relations or a member of the family forming part of the household of such a person; and*
- (iii) *intends to work full-time as a private servant within the terms of this paragraph; and*
- (iv) *does not intend to take employment except within the terms of this paragraph; and*
- (v) *can maintain and accommodate himself and any dependants adequately without recourse to public funds; and*
- (vi) *holds a valid United Kingdom entry clearance for entry in this capacity.*

LEAVE TO ENTER AS A PRIVATE SERVANT IN A DIPLOMATIC HOUSEHOLD

153 *A person seeking leave to enter the United Kingdom as a private servant in a diplomatic household may be given leave to enter for a period not exceeding 12 months provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.*

REFUSAL OF LEAVE TO ENTER AS A PRIVATE SERVANT IN A DIPLOMATIC HOUSEHOLD

154 *Leave to enter as a private servant in a diplomatic household is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.*

REQUIREMENTS FOR AN EXTENSION OF STAY AS A PRIVATE SERVANT IN A DIPLOMATIC HOUSEHOLD

155 *The requirements for an extension of stay as a private servant in a diplomatic household are that the applicant:*

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- (i) *entered the United Kingdom with a valid United Kingdom entry clearance as a private servant in a diplomatic household; and*
- (ii) *is still engaged in the employment for which his entry clearance was granted; and*
- (iii) *is still required for the employment in question, as certified by the employer; and*
- (iv) *meets the requirements of paragraph 152(iii)–(v).*

EXTENSION OF STAY AS A PRIVATE SERVANT IN A DIPLOMATIC HOUSEHOLD

156 An extension of stay as a private servant in a diplomatic household may be granted for a period not exceeding 12 months [at a time] provided the Secretary of State is satisfied that each of the requirements of paragraph 155 is met.

Note

Words in brackets amended by HC 1016.

REFUSAL OF EXTENSION OF STAY AS A PRIVATE SERVANT IN A DIPLOMATIC HOUSEHOLD

157 An extension of stay as a private servant in a diplomatic household is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 155 is met.

Note

Paragraphs 152 to 157 deleted save in so far as they are relevant to paragraphs 158 and 159, by HC 1113.

INDEFINITE LEAVE TO REMAIN FOR A SERVANT IN A DIPLOMATIC HOUSEHOLD

158 Indefinite leave to remain may be granted, on application, to a private servant in a diplomatic household provided:

- (i) *he has spent a continuous period of [5 years] in the United Kingdom in this capacity; and*
- (ii) *he has met the requirements of paragraph 155 throughout the [5 year] period; and*
- (iii) *he is still required for the employment in question, as certified by his employer; and*
- [(iv) *he has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.*]

Note

Words in brackets amended by HC 1016. Sub-paragraph (iv) inserted by HC 398.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR A SERVANT IN A DIPLOMATIC HOUSEHOLD

159 Indefinite leave to remain in the United Kingdom for a private servant in a diplomatic household is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 158 is met.

[Domestic workers in private households]

[REQUIREMENTS FOR LEAVE TO ENTER AS A DOMESTIC WORKER IN A PRIVATE HOUSEHOLD]

159A The requirements to be met by a person seeking leave to enter the United Kingdom as a domestic worker in a private household are that he:

- (i) is aged 18–65 inclusive;
- (ii) has been employed as a domestic worker for one year or more immediately prior to application for entry clearance under the same roof as his employer or in a household that the employer uses for himself on a regular basis and where there is evidence that there is a connection between employer and employee;
- (iii) that he intends to travel to the United Kingdom in the company of his employer, his employer's spouse [or civil partner] or his employer's minor child;
- (iv) intends to work full time as a domestic worker under the same roof as his employer or in a household that the employer uses for himself on a regular basis and where there is evidence that there is a connection between employer and employee;
- (v) does not intend to take employment except within the terms of this paragraph; and
- (vi) can maintain and accommodate himself adequately without recourse to public funds; and
- (vii) holds a valid United Kingdom entry clearance for entry in this capacity.]

Note

Main heading and paragraphs 159A–159H inserted by Cm 5597. Words in square brackets in sub-paragraph (iii) inserted by HC 582.

[LEAVE TO ENTER AS A DOMESTIC WORKER IN A PRIVATE HOUSEHOLD]

159B A person seeking leave to enter the United Kingdom as a domestic worker in a private household may be given leave to enter for that purpose for a period not exceeding 12 months provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.]

Note

Main heading and paragraphs 159A–159H inserted by Cm 5597.

[REFUSAL OF LEAVE TO ENTER AS A DOMESTIC WORKER IN A PRIVATE HOUSEHOLD]

159C Leave to enter as a domestic worker in a private household is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.]

Note

Main heading and paragraphs 159A–159H inserted by Cm 5597.

[REQUIREMENTS FOR EXTENSION OF STAY AS A DOMESTIC WORKER IN A PRIVATE HOUSEHOLD]

159D The requirements for an extension of stay as a domestic worker in a private household are that the applicant:

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- (i) entered the United Kingdom with a valid United Kingdom entry clearance as a domestic worker in a private household; and
- (ii) has continued to be employed for the duration of his leave as a domestic worker in a private household; and
- (iii) continues to be required for employment for the period of the extension sought as a domestic worker in a private household within the terms of paragraph 159A as certified by his current employer; and
- (iv) meets each of the requirements of paragraph 159A(i) to (vi).]

Note

Main heading and paragraphs 159A–159H inserted by Cm 5597.

[EXTENSION OF STAY AS A DOMESTIC WORKER IN A PRIVATE HOUSEHOLD

159E An extension of stay as a domestic worker in a private household may be granted for a period not exceeding 12 months [at a time] provided the Secretary of State is satisfied that each of the requirements of paragraph 159D is met.]

Note

Main heading and paragraphs 159A–159H inserted by Cm 5597. Words in brackets inserted by HC 1016.

[REFUSAL OF EXTENSION OF STAY AS A DOMESTIC WORKER IN A PRIVATE HOUSEHOLD

159F An extension of stay as a domestic worker may be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 159D is met.]

Note

Main heading and paragraphs 159A–159H inserted by Cm 5597.

[INDEFINITE LEAVE TO REMAIN FOR A DOMESTIC WORKER IN A PRIVATE HOUSEHOLD

159G Indefinite leave to remain may be granted, on application, to a domestic worker in a private household provided that:

- (i) he has spent a continuous period of [5 years] in the United Kingdom employed in this capacity; and
- (ii) he has met the requirements of paragraph 159A throughout the [5 year] period; and
- (iii) he is still required for employment as a domestic worker in a private household, as certified by the current employer; and
- [(iv) he has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]]

Note

Main heading and paragraphs 159A–159H inserted by Cm 5597. Words in brackets in 159G inserted by HC 1016. Sub-paragraph (iv) inserted by HC 398.

[REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR A DOMESTIC WORKER IN A PRIVATE HOUSEHOLD

159H Indefinite leave to remain in the United Kingdom for a domestic worker in a private household is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 159G is met.]

Note

Main heading and paragraphs 159A–159H inserted by Cm 5597.

Overseas government employees

REQUIREMENTS FOR LEAVE TO ENTER AS AN OVERSEAS GOVERNMENT EMPLOYEE

160 *For the purposes of these Rules an overseas government employee means a person coming for employment by an overseas government or employed by the United Nations Organisation or other international organisation of which the United Kingdom is a member.*

161 *The requirements to be met by a person seeking leave to enter the United Kingdom as an overseas government employee are that he:*

- (i) *is able to produce either a valid United Kingdom entry clearance for entry in this capacity or satisfactory documentary evidence of his status as an overseas government employee; and*
- (ii) *intends to work full time for the government or organisation concerned; and*
- (iii) *does not intend to take employment except within the terms of this paragraph; and*
- (iv) *can maintain and accommodate himself and any dependants adequately without recourse to public funds.*

LEAVE TO ENTER AS AN OVERSEAS GOVERNMENT EMPLOYEE

162 *A person seeking leave to enter the United Kingdom as an overseas government employee may be given leave to enter for a period not exceeding [2 years], provided he is able, on arrival, to produce to the Immigration Officer a valid United Kingdom entry clearance for entry in this capacity or satisfy the Immigration Officer that each of the requirements of paragraph 161 is met.*

Note

Words in brackets amended by HC 1016.

REFUSAL OF LEAVE TO ENTER AS AN OVERSEAS GOVERNMENT EMPLOYEE

163 *Leave to enter as an overseas government employee is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival or if the Immigration Officer is not satisfied that each of the requirements of paragraph 161 is met.*

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REQUIREMENTS FOR AN EXTENSION OF STAY AS AN OVERSEAS GOVERNMENT EMPLOYEE

164 The requirements to be met by a person seeking an extension of stay as an overseas government employee are that the applicant:

- (i) was given leave to enter the United Kingdom under paragraph 162 as an overseas government employee; and*
- (ii) is still engaged in the employment in question; and*
- (iii) is still required for the employment in question, as certified by the employer; and*
- (iv) meets the requirements of paragraph 161(ii)–(iv).*

EXTENSION OF STAY AS AN OVERSEAS GOVERNMENT EMPLOYEE

165 An extension of stay as an overseas government employee may be granted for a period not exceeding 3 years provided the Secretary of State is satisfied that each of the requirements of paragraph 164 is met.

REFUSAL OF EXTENSION OF STAY AS AN OVERSEAS GOVERNMENT EMPLOYEE

166 An extension of stay as an overseas government employee is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 164 is met.

Note

Paragraphs 160 to 166 deleted save in so far as they are relevant to paragraphs 167 and 168, by HC 1113.

INDEFINITE LEAVE TO REMAIN FOR AN OVERSEAS GOVERNMENT EMPLOYEE

167 Indefinite leave to remain may be granted, on application, to an overseas government employee provided:

- (i) he has spent a continuous period of [5 years] in the United Kingdom in this capacity; and*
- (ii) he has met the requirements of paragraph 164 throughout the [5 year] period; and*
- (iii) he is still required for the employment in question, as certified by his employer; and*
- [(iv) he has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]*

Note

Words in brackets amended by HC 1016. Sub-paragraph (iv) inserted by HC 398.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR AN OVERSEAS GOVERNMENT EMPLOYEE

168 Indefinite leave to remain in the United Kingdom for an overseas government employee is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 167 is met.

Ministers of religion, missionaries and members of religious orders

169 For the purposes of these Rules:

- (i) a minister of religion means a religious functionary whose main regular duties comprise the leading of a congregation in performing the rites and rituals of the faith and in preaching the essentials of the creed;
- (ii) a missionary means a person who is directly engaged in spreading a religious doctrine and whose work is not in essence administrative or clerical;
- (iii) a member of a religious order means a person who is coming to live in a community run by that order.

REQUIREMENTS FOR LEAVE TO ENTER AS A MINISTER OR RELIGION, MISSIONARY OR MEMBER OF A RELIGIOUS ORDER

170 The requirements to be met by a person seeking leave to enter the United Kingdom as a minister of religion, missionary or member of a religious order are that he:

- (i)
 - (a) if seeking leave to enter as a minister of religion has either been working for at least one year as a minister of religion [in any of the 5 years immediately prior to the date on which the application is made] or, where ordination is prescribed by a religious faith as the sole means of entering the ministry, has been ordained as a minister of religion following at least one year's full-time or two years' part-time training for the ministry; or
 - (b) if seeking leave to enter as a missionary has been trained as a missionary or has worked as a missionary and is being sent to the United Kingdom by an overseas organisation; or
 - (c) if seeking leave to enter as a member of a religious order is coming to live in a community maintained by the religious order of which he is a member and, if intending to teach, does not intend to do so save at an establishment maintained by his order; and
- (ii) *intends to work full-time as a minister of religion, missionary or for the religious order of which he is a member; and*
- (iii) *does not intend to take employment except within the terms of this paragraph; and*
- (iv) *can maintain and accommodate himself and any dependants adequately without recourse to public funds; and*
- [(iva) *if seeking leave as a Minister of Religion can produce an International English Language Testing System certificate issued to him to certify that he has achieved level 6 competence in spoken and written English and that it is dated not more than two years prior to the date on which the application is made.*]
- (v) *holds a valid United Kingdom entry clearance for entry in this capacity.*

Note

Words in square brackets in sub-paragraph (i)(a) inserted by Cm 6297. Sub-paragraph amended by Cm 7074.

LEAVE TO ENTER AS A MINISTER OR RELIGION, MISSIONARY OR MEMBER OF A RELIGIOUS ORDER

171 A person seeking leave to enter the United Kingdom as a minister of religion, missionary or member of a religious order may be admitted for a period not exceeding

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[2 years] provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

Note

Words in brackets amended by HC 1016.

REFUSAL OF LEAVE TO ENTER AS A MINISTER OF RELIGION, MISSIONARY OR MEMBER OF A RELIGIOUS ORDER

172 Leave to enter as a minister of religion, missionary or member of a religious order is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

[REQUIREMENTS FOR AN EXTENSION OF STAY AS A MINISTER OF RELIGION WHERE ENTRY TO THE UNITED KINGDOM WAS GRANTED IN THAT CAPACITY]

173 The requirements for an extension of stay as a minister of religion [where entry to the United Kingdom was granted in that capacity], missionary or member of a religious order are that the applicant:

- (i) *entered the United Kingdom with a valid United Kingdom entry clearance as a minister of religion, missionary or member of a religious order; and*
- (ii) *is still engaged in the employment for which his entry clearance was granted; and*
- (iii) *is still required for the employment in question as certified by the leadership of his congregation, his employer or the head of his religious order; and*
- [(iv)
- (a) *if he entered the United Kingdom as a minister of religion, missionary or member of a religious order in accordance with sub paragraph (i) prior to 23 August 2004 meets the requirements of paragraph 170 (ii)–(iv); or*
- (b) *if he entered the United Kingdom as a minister of religion, missionary or member of a religious order in accordance with sub paragraph (i), on or after 23 August 2004 but prior to 19 April 2007, or was granted leave to remain in accordance with paragraph 174B between those dates, meets the requirements of paragraph 170 (ii)–(iv), and if a minister of religion met the requirement to produce an International English Language Testing System certificate certifying that he achieved level 4 competence in spoken English at the time he was first granted leave in this capacity; or*
- (c) *if he entered the United Kingdom as a minister of religion, missionary or member of a religious order in accordance with sub paragraph (i) on or after 19 April 2007, or was granted leave to remain in accordance with paragraph 174B on or after that date, meets the requirements of paragraph 170 (ii)–(iv), and if a minister of religion met the requirement to produce an International English Language Testing System certificate certifying that he achieved level 6 competence in spoken and written English at the time he was first granted leave in this capacity.]*

Note

Words in square brackets in heading and paragraph 173 inserted by Cm 6297. Sub-paragraph (iv) substituted by Cm 7074.

EXTENSION OF STAY AS A MINISTER OF RELIGION, MISSIONARY OR MEMBER OF A RELIGIOUS ORDER

174 An extension of stay as a minister of religion, missionary or member of a religious order may be granted for a period not exceeding 3 years provided the Secretary of State is satisfied that each of the requirements of paragraph 173 is met.

[REQUIREMENTS FOR AN EXTENSION OF STAY AS A MINISTER OF RELIGION WHERE ENTRY TO THE UNITED KINGDOM WAS NOT GRANTED IN THAT CAPACITY]

[174A The requirements for an extension of stay as a minister of religion for an applicant who did not enter the United Kingdom in that capacity are that he:*

- (i) entered the United Kingdom, or was given an extension of stay, in accordance with these Rules, except as a minister of religion or as a visitor under paragraphs 40–56 of these Rules, and has spent a continuous period of at least 12 months here pursuant to that leave immediately prior to the application being made; and*
- (ii) has either been working for at least one year as a minister of religion in any of the 5 years immediately prior to the date on which the application is made (provided that, when doing so, he was not in breach of a condition of any subsisting leave to enter or remain) or, where ordination is prescribed by a religious faith as the sole means of entering the ministry, has been ordained as a minister of religion following at least one year's full-time or two years part-time training for the ministry; and*
- (iii) is imminently to be appointed, or has been appointed, to a position as a minister of religion in the United Kingdom and is suitable for such a position, as certified by the leadership of his prospective congregation; and*
- (iv) meets the requirements of paragraph 170(ii)–(iva).]*

Note

Heading and paragraph 174A inserted by Cm 6297.

[EXTENSION OF STAY AS A MINISTER OF RELIGION WHERE LEAVE TO ENTER WAS NOT GRANTED IN THAT CAPACITY]

[174B An extension of stay as a minister of religion may be granted for a period not exceeding [3 years at a time] provided the Secretary of State is satisfied that each of the requirements of paragraph 174A is met.]

Note

Heading and paragraph 174B inserted by Cm 6297. Words in brackets inserted by HC 1016.

REFUSAL OF EXTENSION OF STAY AS A MINISTER OF RELIGION, MISSIONARY OR MEMBER OF A RELIGIOUS ORDER

175 An extension of stay as a minister of religion, missionary or member of a religious order is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 173 [or 174A] is met.

Note

Words in square brackets inserted by Cm 6297.

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Paragraphs 170 to 175 deleted save in so far as they are relevant to paragraphs 176 and 177, by HC 1113.

INDEFINITE LEAVE TO REMAIN FOR A MINISTER OF RELIGION, MISSIONARY OR MEMBER OF A RELIGIOUS ORDER

176 Indefinite leave to remain may be granted, on application, to a person admitted as a minister of religion, missionary or member of a religious order provided:

- (i) he has spent a continuous period of [5 years] in the United Kingdom in this capacity; and
- (ii) he has met the requirements of paragraph 173 [or 174A] throughout the [5 year period]; and
- (iii) he is still required for the employment in question as certified by the leadership of his congregation, his employer or the head of the religious order to which he belongs; and
- [(iv) has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Reference to paragraph 174A in sub-paragraph (ii) inserted by Cm 6297. References to 5 years inserted by HC 1016. Sub-paragraph (iv) inserted by HC 398.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR A MINISTER OF RELIGION, MISSIONARY OR MEMBER OF A RELIGIOUS ORDER

177 Indefinite leave to remain in the United Kingdom for a minister of religion, missionary or member of a religious order is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 176 is met.

177A–177G [...] For the purposes of these Rules:

Note

Paragraphs 177A to 177G deleted by HC 1113.

Airport-based operational ground staff of overseas-owned airlines

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS-OWNED AIRLINE

178 The requirements to be met by a person seeking leave to enter the United Kingdom as a member of the operational ground staff of an overseas-owned airline are that he:

- (i) has been transferred to the United Kingdom by an overseas-owned airline operating services to and from the United Kingdom to take up duty at an international airport as station manager, security manager or technical manager; and
- (ii) intends to work full-time for the airline concerned; and
- (iii) does not intend to take employment except within the terms of this paragraph; and

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- (iv) can maintain and accommodate himself and any dependants without recourse to public funds; and
- (v) holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER AS A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS-OWNED AIRLINE

179 A person seeking leave to enter the United Kingdom as a member of the operational staff of an overseas-owned airline may be given leave to enter for a period not exceeding [2 years], provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.-

Note

Words in brackets amended by HC 1016.

REFUSAL OF LEAVE TO ENTER AS A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS-OWNED AIRLINE

180 Leave to enter as a member of the operational ground staff of an overseas-owned airline is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS-OWNED AIRLINE

181 The requirements to be met by a person seeking an extension of stay as a member of the operational ground staff of an overseas-owned airline are that the applicant:

- (i) *entered the United Kingdom with a valid United Kingdom entry clearance as a member of the operational ground staff of an overseas-owned airline; and*
- (ii) *is still engaged in the employment for which entry was granted; and*
- (iii) *is still required for the employment in question, as certified by the employer; and*
- (iv) *meets the requirements of paragraph 178(ii)-(iv).*

EXTENSION OF STAY AS A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS-OWNED AIRLINE

182 An extension of stay as a member of the operational ground staff of an overseas-owned airline may be granted for a period not exceeding 3 years, provided the Secretary of State is satisfied that each of the requirements of paragraph 181 is met.

REFUSAL OF EXTENSION OF STAY AS A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS-OWNED AIRLINE

183 An extension of stay as a member of the operational staff of an overseas-owned airline is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 181 is met.

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Note

Paragraphs 178 to 183 deleted save in so far as they are relevant to paragraphs 184 and 185, by HC 1113.

INDEFINITE LEAVE TO REMAIN FOR A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS-OWNED AIRLINE

184 Indefinite leave to remain may be granted, on application, to a member of the operational ground staff of an overseas-owned airline provided:

- (i) he has spent a continuous period of [5 years] in the United Kingdom in this capacity; and
- (ii) he has met the requirements of paragraph 181 throughout the [5 year] period; and
- (iii) he is still required for the employment in question, as certified by the employer; and
- [(iv) he has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Words in brackets in sub-paragraphs (i) and (ii) inserted by HC 1016. Sub-paragraph (iv) inserted by HC 398.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS-OWNED AIRLINE

185 Indefinite leave to remain in the United Kingdom for a member of the operational ground staff of an overseas-owned airline is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 184 is met.

Persons with United Kingdom ancestry

REQUIREMENTS FOR LEAVE TO ENTER ON THE GROUNDS OF UNITED KINGDOM ANCESTRY

186 The requirements to be met by a person seeking leave to enter the United Kingdom on the grounds of his United Kingdom ancestry are that he:

- (i) is a Commonwealth citizen; and
- (ii) is aged 17 or over; and
- (iii) is able to provide proof that one of his grandparents was born in the United Kingdom and Islands [and that any such grandparent is the applicant's blood grandparent or grandparent by reason of an adoption recognised by the laws of the United Kingdom relating to adoption]; and
- (iv) is able to work and intends to take or seek employment in the United Kingdom; and
- (v) will be able to maintain and accommodate himself and any dependants adequately without recourse to public funds; and
- (vi) holds a valid United Kingdom entry clearance for entry in this capacity.

Note

Words in square brackets in sub-paragraph (iii) inserted by Cm 5949.

LEAVE TO ENTER THE UNITED KINGDOM ON THE GROUNDS OF UNITED KINGDOM ANCESTRY

187 A person seeking leave to enter the United Kingdom on the grounds of his United Kingdom ancestry may be given leave to enter for a period not exceeding [5 years] provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

Note

Words in brackets inserted by HC 1016.

REFUSAL OF LEAVE TO ENTER ON THE GROUNDS OF UNITED KINGDOM ANCESTRY

188 Leave to enter the United Kingdom on the grounds of United Kingdom ancestry is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY ON THE GROUNDS OF UNITED KINGDOM ANCESTRY

[189 The requirements to be met by a person seeking an extension of stay on the grounds of United Kingdom ancestry are that:

- (i) he is able to meet each of the requirements of paragraph 186(i)–(v); and
- (ii) he was admitted to the United Kingdom on the grounds of United Kingdom ancestry in accordance with paragraphs 186 to 188 or has been granted an extension of stay in this capacity.]

Note

Paragraph 189 substituted by HC 1112.

EXTENSION OF STAY ON THE GROUNDS OF UNITED KINGDOM ANCESTRY

190 An extension of stay on the grounds of United Kingdom ancestry may be granted for a period not exceeding [5 years] provided the Secretary of State is satisfied that each of the requirements of [paragraph 189] is met.

Note

Reference to paragraph 189 substituted by HC 1112. Reference to 5 years inserted by HC 1016.

REFUSAL OF EXTENSION OF STAY ON THE GROUNDS OF UNITED KINGDOM ANCESTRY

191 An extension of stay on the grounds of United Kingdom ancestry is to be refused if the Secretary of State is not satisfied that each of the requirements of [paragraph 189] is met.

Note

Words in square brackets substituted by HC 1112.

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INDEFINITE LEAVE TO REMAIN ON THE GROUNDS OF UNITED KINGDOM ANCESTRY

192 Indefinite leave to remain may be granted, on application, to a Commonwealth citizen with a United Kingdom born grandparent provided:

- (i) he meets the requirements of paragraph 186(i)–(v); and
- (ii) he has spent a continuous period of [5 years] in the United Kingdom in this capacity; and
- [(iii) has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Words ‘five years’ substituted by HC 1016. Sub-paragraph (iii) inserted by HC 398.

REFUSAL OF INDEFINITE LEAVE TO REMAIN ON THE GROUNDS OF UNITED KINGDOM ANCESTRY

193 Indefinite leave to remain in the United Kingdom on the grounds of a United Kingdom born grandparent is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 192 is met.

[Spouses or civil partners of persons who have or have had leave to enter or remain under paragraphs 128–193 (but not paragraphs 135I–135K)]

REQUIREMENTS FOR LEAVE TO ENTER AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193 (BUT NOT PARAGRAPHS 135I–135K)

194 The requirements to be met by a person seeking leave to enter the United Kingdom as the spouse or civil partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K) are that:

- (i) the applicant is married to or a civil partner of a person with limited leave to enter in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K); and
- (ii) each of the parties intends to live with the other as his or her spouse or civil partner during the applicant’s stay and the marriage or civil partnership is subsisting; and
- (iii) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
- (iv) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
- (v) the applicant does not intend to stay in the United Kingdom beyond any period of leave granted to his spouse; and
- (vi) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WITH LIMITED
LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193
(BUT NOT PARAGRAPHS 135I–135K)

195 A person seeking leave to enter the United Kingdom as the spouse or civil partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K) may be given leave to enter for a period not in excess of that granted to the person with limited leave to enter or remain under paragraphs 128–193 (but not paragraphs 135I–135K) provided the Immigration Officer is satisfied that each of the requirements of paragraph 194 is met. [If the person is seeking leave to enter as the spouse or civil partner of a Highly Skilled Migrant, leave which is granted will be subject to a condition prohibiting Employment as a Doctor in Training.]

Note

Amended by HC 321

REFUSAL OF LEAVE TO ENTER AS THE SPOUSE OR CIVIL PARTNERS OF A PERSON WITH
LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER
PARAGRAPHS 128–193 (BUT NOT PARAGRAPHS 135I–135K)

196 Leave to enter the United Kingdom as the spouse or civil partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K) is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 194 is met.

REQUIREMENTS FOR EXTENSION OF STAY AS THE SPOUSE OR CIVIL PARTNER OF A
PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED
KINGDOM UNDER PARAGRAPHS 128–193 (BUT NOT PARAGRAPHS 135I–135K)

196A The requirements to be met by a person seeking an extension of stay in the United Kingdom as the spouse or civil partner of a person who has or has had leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K) are that the applicant:

- (i) is married to or civil partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K); or
- (ii) is married to or civil partner of a person who has limited leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K) and who is being granted indefinite leave to remain at the same time; or
- (iii) is married to or a civil partner of a person who has indefinite leave to remain in the United Kingdom and who had limited leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K) immediately before being granted indefinite leave to remain; and
- (iv) meets the requirements of paragraph 194(ii) – (v); and
- (v) was admitted with a valid United Kingdom entry clearance for entry in this capacity.

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EXTENSION OF STAY AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193 (BUT NOT PARAGRAPHS 135I–135K)

196B An extension of stay in the United Kingdom as:

- (i) the spouse or civil partner of a person who has limited leave to enter or remain under paragraphs 128–193 (but not paragraphs 135I–135K) may be granted for a period not in excess of that granted to the person with limited leave to enter or remain; or
- (ii) the spouse or civil partner of a person who is being admitted at the same time for settlement, or the spouse or civil partner of a person who has indefinite leave to remain, may be granted for a period not exceeding 2 years, in both instances, provided the Secretary of State is satisfied that each of the requirements of paragraph 196A is met.

[If the person is seeking an extension of stay as the spouse or civil partner, of a Highly Skilled Migrant, leave which is granted will be subject to a condition prohibiting Employment as a Doctor in Training, unless the applicant has, or has last been granted, entry clearance, leave to enter or remain (which was not subject to a condition prohibiting Employment as a Doctor in Training), as the spouse or civil partner, unmarried or same-sex partner of a migrant granted leave under Parts 3, 4, 5 or 6 of these Rules.]

Note

Amended by HC 321.

REFUSAL OF EXTENSION OF STAY AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193 (BUT NOT PARAGRAPHS 135I–135K)

196C An extension of stay in the United Kingdom as the spouse or civil partner of a person who has or has had leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K) is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 196A is met.

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN FOR THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193 (BUT NOT PARAGRAPHS 135I–135K)

196D The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the spouse or civil partner of a person who has or has had leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K) are that the applicant:

- (i) is married to or civil partner of a person who has limited leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K) and who is being granted indefinite leave to remain at the same time; or
- (ii) is married to or a civil partner of a person who has indefinite leave to remain in the United Kingdom and who had limited leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K) immediately before being granted indefinite leave to remain; and
- (iii) meets the requirements of paragraph 194(ii) – (v); and

- (iv) has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application; and
- (v) was admitted with a valid United Kingdom entry clearance for entry in this capacity.

INDEFINITE LEAVE TO REMAIN AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193 (BUT NOT PARAGRAPHS 135I–135K)

196E Indefinite leave to remain in the United Kingdom for the spouse or civil partner of a person who has or has had leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K) may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 196D is met.

REFUSAL OF INDEFINITE LEAVE TO REMAIN AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193 (BUT NOT PARAGRAPHS 135I–135K)

196F Indefinite leave to remain in the United Kingdom for the spouse or civil partner of a person who has or has had limited leave to enter or remain in the United Kingdom under paragraphs 128–193 (but not paragraphs 135I–135K) is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 194D is met.]

Note

Paragraphs 194 to 196F amended by HC 398.

Children of persons with limited leave to enter or remain in the United Kingdom under paragraphs 128–193 [(but not paragraphs 135I–135K)]

REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE CHILD OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193 [(BUT NOT PARAGRAPHS 135I–135K)]

197 The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as a child of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128–193 [(but not paragraphs 135I–135K)] are that:

- (i) he is the child of a parent with limited leave to enter or remain in the United Kingdom under paragraphs 128–193 [(but not paragraphs 135I–135K)]; and
- (ii) he is under the age of 18 or has current leave to enter or remain in this capacity; and
- (iii) he is unmarried [and is not a civil partner], has not formed an independent family unit and is not leading an independent life; and
- (iv) he can and will be maintained and accommodated adequately without recourse to public funds in accommodation which his parent(s) own or occupy exclusively; and
- (v) he will not stay in the United Kingdom beyond any period of leave granted to his parent(s); and

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- (vi) both parents are being or have been admitted to or allowed to remain in the United Kingdom save where:
 - (a) the parent he is accompanying or joining is his sole surviving parent; or
 - (b) the parent he is accompanying or joining has had sole responsibility for his upbringing; or
 - (c) there are serious and compelling family or other considerations which make exclusion from the United Kingdom undesirable and suitable arrangements have been made for his care; and
- (vii) if seeking leave to enter, he holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, was admitted with a valid United Kingdom entry clearance for entry in this capacity.

Note

Words in square brackets inserted by Cmnd 5829. Words in square brackets in sub-paragraph (iii) inserted by HC 582.

LEAVE TO ENTER OR REMAIN AS THE CHILD OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193 [(BUT NOT PARAGRAPHS 135I–135K)]

198 A person seeking leave to enter or remain in the United Kingdom as the child of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128–193 [(but not paragraphs 135I–135K)] may be given leave to enter or remain in the United Kingdom for a period of leave not in excess of that granted to the person with limited leave to enter or remain under paragraphs 128–193 [(but not paragraphs 135I–135K)] provided that, in relation to an application for leave to enter, he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity or, in the case of an application for limited leave to remain, he was admitted with a valid United Kingdom entry clearance for entry in this capacity and is able to satisfy the Secretary of State that each of the requirements of paragraph 197(i)–(vi) is met. An application for indefinite leave to remain in this category may be granted provided the applicant was admitted with a valid United Kingdom entry clearance for entry in this capacity and is able to satisfy the Secretary of State that each of the requirements of paragraph 197(i)–(vi) is met and provided indefinite leave to remain is, at the same time, being granted to the person with limited leave to enter or remain under paragraphs 128–193 [(but not paragraphs 135I–135K)].

Note

Words in square brackets inserted by Cmnd 5829.

REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE CHILD OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193 [(BUT NOT PARAGRAPHS 135I–135K)]

199 Leave to enter or remain in the United Kingdom as the child of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128–193 [(but not paragraphs 135I–135K)] is to be refused if, in relation to an application for leave to enter, a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival or, in the case of an application for limited leave to remain, if the applicant was not admitted with a valid United Kingdom entry clearance for entry in this capacity or is unable to satisfy the Secretary of State that each of the requirements of paragraph 197(i)–(vi) is met. An application for

indefinite leave to remain in this category is to be refused if the applicant was not admitted with a valid United Kingdom entry clearance for entry in this capacity or is unable to satisfy the Secretary of State that each of the requirements of paragraph 197(i)–(vi) is met or if indefinite leave to remain is not, at the same time, being granted to the person with limited leave to enter or remain under paragraphs 128–193 [(but not paragraphs 135I–135K)].

Note

Words in square brackets inserted by Cmnd 5829.

[Multiple entry work permit employment] *

[REQUIREMENTS FOR LEAVE TO ENTER FOR MULTIPLE ENTRY WORK PERMIT EMPLOYMENT]

199A The requirements to be met by a person coming to the United Kingdom to seek or take Multiple Entry work permit employment are that he:

- (i) holds a valid work permit;
- (ii) is not of an age which puts him outside the limits for employment;
- (iii) is capable of undertaking the employment specified in the work permit;
- (iv) does not intend to take employment except as specified in his work permit;
- (v) is able to maintain and accommodate himself adequately without recourse to public funds; and
- (vi) intends to leave the United Kingdom at the end of the employment covered by the Multiple Entry work permit.]
- [(vii) intends to leave the United Kingdom at the end of the employment covered by the Multiple Entry work permit and holds a valid United Kingdom Entry clearance for entry into this capacity except where he holds a work permit valid for 6 months or less [...] or he is a British National (Overseas), a British overseas territories citizen, a British Overseas citizen, a British protected person or a person who under the British Nationality Act 1981 is a British subject.]

Note

Main heading and paragraphs 199A–199C inserted by Cm 5597. Sub-paragraph (vii) inserted by HC 176. Words in sub-paragraph (vii) deleted by HC 523.

[LEAVE TO ENTER FOR MULTIPLE ENTRY WORK PERMIT EMPLOYMENT]

199B A person seeking leave to enter the United Kingdom for the purpose of Multiple Entry work permit employment may be admitted for a period not exceeding 2 years provided that the Immigration Officer is satisfied that each of the requirements of paragraph 199A are met.]

Note

Main heading and paragraphs 199A–199C inserted by Cm 5597.

[REFUSAL OF LEAVE TO ENTER FOR MULTIPLE ENTRY WORK PERMIT EMPLOYMENT]

199C Leave to enter for the purpose of Multiple Entry work permit employment is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 199A is met.]

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Note

Main heading and paragraphs 199A–199C inserted by Cm 5597.

PART 6

PERSONS SEEKING TO ENTER OR REMAIN IN THE UNITED KINGDOM AS A BUSINESSMAN, SELF-EMPLOYED PERSON, INVESTOR, WRITER, COMPOSER OR ARTIST

Persons intending to establish themselves in business

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A PERSON INTENDING TO ESTABLISH HIMSELF IN BUSINESS

200 For the purpose of paragraphs 201–210 a business means an enterprise as:

- a sole trader; or
- a partnership; or
- a company registered in the United Kingdom.

201 The requirements to be met by a person seeking leave to enter the United Kingdom to establish himself in business are:

- (i) *that he satisfies the requirements of either paragraph 202 or paragraph 203; and*
- (ii) *that he has not less than £200,000 of his own money under his control and disposable in the United Kingdom which is held in his own name and not by a trust or other investment vehicle and which he will be investing in the business in the United Kingdom; and*
- (iii) *that until his business provides him with an income he will have sufficient additional funds to maintain and accommodate himself and any dependants without recourse to employment (other than his work for the business) or to public funds; and*
- (iv) *that he will be actively involved full-time in trading or providing services on his own account or in partnership, or in the promotion and management of the company as a director; and*
- (v) *that his level of financial investment will be proportional to his interest in the business; and*
- (vi) *that he will have either a controlling or equal interest in the business and that any partnership or directorship does not amount to disguised employment; and*
- (vii) *that he will be able to bear his share of liabilities; and*
- (viii) *that there is a genuine need for his investment and services in the United Kingdom; and*
- (ix) *that his share of the profits of the business will be sufficient to maintain and accommodate himself and any dependants without recourse to employment (other than his work for the business) or to public funds; and*
- (x) *that he does not intend to supplement his business activities by taking or seeking employment in the United Kingdom other than his work for the business; and*
- (xi) *that he holds a valid United Kingdom entry clearance for entry in this capacity.*

202 Where a person intends to take over or join as a partner or director an existing business in the United Kingdom he will need, in addition to meeting the requirements at paragraph 201, to produce:

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- (i) *a written statement of the terms on which he is to take over or join the business; and*
- (ii) *audited accounts for the business for previous years; and*
- (iii) *evidence that his services and investment will result in a net increase in the employment provided by the business to persons settled here to the extent of creating at least 2 new full-time jobs.*

203 *Where a person intends to establish a new business in the United Kingdom he will need, in addition to meeting the requirements at paragraph 201 above, to produce evidence:*

- (i) *that he will be bringing into the country sufficient funds of his own to establish a business; and*
- (ii) *that the business will create full-time paid employment for at least 2 persons already settled in the United Kingdom.*

LEAVE TO ENTER THE UNITED KINGDOM AS A PERSON SEEKING TO ESTABLISH HIMSELF IN BUSINESS

204 *A person seeking leave to enter the United Kingdom to establish himself in business may be admitted for a period not exceeding [2 years] with a condition restricting his freedom to take employment provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.*

Note

Words in brackets amended by HC 1016.

REFUSAL OF LEAVE TO ENTER THE UNITED KINGDOM AS A PERSON SEEKING TO ESTABLISH HIMSELF IN BUSINESS

205 *Leave to enter the United Kingdom as a person seeking to establish himself in business is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.*

REQUIREMENTS FOR AN EXTENSION OF STAY IN ORDER TO REMAIN IN BUSINESS

206 *The requirements for an extension to stay in order to remain in business in the United Kingdom are that the applicant can show:*

- (i) *that he entered the United Kingdom with a valid United Kingdom entry clearance as a businessman; and*
- (ii) *audited accounts which show the precise financial position of the business and which confirm that he has invested not less than £200,000 of his own money directly into the business in the United Kingdom; and*
- (iii) *that he is actively involved on a full-time basis in trading or providing services on his own account or in partnership or in the promotion and management of the company as a director; and*
- (iv) *that his level of financial investment is proportional to his interest in the business; and*
- (v) *that he has either a controlling or equal interest in the business and that any partnership or directorship does not amount to disguised employment; and*
- (vi) *that he is able to bear his share of any liability the business may incur; and*

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- (vii) *that there is a genuine need for his investment and services in the United Kingdom; and*
- (viii)
 - (a) *that where he has established a new business, new full-time paid employment has been created in the business for at least 2 persons settled in the United Kingdom; or*
 - (b) *that where he has taken over or joined an existing business, his services and investment have resulted in a net increase in the employment provided by the business to persons settled here to the extent of creating at least 2 new full-time jobs; and*
- (ix) *that his share of the profits of the business is sufficient to maintain and accommodate him and any dependants without recourse to employment (other than his work for the business) or to public funds; and*
- (x) *that he does not and will not have to supplement his business activities by taking or seeking employment in the United Kingdom other than his work for the business.*

[206A The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a person who has leave to enter or remain for work permit employment are that the applicant:

- (i) *entered the United Kingdom or was given leave to remain as a work permit holder in accordance with paragraphs 128 to 133 of these Rules; and*
- (ii) *meets each of the requirements of paragraph 201(i)-(x).]*

Note

Paragraphs 206A–206F inserted by HC 346.

[206B The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a highly skilled migrant are that the applicant:

- (i) *entered the United Kingdom or was given leave to remain as a highly skilled migrant in accordance with paragraphs 135A to 135F of these Rules; and*
- (ii) *meets each of the requirements of paragraph 201(i)-(x).]*

Note

Paragraphs 206A–206F inserted by HC 346.

[206C The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a participant in the [International Graduates Scheme] are that the applicant:

- (i) *entered the United Kingdom or was given leave to remain as a participant in the [International Graduates Scheme] in accordance with paragraphs 135O to 135T of these Rules; and*
- (ii) *meets each of the requirements of paragraph 201(i)-(x).]*

Note

Paragraphs 206A–206F inserted by HC 346. The words 'International Graduates Scheme' inserted by Cm 7075.

[206D The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for an innovator are that the applicant:

- (i) *entered the United Kingdom or was given leave to remain as an innovator in accordance with paragraphs 210A to 210F of these Rules; and*
- (ii) *meets each of the requirements of paragraph 201(i)-(x).]*

Note

Paragraphs 206A–206F inserted by HC 346.

[206E The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a student are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a student in accordance with paragraphs 57 to 62 of these Rules; and*
- (ii) has obtained a degree qualification on a recognised degree course at either a United Kingdom publicly funded further or higher education institution or a bona fide United Kingdom private education institution which maintains satisfactory records of enrolment and attendance; and*
- (iii) has the written consent of his official sponsor to such self employment if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing or has recently come to an end at the time of the requested extension; and*
- (iv) meets each of the requirements of paragraph 201(i)–(x).]*

Note

Paragraphs 206A–206F inserted by HC 346.

[206F The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a working holidaymaker are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a working holidaymaker in accordance with paragraphs 95 to 100 of these Rules; and*
- (ii) has spent more than 12 months in total in the UK in this capacity; and*
- (iii) meets each of the requirements of paragraph 201(i)–(x).]*

Note

Paragraphs 206A–206F inserted by HC 346.

[206G The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom in the case of a person who has leave to enter or remain as a Fresh Talent: Working in Scotland scheme participant are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a Fresh Talent: Working in Scotland scheme participant in accordance with paragraphs 143A to 143F of these Rules; and*
- (ii) has the written consent of this official sponsor to such employment if the studies which led to him being granted leave under the Fresh Talent: Working in Scotland scheme in accordance with paragraphs 143A to 143F of these Rules, or any studies he has subsequently undertaken, were sponsored by a government or international scholarship agency; and*
- (iii) meets each of the requirements of paragraph 201(i)–(x).]*

Note

Inserted by HC 104.

[206H The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a Postgraduate Doctor or Dentist are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a Postgraduate Doctor or Dentist in accordance with paragraphs 70 to 75 of these Rules; and*

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- (ii) *has the written consent of his official sponsor to such self employment if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing or has recently come to an end at the time of the requested extension; and*
- (iii) *meets each of the requirements of paragraph 201(i)–(x).]*

Note

Inserted by HC 1016.

[206I The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a Tier 1 (General) Migrant are that the applicant:

- (i) *entered the United Kingdom or was given leave to remain as a Tier 1 (General) Migrant; and*
- (ii) *meets each of the requirements of paragraph 201(i)–(x).]*

Note

Inserted by HC 321.

EXTENSION OF STAY IN ORDER TO REMAIN IN BUSINESS

[207 An extension of stay in order to remain in business with a condition restricting his freedom to take employment may be granted for a period not exceeding 3 years [at a time] provided the Secretary of State is satisfied that each of the requirements of paragraph 206, 206A, 206B, 206C, 206D, 206E, 206F or 206G, [206H or 206I] is met.]

Note

Substituted by HC 346. Further substituted by HC 104. Words in brackets inserted by HC 1016. Reference to 206I inserted by HC 321.

REFUSAL OF EXTENSION OF STAY IN ORDER TO REMAIN IN BUSINESS

[208 An extension of stay in order to remain in business is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 206, 206A, 206B, 206C, 206D, 206E, 206F or 206G, [206H or 206I] is met.]

Note

Substituted by HC 346. Further substituted by HC 104. Reference to 206H inserted by HC 1016. Reference to 206I inserted by HC 321.

Paragraphs 200 to 208 deleted on 30 June 2008 by paragraph 17 of Statement of Changes HC 607 except insofar as relevant to paragraph 209. Please see Appendix F for the wording of these Rules in a case in which they are relevant.

INDEFINITE LEAVE TO REMAIN FOR A PERSON ESTABLISHED IN BUSINESS

209 Indefinite leave to remain may be granted, on application, to a person established in business provided he:

- (i) *has spent a continuous period of [5 years] in the United Kingdom in this capacity and is still engaged in the business in question; and*
- (ii) *has met the requirements of paragraph 206 throughout the [5 year] period; and*

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[(iii) submits audited accounts for the first 4 years of trading and management accounts for the 5th year;] and

[(iv) has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Sub-paragraph substituted by HC 1016. Sub-paragraph (iv) inserted by HC 398.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR A PERSON ESTABLISHED IN BUSINESS

210 Indefinite leave to remain in the United Kingdom for a person established in business is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 209 is met.

Innovators

[REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS AN INNOVATOR

210A *The requirements to be met by a person seeking leave to enter as an innovator are that the applicant:*

- (i) *is approved by the Home Office as a person who meets the criteria specified by the Secretary of State for entry under the innovator scheme at the time that approval is sought under that scheme;*
- (ii) *intends to set up a business that will create full-time paid employment for at least 2 persons already settled in the UK; and*
- (iii) *intends to maintain a minimum five per cent shareholding of the equity capital in that business, once it has been set up, throughout the period of his stay as an innovator; and*
- (iv) *will be able to maintain and accommodated himself and any dependants adequately without recourse to public funds or to other employment; and*
- (v) *holds a valid United Kingdom entry clearance for entry in this capacity.]*

Note

Inserted by HC 538.

[LEAVE TO ENTER AS AN INNOVATOR

210B *A person seeking leave to enter the United Kingdom as an innovator may be admitted for a period not exceeding [2 years], provided the Immigration Officer is satisfied that each of the requirements of paragraph 210A is met.]*

Note

Inserted by HC 538. Words in brackets inserted by HC 1016.

[REFUSAL OF LEAVE TO ENTER AS AN INNOVATOR

210C *Leave to enter as an innovator is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 210A are met.]*

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Note

Inserted by HC 538.

REQUIREMENTS FOR AN EXTENSION OF STAY AS AN INNOVATOR

[210D The requirements for an extension of stay in the United Kingdom as an innovator, in the case of a person who was granted leave to enter under paragraph 210A, are that the applicant:

- (i) has established a viable trading business, by reference to the audited accounts and trading records of that business; and*
- (ii) continues to meet the requirements of paragraph 210A(i) and (iv); and*

has set up a business that will create full-time paid employment for at least 2 persons already settled in the UK; and

- (iii) has maintained a minimum five per cent shareholding of the equity capital in that business, once it has been set up, throughout the period of his stay.]*

Note

Substituted by Cm 6339.

[210DA The requirements for an extension of stay in the United Kingdom as an innovator, in the case of a person who has leave for the purpose of work permit employment are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a work permit holder in accordance with paragraphs 128 to 132 of these Rules; and*
- (ii) meets the requirements of paragraph 210A(i)–(iv).]*

Note

Inserted by Cm 6339.

[210DB The requirements for an extension of stay in the United Kingdom as an innovator in the case of a person who has leave as a student are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a student in accordance with paragraphs 57 to 62 of these Rules; and*
- (ii) has obtained a degree qualification on a recognised degree course at either a United Kingdom publicly funded further or higher education institution or a bona fide United Kingdom private education institution which maintains satisfactory records of enrolment and attendance; and*
- (iii) has the written consent of his official sponsor to remain under the Innovator category if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing or has recently come to an end at the time of the requested extension; and*
- (iv) meets the requirements of paragraph 210(i)–(iv).]*

Note

Inserted by Cm 6339.

[210DC The requirements to be met for an extension of stay as an innovator, for a person who has leave as a working holidaymaker are that the applicant:

- (i) entered the United Kingdom as a working holidaymaker in accordance with paragraphs 95 to 96 of these Rules; and*
- (ii) meets the requirements of paragraph 210A(i)–(iv).]*

Note

Inserted by Cm 6339.

[210DD The requirements to be met for an extension of stay as an innovator, for a postgraduate doctor, postgraduate dentist or trainee general practitioner are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a postgraduate doctor, postgraduate dentist or trainee general practitioner in accordance with paragraphs 70 to 75 of these Rules; and*
- (ii) has the written consent of his official sponsor to remain under the innovator category if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing or has recently come to an end at the time of the requested extension; and*
- (iii) meets the requirements of paragraph 210(i)–(iv).]*

Note

Inserted by HC 1112.

[210DE The requirements to be met for an extension of stay as an innovator, for a participant in the [International Graduates Scheme] are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a participant in the [International Graduates Scheme] in accordance with paragraphs 135O to 135T of these Rules; and*
- (ii) meets the requirements of paragraph 210A(i)–(iv).]*

Note

Inserted by HC 1112. The words ‘International Graduates Scheme’ inserted by Cm 7075.

[210DF The requirements to be met for an extension of stay as an innovator, for a highly skilled migrant are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a highly skilled migrant in accordance with paragraphs 135A to 135E of these Rules; and*
- (ii) meets the requirements of paragraph 210A(i)–(iv).]*

Note

Inserted by HC 1112

[210DG The requirements to be met for an extension of stay as an innovator, for a person in the United Kingdom to establish themselves or remain in business are that the applicant:

- (i) entered the United Kingdom or was granted leave to remain as a person intending to establish themselves or remain in business in accordance with paragraphs 201–208 of these Rules; and*
- (ii) meets the requirements of paragraph 210(i)–(iv).]*

Note

Inserted by HC 346.

[210DH The requirements to be met for an extension of stay as an innovator, in the case of a person who has leave to enter or remain as a Fresh Talent: Working in Scotland scheme participant are that the applicant:

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- (i) *entered the United Kingdom or was given leave to remain as a Fresh Talent: Working in Scotland scheme participant in accordance with paragraphs 143A to 143F of these Rules; and*
- (ii) *has the written consent of his official sponsor to such employment if the studies which led to him being granted leave under the Fresh Talent: Working in Scotland scheme in accordance with paragraphs 143A to 143F of these Rules, or any studies he has subsequently undertaken, were sponsored by a government or international scholarship agency; and*
- (iii) *meets each of the requirements of paragraph 210(i)–(iv).]*

Note

Inserted by HC 104.

[210DI The requirements to be met for an extension of stay as an innovator, for a Tier 1 (General) Migrant are that the applicant:

- (i) *entered the United Kingdom or was given leave to remain as a Tier 1 (General) Migrant; and*
- (ii) *meets the requirements of paragraph 210A(i)–(iv).]*

Note

Inserted by HC 321.

[EXTENSION OF STAY AS AN INNOVATOR

210E An extension of stay as an innovator may be granted for a period not exceeding [3years at a time] provided the Secretary of State is satisfied that each of the requirements of paragraph 210D, 210DA, 210DB, 210DC, 210DD, 210DE, 210DF, 210DG or 210DH is met.]

Note

Substituted by HC 346. Further substituted by HC 104. Words in brackets inserted by HC 1016.

[REFUSAL OF EXTENSION TO STAY AS AN INNOVATOR

210F An extension of stay as an innovator is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 210D, 210DA, 210DB, 210DC, 210DD, 210DE, 210DF, 210DG or 210DH is met.]

Note

Substituted by HC 346. Further substituted by HC 104.

Paragraphs 210 to 210F deleted on 30 June 2008 by paragraph 17 of Statement of Changes HC 607 except insofar as relevant to paragraph 210G. Please see Appendix F for the wording of these Rules in a case in which they are relevant.

[INDEFINITE LEAVE TO REMAIN FOR AN INNOVATOR

210G Indefinite leave to remain may be granted, on application, to a person currently with leave as an innovator provided that he:

- (i) *has spent a continuous period of at least [5 years] in the United Kingdom in this capacity; and*

- (ii) has met the requirements of paragraph 210D throughout the [5 year] period;] and
- [(iii) has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]]

Note

Inserted by HC 538. Words 'five years' inserted by HC 1016. Sub-paragraph (iii) inserted by HC 398.

[REFUSAL OF INDEFINITE LEAVE TO REMAIN AS AN INNOVATOR

210H Indefinite leave to remain in the United Kingdom as a person currently with leave as a innovator is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 210G is met.]

Note

Inserted by HC 538.

Persons intending to establish themselves in business under provisions of EC association agreements

211–221 [...]

Note

Paragraphs 211 to 221 deleted by HC 130.

INDEFINITE LEAVE TO REMAIN FOR A PERSON ESTABLISHED IN BUSINESS UNDER THE PROVISIONS OF AN EC ASSOCIATION AGREEMENT

[222 Indefinite leave to remain may be granted, on application, to a person established in business provided he –

- (i) is a national of Bulgaria or Romania; and
- (ii) entered the United Kingdom with a valid United Kingdom entry clearance as a person intending to establish himself in business under the provisions of an EC Association Agreement; and
- (iii) was granted an extension of stay before 1st January 2007 in order to remain in business under the provisions of the Agreement; and
- (iv) established himself in business in the United Kingdom, spent a continuous period of 5 years in the United Kingdom in this capacity and is still so engaged; and
- (v) met the requirements of paragraph 222A throughout the period of 5 years; and
- (vi) submits audited accounts for the first 4 years of trading and management accounts for the 5th year;] and
- [(vii) has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Sub-paragraph (vii) inserted by HC 398.

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222A The requirements mentioned in paragraph 222(v) are that throughout the period of 5 years –

- (i) the applicant's share of the profits of the business has been sufficient to maintain and accommodate himself and any dependants without recourse to employment (other than his work for the business) or to public funds; and
- (ii) he has not supplemented his business activities by taking or seeking employment in the United Kingdom (other than his work for the business); and
- (iii) he has satisfied the requirements in paragraph 222B or 222C.

222B Where the applicant has established himself in a company in the United Kingdom which he effectively controls, the requirements for the purpose of paragraph 222A(iii) are that–

- (i) the applicant has been actively involved in the promotion and management of the company; and
- (ii) he has had a controlling interest in the company; and
- (iii) the company was registered in the United Kingdom and has been trading or providing services in the United Kingdom; and
- (iv) the company owned the assets of the business.

222C Where the applicant has established himself as a sole trader or in a partnership in the United Kingdom, the requirements for the purpose of paragraph 222A(iii) are that–

- (i) the applicant has been actively involved in trading or providing services on his own account or in a partnership in the United Kingdom; and
- (ii) the applicant owned, or together with his partners owned, the assets of the business; and
- (iii) in the case of a partnership, the applicant's part in the business did not amount to disguised employment.]

Note

Paragraphs 222 to 222C inserted by HC 130.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR A PERSON ESTABLISHED IN BUSINESS UNDER THE PROVISIONS OF AN EC ASSOCIATION AGREEMENT

223 Indefinite leave to remain in the United Kingdom for a person established in business is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 222 is met.

[223A Notwithstanding paragraph 5, paragraphs 222 to 223 shall apply to a person who is entitled to remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations.]

Note

Paragraph 223A inserted by HC 130.

Investors

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS AN INVESTOR

224 *The requirements to be met by a person seeking leave to enter the United Kingdom as an investor are that he:*

- (i)
 - (a) has money of his own under his control in the United Kingdom amounting to no less than £1 million; or
 - (b)
 - (i) owns personal assets which, taking into account any liabilities to which he is subject, have a value exceeding £2 million; and
 - (ii) has money under his control in the United Kingdom amounting to no less than £1 million, which may include money loaned to him provided that it was loaned by a financial institution regulated by the Financial Services Authority; and]
- (ii) intends to invest not less than £750,000 of his capital in the United Kingdom by way of United Kingdom Government bonds, share capital or loan capital in active and trading United Kingdom registered companies (other than those principally engaged in property investment and excluding investment by the applicant by way of deposits with a bank, building society or other enterprise whose normal course of business includes the acceptance of deposits); and
- (iii) intends to make the United Kingdom his main home; and
- (iv) is able to maintain and accommodate himself and any dependants without taking employment (other than self-employment or business) or recourse to public funds; and
- (v) holds a valid United Kingdom entry clearance for entry in this capacity.

Note

Sub-paragraph (i) substituted by HC 176. Deleted on 30 June 2008 by paragraph 17 of Statement of Changes HC 607 except insofar as relevant to paragraph 230. Please see Appendix F for the wording of these Rules in a case in which they are relevant.

LEAVE TO ENTER AS AN INVESTOR

225 A person seeking leave to enter the United Kingdom as an investor may be admitted for a period not exceeding [2 years] with a restriction on his right to take employment, provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

Note

Words in brackets amended by HC 1016.

REFUSAL OF LEAVE TO ENTER AS AN INVESTOR

226 Leave to enter as an investor is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY AS AN INVESTOR

- 227 The requirements for an extension of stay as an investor are that the applicant:*
- (i) entered the United Kingdom with a valid United Kingdom entry clearance as an investor; and
 - (ii) has no less than £1 million of his own money under his control in the United Kingdom; and

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- (iii) *has invested not less than £750,000 of his capital in the United Kingdom on the terms set out in paragraph 224(ii) above and intends to maintain that investment on the terms set out in paragraph 224(ii); and*
- (iv) *has made the United Kingdom his main home; and*
- (v) *is able to maintain and accommodate himself and any dependants without taking employment (other than his self-employment or business) or recourse to public funds.*

[227A The requirements to be met for an extension of stay as an investor, for a person who has leave to enter or remain in the United Kingdom as a work permit holder are that the applicant:

- (i) *entered the United Kingdom or was granted leave to remain as a work permit holder in accordance with paragraphs 128 to 133 of these Rules; and*
- (ii) *meets the requirements of paragraph 224(i)–(iv).]*

Note

Paragraphs 227A–227D inserted by HC 346.

[227B The requirements to be met for an extension of stay as an investor, for a person in the United Kingdom as a highly skilled migrant are that the applicant:

- (i) *entered the United Kingdom or was granted leave to remain as a highly skilled migrant in accordance with paragraphs 135A to 135F of these Rules; and*
- (ii) *meets the requirements of paragraph 224(i)–(iv).]*

Note

Paragraphs 227A–227D inserted by HC 346.

[227C The requirements to be met for an extension of stay as an investor, for a person in the United Kingdom to establish themselves or remain in business are that the applicant:

- (i) *entered the United Kingdom or was granted leave to remain as a person intending to establish themselves or remain in business in accordance with paragraphs 201 to 208 of these Rules; and*
- (ii) *meets the requirements of paragraph 224(i)–(iv).]*

Note

Paragraphs 227A–227D inserted by HC 346.

[227D The requirements to be met for an extension of stay as an investor, for a person in the United Kingdom as an innovator are that the applicant:

- (i) *entered the United Kingdom or was granted leave to remain as an innovator in accordance with paragraphs 210A to 210F of these Rules; and*
- (ii) *meets the requirements of paragraph 224(i)–(iv).]*

Note

Paragraphs 227A–227D inserted by HC 346.

EXTENSION OF STAY AS AN INVESTOR

[228 An extension of stay as an investor, with a restriction on the taking of employment, may be granted for a [...] period [not exceeding 3 years], provided the Secretary of State is satisfied that each of the requirements of paragraph 227, 227A, 227B, 227C[, 227D or 227E] is met.]

Note

Substituted by HC 346. Words deleted by HC 1016. Words 'not exceeding 3 years' amended by HC 1016. Words '227D or 2227E' substituted by HC 321.

REFUSAL OF EXTENSION OF STAY AS AN INVESTOR

[229 An extension of stay as an investor is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 227, 227A, 227B, 227C[, 227D or 227E] is met.]

Note

Substituted by HC 346. Words '227D or 2227E' substituted by HC 321.

Paragraphs 224 to 229 deleted on 30 June 2008 by paragraph 17 of Statement of Changes HC 607 except insofar as relevant to paragraph 230. Please see Appendix F for the wording of these Rules in a case in which they are relevant.

INDEFINITE LEAVE TO REMAIN FOR AN INVESTOR

230 Indefinite leave to remain may be granted, on application, to a person admitted as an investor provided he:

- (i) has spent a continuous period of [5 years] in the United Kingdom in this capacity; and
- (ii) has met the requirements of paragraph 227 throughout the [5 year] period including the requirement as to the investment of £750,000 and continues to do so; and
- [(iii) has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Words 'five years' substituted by HC 1016. Sub-paragraph (iii) inserted by HC 398.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR AN INVESTOR

231 Indefinite leave to remain in the United Kingdom for an investor is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 230 is met.

Writers, composers and artists

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A WRITER, COMPOSER OR ARTIST

232 *The requirements to be met by a person seeking leave to enter the United Kingdom as a writer, composer or artist are that he:*

- (i) *has established himself outside the United Kingdom as a writer, composer or artist primarily engaged in producing original work which has been published (other than exclusively in newspapers or magazines), performed or exhibited for its literary, musical or artistic merit; and*

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- (ii) *does not intend to work except as related to his self-employment as a writer, composer or artist; and*
- (iii) *has for the preceding year been able to maintain and accommodate himself and any dependants from his own resources without working except as a writer, composer or artist; and*
- (iv) *will be able to maintain and accommodate himself and any dependants from his own resources without working except as a writer, composer or artist and without recourse to public funds; and*
- (v) *holds a valid United Kingdom entry clearance for entry in this capacity.*

LEAVE TO ENTER AS A WRITER, COMPOSER OR ARTIST

233 *A person seeking leave to enter the United Kingdom as a writer, composer or artist may be admitted for a period not exceeding [2 years], subject to a condition restricting his freedom to take employment, provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.*

Note

Words in brackets amended by HC 1016.

REFUSAL OF LEAVE TO ENTER AS A WRITER, COMPOSER OR ARTIST

234 *Leave to enter as a writer, composer or artist is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.*

REQUIREMENTS FOR AN EXTENSION OF STAY AS A WRITER, COMPOSER OR ARTIST

235 *The requirements for an extension of stay as a writer, composer or artist are that the applicant:*

- (i) *entered the United Kingdom with a valid United Kingdom entry clearance as a writer, composer or artist; and*
- (ii) *meets the requirements of paragraph 232(ii)–(iv).*

EXTENSION OF STAY AS A WRITER, COMPOSER OR ARTIST

236 *An extension of stay as writer, composer or artist may be granted for a period not exceeding 3 years with a restriction on his freedom to take employment, provided the Secretary of State is satisfied that each of the requirements of paragraph 235 is met.*

REFUSAL OF EXTENSION OF STAY AS A WRITER, COMPOSER OR ARTIST

237 *An extension of stay as a writer, composer or artist is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 235 is met.*

Note

Paragraphs 232 to 237 deleted on 30 June 2008 by paragraph 17 of Statement of Changes HC 607 except insofar as relevant to paragraph 238. Please see Appendix F for the wording of these Rules in a case in which they are relevant.

INDEFINITE LEAVE TO REMAIN FOR A WRITER, COMPOSER OR ARTIST

238 Indefinite leave to remain may be granted, on application, to a person admitted as a writer, composer or artist provided he:

- (i) has spent a continuous period of [5 years] in the United Kingdom in this capacity; and
- (ii) has met the requirements of paragraph 235 throughout the [5 year] period;] and
- [(iii) has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Words 'five years' substituted by HC 1016. Sub-paragraph (iii) inserted by HC 398.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR A WRITER, COMPOSER OR ARTIST

239 Indefinite leave to remain for a writer, composer or artist is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 238 is met.

[Spouses or civil partners of persons who have or have had limited leave to enter or remain under paragraphs 200–239]

REQUIREMENTS FOR LEAVE TO ENTER AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN UNDER PARAGRAPHS 200–239

240 The requirements to be met by a person seeking leave to enter the United Kingdom as the spouse or civil partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 200–239 are that:

- (i) the applicant is married to or the civil partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 200–239; and
- (ii) each of the parties intends to live with the other as his or her spouse or civil partner during the applicant's stay and the marriage or civil partnership is subsisting; and
- (iii) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
- (iv) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
- (v) the applicant does not intend to stay in the United Kingdom beyond any period of leave granted to his spouse or civil partner; and
- (vi) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

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LEAVE TO ENTER AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WITH LIMITED
LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 200–239

241 A person seeking limited leave to enter the United Kingdom as the spouse or civil partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 200–239 may be given leave to enter for a period not in excess of that granted to the person with limited leave to enter or remain under paragraphs 200–239 provided the Immigration Officer is satisfied that each of the requirements of paragraph 240 is met.

REFUSAL OF LEAVE TO ENTER AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WITH
LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER
PARAGRAPHS 200–239

242 Leave to enter the United Kingdom as the spouse or civil partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 200–239 is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 240 is met.

REQUIREMENTS FOR EXTENSION OF STAY AS THE SPOUSE OR CIVIL PARTNER OF A
PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED
KINGDOM UNDER PARAGRAPHS 200–239

242A The requirements to be met by a person seeking an extension of stay in the United Kingdom as the spouse or civil partner of a person who has or has had leave to enter or remain under paragraphs 200–239 are that the applicant:

- (i) is married to or the civil partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 200–239; or
- (ii) is married to or civil partner of a person who has limited leave to enter or remain in the United Kingdom under paragraphs 200–239 and who is being granted indefinite leave to remain at the same time; or
- (iii) is married to or civil partner of a person who has indefinite leave to remain in the United Kingdom and who had limited leave to enter or remain in the United Kingdom under paragraphs 200–239 immediately before being granted indefinite leave to remain; and
- (iv) meets the requirements of paragraph 240(ii)–(v); and
- (v) was admitted with a valid United Kingdom entry clearance for entry in this capacity.

EXTENSION OF STAY AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR
HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER
PARAGRAPHS 200–239

242B An extension of stay in the United Kingdom as:

- (i) the spouse or civil partner of a person who has limited leave to enter or remain under paragraphs 200–239 may be granted for a period not in excess of that granted to the person with limited to enter or remain; or
- (ii) the spouse or civil partner of a person who is being admitted at the same time for settlement or the spouse or civil partner of a person who has indefinite leave

to remain may be granted for a period not exceeding 2 years, in both instances, provided the Secretary of State is satisfied that each of the requirements of paragraph 242A is met.

REFUSAL OF EXTENSION OF STAY AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 200–239

242C An extension of stay in the United Kingdom as the spouse or civil partner of a person who has or has had leave to enter or remain under paragraphs 200–239 is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 242A is met.

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 200–239

242D The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the spouse or civil partner of a person who has or has had leave to enter or remain in the United Kingdom under paragraphs 200–239 are that the applicant:

- (i) is married to or civil partner of a person who has limited leave to enter or remain in the United Kingdom under paragraphs 200–239 and who is being granted indefinite leave to remain at the same time; or
- (ii) is married to or civil partner of a person who has indefinite leave to remain in the United Kingdom and who had limited leave to enter or remain under paragraphs 200 – 239 immediately before being granted indefinite leave to remain; and
- (iii) meets the requirements of paragraph 240 (ii) to (v);
- (iv) has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless the applicant is under the age of 18 or aged 65 or over at the time he makes his application; and
- (v) was admitted with a valid United Kingdom entry clearance for entry in this capacity.

INDEFINITE LEAVE TO REMAIN AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 200–239

242E Indefinite leave to remain in the United Kingdom as the spouse or civil partner of a person who has or has had limited leave to enter or remain in the United Kingdom under paragraphs 200–239 may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 242D is met.

REFUSAL OF INDEFINITE LEAVE TO REMAIN AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 200–239

242F Indefinite leave to remain in the United Kingdom as the spouse or civil partner of a person who has or has had limited leave to enter or remain in the United Kingdom

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under paragraphs 200–239 is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 242D is met.]

Note

Paragraphs 240 to 242F inserted by HC 398.

Children of persons with limited leave to enter or remain under paragraphs 200–239

REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE CHILD OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 200–239

243 The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as a child of a person with limited leave to enter or remain in the United Kingdom under paragraphs 200–239 are that:

- (i) he is the child of a parent who has leave to enter or remain in the United Kingdom under paragraphs 200–239; and
- (ii) he is under the age of 18 or has current leave to enter or remain in this capacity; and
- (iii) he is unmarried [and is not a civil partner], has not formed an independent family unit and is not leading an independent life; and
- (iv) he can and will be maintained and accommodated adequately without recourse to public funds in accommodation which his parent(s) own or occupy exclusively; and
- (v) he will not stay in the United Kingdom beyond any period of leave granted to his parent(s); and
- (vi) both parents are being or have been admitted to or allowed to remain in the United Kingdom save where:
 - (a) the parent he is accompanying or joining is his sole surviving parent; or
 - (b) the parent he is accompanying or joining has had sole responsibility for his upbringing; or
 - (c) there are serious and compelling family or other considerations which make exclusion from the United Kingdom undesirable and suitable arrangements have been made for his care; and
- (vii) if seeking leave to enter, he holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, was admitted with a valid United Kingdom entry clearance for entry in this capacity.

Note

Words in square brackets inserted by HC 582.

LEAVE TO ENTER OR REMAIN AS THE CHILD OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 200–239

244 A person seeking leave to enter or remain in the United Kingdom as the child of a person with limited leave to enter or remain in the United Kingdom under paragraphs 200–239 may be admitted to or allowed to remain in the United Kingdom for the same period of leave as that granted to the person given limited leave to enter or remain under paragraphs 200–239 provided that, in relation to an application for leave to enter, he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity or, in the case of an application for limited leave to remain, he was admitted with a valid United Kingdom entry clearance for entry in this capacity and is able to satisfy the Secretary of State that each of the

requirements of paragraph 243(i)–(vi) is met. An application for indefinite leave to remain in this category may be granted provided the applicant was admitted with a valid United Kingdom entry clearance for entry in this capacity and is able to satisfy the Secretary of State that each of the requirements of paragraph 243(i)–(vi) is met and provided indefinite leave to remain is, at the same time, being granted to the person with limited leave to remain under paragraphs 200–239.

REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE CHILD OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 200–239

245 Leave to enter or remain in the United Kingdom as the child of a person with limited leave to enter or remain in the United Kingdom under paragraphs 200–239 is to be refused if, in relation to an application for leave to enter, a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival or, in the case of an application for limited leave to remain, if the applicant was not admitted with a valid United Kingdom entry clearance for entry in this capacity or is unable to satisfy the Secretary of State that each of the requirements of paragraph 243(i)–(vi) is met. An application for indefinite leave to remain in this capacity is to be refused if the applicant was not admitted with a valid United Kingdom entry clearance for entry in this capacity or is unable to satisfy the Secretary of State that each of the requirements of paragraph 243(i)–(vi) is met or if indefinite leave to remain is not, at the same time, being granted to the person with limited leave to remain under paragraphs 200–239.

[PART 6A
POINTS-BASED SYSTEM

[...]

Purpose

[DOCUMENTARY EVIDENCE

245AA

- (a) Where Part 6A or Appendices A to C, or E of these Rules state that specified documents must be provided, that means documents specified by the Secretary of State in the [...] Points Based System Policy Guidance as being specified documents for the route under which the applicant is applying. If the specified documents are not provided, the applicant will not meet the requirement for which the specified documents are required as evidence.
- (b) If the Entry Clearance Officer or Secretary of State has reasonable cause to doubt the genuineness of any document submitted by an applicant which is, or which purports to be, a specified document under Part 6A or Appendices A to C, or E of these Rules and, having taken reasonable steps to verify the document, is unable to verify that it is genuine, the document will be discounted for the purposes of this application.]

Note

Heading deleted by HC 1113.

Paragraph 245AA inserted by HC 607.

Words in square brackets deleted by HC 1113.

Appendix 5 Immigration Rules

[Tier 1 (General) Migrants]

245A This route is for highly skilled migrants who wish to work, or become self-employed in the UK.

Note

Heading inserted by HC 1113.

ENTRY TO THE UK

245B All migrants arriving in the UK and wishing to enter as a Tier 1 (General) Migrant must have a valid entry clearance for entry under this route. If they do not have a valid entry clearance, entry will be refused.

REQUIREMENTS FOR ENTRY CLEARANCE OR LEAVE TO REMAIN

245C To qualify for entry clearance or leave to remain as a Tier 1 (General) Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance or leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) [...]
- (b) The applicant must not fall for refusal under the general grounds for refusal, and if applying for leave to remain, must not be an illegal entrant.
- (c) The applicant must have a minimum of 75 points under [paragraphs 1 to 3 of] [paragraphs 1 to 31 of Appendix A].
- (d) The applicant must have 10 points under Appendix B.
- (e) The applicant must have 10 points under [paragraphs 1 to 2 of] Appendix C.
- (f) An applicant who is applying for leave to remain must have, or have last been granted, entry clearance, leave to enter or remain:
 - (i) as a Highly Skilled Migrant,
 - (ii) as a Tier 1 (General) Migrant,
 - (iii) as an Innovator,
 - (iv) as a Participant in the Fresh Talent: Working in Scotland Scheme,
 - (v) as a Participant in the International Graduates Scheme (or its predecessor, the Science and Engineering Graduates Scheme),
 - (vi) as a Postgraduate Doctor or Dentist,
 - (vii) as a Student,
 - (viii) as a Student Nurse,
 - (ix) as a Student Re-Sitting an Examination,
 - (x) as a Student Writing-Up a Thesis, [...]
 - (xi) as a Work Permit Holder [,]
 - [(xii) as a Businessperson,
 - (xiii) as a Self-employed Lawyer,
 - (xiv) as a Tier 1 (Entrepreneur) Migrant,
 - (xv) as a Tier 1 (Investor) Migrant,
 - (xvi) as a Tier 1 (Post-Study Work) Migrant, [...]
 - (xvii) as a Writer, Composer or Artist,]
 - [(xviii) as a Tier 2 Migrant[, or]]
 - [(xix) as a Tier 4 Migrant.]

- (g) [An applicant who has, or was last granted, leave as a Student, Postgraduate Doctor or Dentist, Student Nurse, Student Re-Sitting an Examination, Student Writing-Up a Thesis or as a Tier 4 Migrant and:]
- (i) is currently being sponsored by a government or international scholarship agency, or
 - (ii) was being sponsored by a government or international scholarship agency, and that sponsorship came to an end 12 months ago or less, must provide the unconditional written consent of the sponsoring Government or agency to the application [and must provide the specified documents to show that this consent has been obtained].

Note

Sub-paragraph 245C(a) deleted by HC 607. Sub-paragraph 245C(c): first words in square brackets inserted by HC 1113, second words in square brackets substituted by HC 607. Sub-paragraph 245C(e): words in square brackets inserted by HC 1113. Sub-paragraphs 245C(f)(x) and 245C(f)(xi) text in square brackets removed and substituted by HC 607. Sub-paragraphs 245C(f)(xii) to 245C(f)(xvii) inserted by HC 607. Sub-paragraph 245C(f)(xvi): words deleted by HC 1113. Sub-paragraph 245C(f)(xvii): words in square brackets inserted by HC 1113. Sub-paragraph 245C(f)(xviii) inserted by HC 1113. Sub-paragraph 245C(g) words in square brackets inserted by HC 1113. Words ‘, or’ in square brackets and sub-para (xix) inserted by HC 314. Words beginning ‘An applicant who’ in square brackets substituted by HC 314.

PERIOD AND CONDITIONS OF GRANT

245D

- (a) Entry clearance will be granted for a period of 3 years.
- (b) Leave to remain will be granted:
 - (i) for a period of 2 years, to an applicant who has, or was last granted, leave as a Tier 1 (General) Migrant,
 - (ii) for a period of 3 years, to any other applicant.
- (c) Entry clearance and leave to remain under this route will be subject to the following conditions:
 - (i) no recourse to public funds,
 - (ii) registration with the police, if this is required by paragraph 326 of these Rules, and
 - (iii) no Employment as a Doctor in Training, unless the applicant:
 - (1) is in the UK and has, or has last been granted, entry clearance, leave to enter or remain as a Highly Skilled Migrant [(provided that grant was not subject to a condition prohibiting Employment as a Doctor in Training), as an Innovator] or as a Postgraduate Doctor or Dentist,
 - (2) is in the UK and has, or has last been granted, entry clearance or leave to remain as a Tier 1 (General) Migrant and that grant was not subject to a condition prohibiting Employment as a Doctor in Training, or
 - (3) has submitted with this application a valid Highly Skilled Migrant Programme Approval Letter, where the application for that approval letter was made on or before 6 February 2008.

Note

Sub-paragraph 245D(c)(iii)(1) words in square brackets inserted by HC 607.

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REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN

245E To qualify for indefinite leave to remain, a Tier 1 (General) Migrant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused[.] [...]

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
- (b) The applicant must have spent a continuous period of 5 years lawfully in the UK, of which the most recent period must have been spent with leave as a Tier 1 (General) Migrant, and the rest may be made up of leave [in any combination of the following categories]:
 - (i) as a Tier 1 (General) Migrant,
 - (ii) as a Highly Skilled Migrant,
 - (iii) as a Work Permit Holder,
 - (iv) as an Innovator[,]
 - [(v) as a Self-Employed Lawyer,
 - (vi) as a Writer, Composer or Artist[,]
 - [(vii) as a Tier 2 Migrant.]
- (c) The applicant must be economically active in the UK, in employment or self-employment or both.
- (d) The applicant must have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, with reference to paragraphs 33B to [33D] of these Rules, unless the applicant is under the age of 18 or aged 65 or over at the time the application is made.

Note

Sub-paragraph 245E(b) words in square brackets substituted and inserted by HC 607.

Words deleted by HC 314.

Words 'in any combination of the following categories' and '33D' in square brackets inserted by HC 314.

Sub-paragraphs (v)–(vi) inserted by HC 607.

Sub-paragraph (vii) inserted by HC 314.

TRANSITIONAL ARRANGEMENTS

245F This paragraph makes special provision for applicants who on 29 February 2008 are in the UK, or on 1 April are in India, and who are in the process of applying to become a Highly Skilled Migrant.

It will also be relevant to applicants who have, or have last been granted, leave to remain as a Highly Skilled Migrant, who are Self-Employed, and who fall within subparagraph (c) below.

- (a) If an applicant has made an application for entry clearance in India as a Highly Skilled Migrant before 1 April 2008, and the application has not been decided before that date, it will be decided in accordance with these Rules in force on 31 March 2008 as set out in Appendix D.
- (b) If an applicant has made an application for limited leave to remain as a Highly Skilled Migrant before 29 February 2008, and the application has not been decided before that date, it will be decided in accordance with these Rules in force on 28 February 2008 as set out in Appendix D.
- (c) If an applicant has made an application in India for entry clearance on or after 1 April 2008, or has made an application in the UK for limited leave to remain on or after 29 February 2008, and has submitted with that application a valid

Highly Skilled Migrant Programme Approval Letter, the applicant will be automatically awarded 75 points under Appendix A and 10 points under Appendix B.

- [(ca) If an applicant has made an application other than in India for entry clearance on or after 30 June 2008, and has submitted with that application a valid Highly Skilled Migrant Programme Approval Letter, the applicant will be automatically awarded 75 points under Appendix A and 10 points under Appendix B.]
- (d) [...]

Requirements:

- (i) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
- (ii) The applicant must have, or have last been granted, entry clearance, leave to enter or remain as a Highly Skilled Migrant which was granted in accordance with these Rules in force on or before 8 November 2006.
- (iii) The applicant must have become Self-Employed in the UK whilst having leave as a Highly Skilled Migrant, and must provide the specified documents.
- (iv) The applicant must have been Self-Employed for at least 4 months prior to the date the current application for leave to remain was made, and the specified documents must be provided.
- (v) The applicant must have ongoing business commitments for at least 6 months after the date the current application for leave to remain was made, and the specified documents must be provided.
- (vi) The applicant must have 10 points under Appendix B.
- (vii) The applicant must have 10 points under Appendix C.

If the requirements above are met, leave to remain as a Tier 1 (General) Migrant will be granted for a period of 3 years, subject to the conditions in paragraph 245D(c) above.

Note

Sub-paragraph 245F(ca) inserted by HC 607.

Sub-paragraph 245F(d) deleted by HC 1113.

DOCUMENTARY EVIDENCE

245G

[...]

Note

Paragraphs 245A–245G inserted by HC 321. Paragraph 245G deleted by HC 607.

[Tier 1 (Entrepreneur) Migrants]

PURPOSE OF THIS ROUTE AND MEANING OF ‘BUSINESS’

245H

- (a) This route is for migrants who wish to establish, join or take over one or more businesses in the UK.
- (b) For the purpose of paragraphs 245G to 245N and paragraphs 32 to 41 of Appendix A ‘business’ means an enterprise as:

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- (i) a sole trader,
- (ii) a partnership, or
- (iii) a company registered in the UK.

ENTRY TO THE UK

245I All migrants arriving in the UK and wishing to enter as a Tier 1 (Entrepreneur) Migrant must have a valid entry clearance for entry under this route. If they do not have a valid entry clearance, entry will be refused.

REQUIREMENTS FOR ENTRY CLEARANCE

245J To qualify for entry clearance as a Tier 1 (Entrepreneur) Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal.
- (b) The applicant must have a minimum of 75 points under paragraphs 32 to 41 of Appendix A.
- (c) The applicant must have a minimum of 10 points under [paragraphs 1 to 3 of] Appendix B.
- (d) The applicant must have a minimum of 10 points under [paragraphs 1 to 2 of] Appendix C.
- [(e) an applicant who has, or was last granted, leave as a student or a Postgraduate doctor or dentist, a student nurse, a student Writing up a Thesis[, a Student Re-Sitting an Examination or as a Tier 4 Migrant] and:
 - (i) is currently being sponsored by a government or international scholarship agency, or
 - (ii) was being sponsored by a government or international scholarship agency, and that sponsorship came to an end 12 months ago or lessmust provide the unconditional written consent of the sponsoring Government or agency to the application and must provide the specified documents to show that this requirement has been met.]

Note

Words in square brackets inserted by HC 1113.

Sub-paragraph 245J(e) inserted by HC 1113. Words 'a Student Re-Sitting an Examination or as a Tier 4 Migrant' in square brackets substituted by HC 314.

PERIOD AND CONDITIONS OF GRANT

245K

- (a) Entry clearance will be granted for a period of 3 years and will be subject to the following conditions:
 - (i) no recourse to public funds,
 - (ii) registration with the police, if this is required by paragraph 326 of these Rules, and
 - (iii) no employment other than working for the business(es) the applicant has established, joined or taken over.

REQUIREMENTS FOR LEAVE TO REMAIN

245L To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
- (b) The applicant must have a minimum of 75 points under paragraphs 32 to 41 of Appendix A.
- (c) The applicant must have a minimum of 10 points under [paragraphs 1 to 3 of] Appendix B.
- (d) The applicant must have a minimum of 10 points under [paragraphs 1 to 2 of] Appendix C.
- (e) The applicant who is applying for leave to remain must have, or have last been granted, entry clearance, leave to enter or remain:
 - (i) as a Highly Skilled Migrant,
 - (ii) as a Tier 1 (General) Migrant,
 - (iii) as a Tier 1 (Entrepreneur) Migrant,
 - (iv) as a Tier 1 (Investor) Migrant,
 - (v) as a Tier 1 (Post-Study Work) Migrant,
 - (vi) as a Businessperson,
 - (vii) as an Innovator,
 - (viii) as an Investor,
 - (ix) as a Participant in the Fresh Talent: Working in Scotland Scheme,
 - (x) as a Participant in the International Graduates Scheme (or its predecessor, the Science and Engineering Graduates Scheme),
 - (xi) as a Postgraduate Doctor or Dentist,
 - (xii) as a Self-employed Lawyer,
 - (xiii) as a Student,
 - (xiv) as a Student Nurse,
 - (xv) as a Student Re-Sitting an Examination,
 - (xvi) as a Student Writing Up a Thesis,
 - (xvii) as a Work Permit Holder, [...]
 - as a Writer, Composer or Artist[, [...]]
 - [(xix) as a Tier 2 Migrant[, or]]
 - [(xx) as a Tier 4 Migrant.]
- (f) An applicant who has, or was last granted, leave as a Student or a Postgraduate Doctor or Dentist [student nurse, student re-sitting an examination[, a Student Writing-Up a Thesis or as a Tier 4 Migrant]].

and:

- (i) is currently being sponsored by a government or international scholarship agency, or
- (ii) was being sponsored by a government or international scholarship agency, and that sponsorship came to an end 12 months ago or less, must provide the [unconditional] written consent of the sponsoring Government or agency to the application [and must provide the specified documents to show that this requirement has been met].

Note

Words in square brackets inserted by HC 1113.

Words deleted by HC 1113 and HC 314 respectively.

Sub-paragraph (xx) inserted by HC 314.

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Words “, a Student Writing-Up a Thesis or as a Tier 4 Migrant’ in square brackets inserted by HC 314.

[PERIOD, CONDITIONS AND CURTAILMENT OF GRANT]

245M

- (a) Leave to remain will be granted:
 - (i) for a period of 2 years, to an applicant who has, or was last granted, leave as a Tier 1 (Entrepreneur) Migrant,
 - (ii) for a period of 3 years, to any other applicant.
- (b) Leave to remain under this route will be subject to the following conditions:
 - (i) no recourse to public funds,
 - (ii) registration with the police, if this is required by paragraph 326 of these Rules, and
 - (iii) no employment, other than working for the business or businesses which he has established, joined or taken over.
- (c) Without prejudice to the grounds for curtailment in paragraph 323 of these rules, leave to enter or remain granted to a Tier 1 (entrepreneur) Migrant may be curtailed if, within 3 months of the date specified in paragraph (d), the applicant has not done one or more of the following things:
 - (i) registered with HM revenue and Customs as self-employed,
 - (ii) registered a new business in which he is a director, or
 - (iii) registered as a director of an existing business.
- (d) The date referred to in paragraph (c) is:
 - (i) the date of the applicant's entry to the UK, in the case of an applicant granted entry clearance as a Tier 1 (entrepreneur) Migrant where there is evidence to establish the applicant's date of entry to the UK,
 - (ii) the date of the grant of entry clearance to the applicant, in the case of an applicant granted entry clearance as a Tier 1 (entrepreneur) Migrant where there is no evidence to establish the applicant's date of entry to the UK, or
 - (iii) the date of the grant of leave to remain to the applicant, in any other case.
- (e) Paragraph 245M(c) does not apply where the applicant's last grant of leave prior to the grant of the leave that he currently has was as a Tier 1 (entrepreneur) Migrant, a Businessperson or an innovator.]

Note

Sub-paragraphs 245M(c)–(e) inserted by HC 1113.

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN

245N To qualify for indefinite leave to remain as a Tier 1 (Entrepreneur) Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused[.] [...]

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
- (b) The applicant must be engaged in business activity at the time of his application and the applicant must provide specified evidence to show this.

- (c) The applicant must have spent a continuous period of 5 years Lawfully in the UK, of which the most recent period must have been spent with leave as a Tier (1) (Entrepreneur) Migrant, and the rest may be made up of leave [in any combination of the following categories]:
 - (i) as a Tier 1 (Entrepreneur) Migrant,
 - (ii) as a Businessperson,
 - (iii) as an Innovator.
- (d) The applicant must have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, with reference to paragraphs 33B to [33D] of these Rules, unless the applicant is under the age of 18 or aged 65 or over at the time the application is made.

Note

Words in square brackets substituted by HC 314.

Words deleted by HC 314.

Tier 1 (Investor) Migrants

PURPOSE

245O This route is for high net worth individuals making a substantial financial investment to the UK.

ENTRY TO THE UK

245P All migrants arriving in the UK and wishing to enter as a Tier 1 (Investor) Migrant must have a valid entry clearance for entry under this route. If they do not have a valid entry clearance, entry will be refused.

REQUIREMENTS FOR ENTRY CLEARANCE

245Q To qualify for entry clearance or leave to remain as a Tier 1 (Investor) Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal.
- (b) The applicant must have a minimum of 75 points under paragraphs 42 to 50 of Appendix A.
- [(c) an applicant who has, or was last granted, leave as a student or a Postgraduate doctor or dentist, a student nurse[, a Student Re-Sitting an Examination, a Student Writing-Up a Thesis or as a Tier 4 Migrant] and:
 - (i) is currently being sponsored by a government or international scholarship agency, or
 - (ii) was being sponsored by a government or international scholarship agency, and that sponsorship came to an end 12 months ago or less must provide the unconditional written consent of the sponsoring Government or agency to the application and must provide the specified documents to show that this requirement has been met.]

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Note

Sub-paragraphs 245Q(c) inserted by HC 1113.

Words in square brackets substituted by HC 314.

PERIOD AND CONDITIONS OF GRANT

245R

- (a) Entry clearance will be granted for a period of 3 years and will be subject to the following conditions:
- (i) no recourse to public funds,
 - (ii) registration with the police, if this is required by paragraph 326 of these Rules, and
 - (iii) no Employment as a Doctor in Training.

REQUIREMENTS FOR LEAVE TO REMAIN

245S To qualify for leave to remain as a Tier 1 (Investor) Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
- (b) The applicant must have a minimum of 75 points under paragraphs 42 to 50 of Appendix A.
- (c) The applicant must have, or have last been granted, entry clearance, leave to enter or remain:
- (i) as a Highly Skilled Migrant,
 - (ii) as a Tier 1 (General) Migrant,
 - (iii) as a Tier 1 (Entrepreneur) Migrant,
 - (iii) as a Tier 1 (Investor) Migrant,
 - (iv) as a Tier 1 (Post-Study Work) Migrant,
 - (v) as a Businessperson,
 - (vi) as an Innovator,
 - (vii) as an Investor,
 - (viii) as a Student,
 - (ix) as a Student Nurse,
 - (x) as a Student Re-Sitting an Examination,
 - (xi) as a Student Writing Up a Thesis,
 - (xii) as a Work Permit Holder, [...]
 - as a Writer, Composer or Artist[, [...]]
 - (xiv) as a Writer, Composer or Artist, [...]
 - [(xv) as a Tier 2 Migrant[, or]]
 - [(xvi) as a Tier 4 Migrant.]
- (d) An applicant who has, or was last granted, leave as a Student[, student nurse, student re-sitting an examination[, Student Writing-Up a Thesis or as a Tier 4 Migrant]] and:
- (i) is currently being sponsored by a government or international scholarship agency, or
 - (ii) was being sponsored by a government or international scholarship agency, and that sponsorship came to an end 12 months ago or less,

must provide the [unconditional] written consent of the sponsoring Government or agency to the application [and must provide the specified documents to show that this requirement has been met.]

Note

Words in square brackets inserted by HC 1113, words deleted by HC 1113.

Sub-paragraph (xvi) inserted by HC 314. Words ' , Student Writing-Up a Thesis or as a Tier 4 Migrant' in square brackets substituted by HC 314.

[PERIOD, CONDITIONS AND CURTAILMENT OF GRANT]

245T

- (a) Leave to remain will be granted:
 - (i) for a period of 2 years, to an applicant who has, or was last granted, leave as a Tier 1 (Investor) Migrant,
 - (ii) for a period of 3 years, to any other applicant.
- (b) Leave to remain under this route will be subject to the following conditions:
 - (i) no recourse to public funds,
 - (ii) registration with the police, if this is required by paragraph 326 of these Rules, andno Employment as a Doctor in Training.
- [(c) Without prejudice to the grounds for curtailment in paragraph 323 of these rules, leave to enter or remain as a Tier 1 (investor) Migrant may be curtailed if within 3 months of the date specified in paragraph (d), the applicant has not invested, or had invested on his behalf, at least £750,000 of his capital in the UK by way of UK Government bonds, share capital or loan capital in active and trading UK registered companies other than those principally engaged in property investment.
- (d) The date referred to in paragraph (c) is:
 - (i) the date of the applicant's entry to the UK, in the case of an applicant granted entry clearance as a Tier 1 (investor) Migrant where there is evidence to establish the applicant's date of entry to the UK,
 - (ii) the date of the grant of entry clearance to the applicant, in the case of an applicant granted entry clearance as a Tier 1 (investor) Migrant where there is no evidence to establish the applicant's date of entry to the UK, or
 - (iii) the date of the grant of leave to remain to the applicant, in any other case.
- (e) Paragraph 245T(c) does not apply where the applicant's last grant of leave prior to the grant of the leave that he currently has was as a Tier 1 (investor) Migrant or as an investor.]

Note

Sub-paragraphs (c)–(e) inserted by HC 1113.

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN

245U To qualify for indefinite leave to remain, a Tier 1 (Investor) Migrant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused[.] [...]

Requirements:

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- (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
- (b) The applicant must have spent a continuous period of 5 years Lawfully in the UK, of which the most recent period must have been spent with leave as a Tier 1 (Investor) Migrant, and the rest may be made up of leave [in any combination of the following categories]:
 - (i) as a Tier 1 (Investor) Migrant,
 - (ii) as an Investor.
- (c) The applicant must have maintained the investment referred to in Table 8 of Appendix A throughout the period of 5 years referred to in subparagraph (b) above other than in the first 3 months of that period and, in relation to time spent with leave as a Tier 1 (Investor) Migrant, the applicant must provide specified documents to show that this requirement has been met.
- (d) The applicant must have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, with reference to paragraphs 33B to 33F of these Rules, unless the applicant is under the age of 18 or aged 65 or over at the time the application is made.

Note

Words in square brackets inserted by HC 314.

Words deleted by HC 314.

Tier 1 (Post-study Work) Migrants

PURPOSE

245V The purpose of this route is to encourage international graduates who have studied in the UK to stay on and do skilled or highly skilled work.

ENTRY TO THE UK

245W All migrants arriving in the UK and wishing to enter as a Tier 1 (Post-Study Work) Migrant must have a valid entry clearance for entry under this route. If they do not have a valid entry clearance, entry will be refused.

REQUIREMENTS FOR ENTRY CLEARANCE

245X To qualify for entry clearance as a Tier 1 (Post-Study Work) Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal.
- (b) The applicant must not previously have been granted entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant[, as a Participant in the international Graduates scheme (or its predecessor, the science and engineering Graduates scheme), or as a Participant in the fresh Talent: Working in Scotland scheme.
- (c) The applicant must have a minimum of 75 points under paragraphs 51 to 58 of Appendix A.

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- (d) The applicant must have a minimum of 10 points under [paragraphs 1 to 3 of Appendix B.
- (e) The applicant must have a minimum of 10 points under [paragraphs 1 to 2 of Appendix C.
- [(f) if:
 - (i) the studies that led to the qualification for which the applicant obtains points under paragraphs 51 to 58 of Appendix A were sponsored by a Government or international scholarship agency, and (ii) those studies came to an end 12 months ago or less the applicant must provide the unconditional written consent of the sponsoring Government or agency to the application and must provide the specified documents to show that this requirement has been met.]

Note

Words in square brackets inserted by HC 1113.

Sub-paragraph (f) inserted by HC 1113.

PERIOD AND CONDITIONS OF GRANT

245Y Entry clearance will be granted for a period of 2 years and will be subject to the following conditions:

- (a) no recourse to public funds,
- (b) registration with the police, if this is required by paragraph 326 of these Rules, and
- (c) no Employment as a Doctor in Training.

REQUIREMENTS FOR LEAVE TO REMAIN

245Z To qualify for leave to remain as a Tier 1 (Post-Study Work) Migrant, an applicant must meet the requirements listed below. Subject to paragraph 245ZA(i), if the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
- (b) The applicant must not previously have been granted entry clearance or leave to remain as a Tier 1 (Post-Study Work) migrant.
- (c) The applicant must have a minimum of 75 points under paragraphs 51 to 58 of Appendix A.
- (d) The applicant must have a minimum of 10 points under [paragraphs 1 to 3 of] Appendix B.
- (e) The applicant must have a minimum of 10 points under [paragraphs 1 to 2 of] Appendix C.
- (f) The applicant must have, or have last been granted, entry clearance, leave to enter or leave to remain:
 - (i) as a Participant in the Fresh Talent: Working in Scotland Scheme,
 - (ii) as a Participant in the International Graduates Scheme (or its predecessor, the Science and Engineering Graduates Scheme),
 - (iii) as a Student[, provided the applicant has not previously been granted leave in any of the categories referred to in paragraphs (i) and (ii) above],

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- (iv) as a Student Nurse [provided the applicant has not previously been granted leave in any of the categories referred to in paragraphs (i) and (ii) above],
- (v) as a Student Re-Sitting an Examination, provided the applicant has not previously been granted leave in any of the categories referred to in paragraphs (i) and (ii) above], [...]
- (vi) as a Student Writing Up a Thesis[, provided the applicant has not previously been granted leave as a Tier 1 Migrant or in any of the categories referred to in paragraphs (i) and (ii) above][, or]
- [(vii) as a Tier 4 Migrant, provided the applicant has not previously been granted leave as a Tier 1 (Post-Study Work) Migrant or in any of the categories referred to in paragraphs (i) and (ii) above.]
- (g) An applicant who has, or was last granted leave as a Participant in the Fresh Talent: Working in Scotland Scheme must be a British National (Overseas), British overseas territories citizen, British Overseas citizen, British protected person or a British subject as defined in the British Nationality Act 1981.
- [(h) if:
 - (i) the studies that led to the qualification for which the applicant obtains points under paragraphs 51 to 58 of Appendix A were sponsored by a Government or international scholarship agency, and
 - (ii) those studies came to an end 12 months ago or less the applicant must provide the unconditional written consent of the sponsoring Government or agency to the application and must provide the specified documents to show that this requirement has been met.]

Note

Words in square brackets inserted by HC 1113.

Sub-paragraph (f): words in square brackets inserted by HC 314.

Sub-paragraph (h) substituted by HC 1113.

PERIOD AND CONDITIONS OF GRANT

245ZA

- (a) Leave to remain will be granted:
 - (i) for a period of the difference between 2 years and the period of the last grant of entry clearance, leave to enter or remain, to an applicant who has or was last granted leave as a Participant in the Fresh Talent: Working in Scotland Scheme, as a Participant in the International Graduates Scheme (or its predecessor the Science and Engineering Graduates Scheme). If this calculation results in no grant of leave then leave to remain is to be refused;
 - (ii) for a period of 2 years, to any other applicant.
- (b) Leave to remain under this route will be subject to the following conditions:
 - (i) no access to public funds,
 - (ii) registration with the police, if this is required by paragraph 326 of these Rules, and
 - (iii) no Employment as a Doctor in Training unless the applicant has, or has last been granted, entry clearance, leave to enter or remain as a Participant in the International Graduates Scheme (or its predecessor, the Science and Engineering Graduates Scheme) or as a Participant in the Fresh Talent: Working in Scotland Scheme.]

Note

Paragraphs 245H to 245ZA inserted by HC 607.

[Tier 2 migrants

245ZB Purpose of this route and definitions

- (a) This route enables UK employers to recruit workers from outside the EEA to fill a particular vacancy that cannot be filled by a British or EEA worker.
- (b) in paragraphs 245ZB to 245Zl and paragraphs 59 to 100 of Appendix A: 'employment' includes unpaid employment, 'length of the period of engagement' is the period beginning with the employment start date as recorded on the Certificate of sponsorship Checking service entry which relates to the Certificate of sponsorship reference number for which the migrant was awarded points under paragraphs 59 to 100 of Appendix A and ending on the employment end date as recorded in the same entry, and 'working for the same employer' includes working for the same business or concern as at the time of the earlier grant of leave if that business or concern has, since that date, merged or been taken over by another entity.

245ZC Entry clearance

All migrants arriving in the UK and wishing to enter as a Tier 2 Migrant must have a valid entry clearance for entry under this route. if they do not have a valid entry clearance, entry will be refused.

245ZD Requirements for entry clearance

To qualify for entry clearance as a Tier 2 Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance will be granted. if the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal.
- (b) if applying as a Tier 2 (General) Migrant or as a Tier 2 (intra-Company Transfer) Migrant, the applicant must have a minimum of 50 points under paragraphs 59 to 84 of Appendix A.
- (c) if applying as a Tier 2 (Minister of religion) Migrant, the applicant must have a minimum of 50 points under paragraphs 85 to 92 of Appendix A.
- (d) if applying as a Tier 2 (sportsperson) Migrant, the applicant must have a minimum of 50 points under paragraphs 93 to 100 of Appendix A.
- (e) Unless the applicant is applying as a Tier 2 (intra-Company Transfer) Migrant, the applicant must have a minimum of 10 points under paragraphs 4 to 6 of Appendix B.
- (f) The applicant must have a minimum of 10 points under paragraphs 4 to 5 of Appendix C.
- (g) an applicant who has, or was last granted, leave as a student, a student nurse, a student re-sitting an examination, a student Writing up a Thesis[, a Postgraduate Doctor or Dentist or a Tier 4 Migrant] and:
 - (i) is currently being sponsored by a government or international scholarship agency, or
 - (ii) was being sponsored by a government or international scholarship agency, and that sponsorship came to an end 12 months ago or less must provide the unconditional written consent of the sponsoring Government or agency to the application and must provide the specified documents to show that this requirement has been met.
- (h) The applicant must be at least 16 years old.

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- (i) if the sponsor is a limited company, the applicant must not own more than 10% of its shares.

Note

Words in square brackets substituted by HC 314.

245ZE Period and conditions of grant

- (a) entry clearance will be granted for:
 - (i) a period equal to the length of the period of engagement plus 1 month,
or
 - (ii) a period of 3 years and 1 month

whichever is the shorter.

- (b) entry clearance will be granted with effect from 14 days before the date that the Certificate of sponsorship Checking service records as the start date for the applicant's employment in the UK, unless entry clearance is being granted less than 14 days before that date, in which case it will be granted with immediate effect.
- (c) entry clearance will be subject to the following conditions:
 - (i) no recourse to public funds,
 - (ii) registration with the police, if this is required by paragraph 326 of these rules, and
 - (iii) no employment except:
 - (1) working for the sponsor in the employment that the Certificate of sponsorship Checking service records that the migrant is being sponsored to do,
 - (2) supplementary employment, and
 - (3) voluntary work.
- (e)(i) applicants who meet the requirements for entry clearance and who obtain points under paragraphs 59 to 84 of Appendix A including points under the intra-company transfer provisions in Table 10 of that Appendix shall be granted entry clearance as a Tier 2 (intra-Company Transfer) Migrant.
- (ii) applicants who meet the requirements for entry clearance and who obtain points under paragraphs 59 to 84 of Appendix A but who do not obtain points under the intra-company transfer provisions in Table 10 of that Appendix shall be granted entry clearance as a Tier 2 (General) Migrant.
- (iii) applicants who meet the requirements for entry clearance and who obtain points under paragraphs 85 to 92 of Appendix A shall be granted entry clearance as a Tier 2 (Minister of religion) Migrant.
- (iv) applicants who meet the requirements for entry clearance and who obtain points under paragraphs 93 to 100 of Appendix A shall be granted entry clearance as a Tier 2 (sportsperson) Migrant.

245ZF Requirements for leave to remain

To qualify for leave to remain as a Tier 2 Migrant under this rule, an applicant must meet the requirements listed below. if the applicant meets these requirements, leave to remain will be granted. if the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.

- (b) if the applicant is applying for leave to remain as a Tier 2 (intra-Company Transfer) Migrant:
 - (i) the applicant must have, or have last been granted, entry clearance, leave to enter or leave to remain as either:
 - (1) a Tier 2 (intra-Company Transfer) Migrant, or
 - (2) as a Qualifying Work Permit Holder, provided that the work permit was granted because the applicant was the subject of an intra-company transfer, and
 - (ii) the applicant must still be working for the same employer as he was at the time of that earlier grant of leave.
- (c) if the applicant is applying for leave to remain as a Tier 2 (General) Migrant, a Tier 2 (Minister of religion) Migrant or a Tier 2 (sportsperson) Migrant, the applicant must have, or have last been granted, entry clearance, leave to enter or leave to remain:
 - (i) as a Tier 1 Migrant,
 - (ii) as a Tier 2 Migrant,
 - (iii) as a Highly skilled Migrant,
 - (iv) as an innovator,
 - (v) as a Jewish agency employee,
 - (vi) as a Member of the operational Ground staff of an overseas-owned airline,
 - (vii) as a Minister of religion, Missionary or Member of a religious order,
 - (viii) as an overseas Qualified nurse or Midwife,
 - (ix) as a Participant in the fresh Talent: Working in Scotland scheme,
 - (x) as a Participant in the international Graduates scheme (or its predecessor, the science and engineering Graduates scheme),
 - (xi) as a Person Writing Up a Thesis,
 - (xii) as a Postgraduate doctor or dentist,
 - (xiii) as a Qualifying Work Permit Holder,
 - (xiv) as a representative of an overseas newspaper, news agency or broadcasting organisation,
 - (xv) as a student,
 - (xvi) as a student re-sitting an examination,
 - (xvii) as a student nurse, [...]
 - (xviii) as a student Union sabbatical officer[,]
 - [(xix) as a Tier 4 Migrant, or
 - (xx) as a Tier 5 (Temporary Worker) Migrant.]
- (d) an applicant who has, or was last granted, leave as [a Tier 4 Migrant,] a student, a student nurse, a student re-sitting an examination, a student Writing up a Thesis[, a Postgraduate Doctor or Dentist or a Tier 4 Migrant] and:
 - (i) is currently being sponsored by a government or international scholarship agency, or
 - (ii) was being sponsored by a government or international scholarship agency, and that sponsorship came to an end 12 months ago or less must provide the unconditional written consent of the sponsoring Government or agency to the application and must provide the specified documents to show that this requirement has been met.
- [(da)
 - (i) An applicant who was last granted leave as a Tier 5 (Temporary Worker) Migrant must have been granted such leave in either the Government Authorised Exchange sub-category or the Creative and Sporting sub-category of Tier 5.
 - (ii) If the applicant was last granted leave in the Government Authorised Exchange sub-category:
 - (1) that leave must have been granted in order to allow the applicant to work as an overseas qualified nurse or midwife, and

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- (2) the applicant must have completed their registration with the Nursing and Midwifery Council and the applicant must provide the specified documents to show that the requirements in paragraph (ii)(1) and (2) have been met.
- (iii) If the applicant was last granted leave in the Creative and Sporting sub-category, that leave must have been granted in order to allow the applicant to work as a professional footballer and the applicant must provide the specified documents to show that this requirement has been met.]
- (e) if applying as a Tier 2 (General) Migrant or as a Tier 2 (intra-Company Transfer) Migrant, the applicant must have a minimum of 50 points under paragraphs 59 to 84 of Appendix A.
- (f) if applying as a Tier 2 (Minister of religion) Migrant, the applicant must have a minimum of 50 points under paragraphs 85 to 92 of Appendix A.
- (g) if applying as a Tier 2 (sportsperson) Migrant, the applicant must have a minimum of 50 points under paragraphs 93 to 100 of Appendix A.
- (h) The applicant must have a minimum of 10 points under paragraphs 4 to 6 of Appendix B, unless the applicant:
 - (i) is applying for leave to remain as a Tier 2 (intra-Company Transfer) Migrant, and
 - (ii) is not seeking a grant of leave to remain that would extend his total stay in this category beyond 3 years.
- (i) The applicant must have a minimum of 10 points under paragraphs 4 to 5 of Appendix C.
- (j) The applicant must be at least 16 years old.
- (k) if the sponsor is a limited company, the applicant must not own more than 10% of its shares.

Note

Words in square brackets substituted by HC 314.

Sub-paragraphs (c)(xix) and (xx) inserted by HC 314.

Sub-paragraph (da) inserted by HC 314.

Words deleted by HC 314.

245ZG Period and conditions of grant

- [(a) In the cases set out in paragraph (b), leave to remain will be granted for:
 - (i) subject to paragraph (ii), a period equal to 5 years less X, where X is the period of time, beginning with the date on which the applicant was last granted entry clearance or leave to enter, that the applicant has already spent in the UK with entry clearance, leave to enter or remain in any combination of the categories set out in paragraph (b),
 - (ii) where the calculation in paragraph (1) would lead to a period of leave of less than 2 years or a period of leave longer than the length of the period of engagement plus 14 days, a period equal to:
 - (1) the length of the period of engagement plus 14 days, or
 - (2) 2 years.whichever is the shorter.]
- (b) The cases referred to in paragraph (a) are those where [the applicant has not already spent a period greater than 5 years in the UK since the applicant], or was last granted, entry clearance, leave to enter or leave to remain as:
 - (i) a Jewish agency employee, provided he is still working for the same employer,
 - (ii) a Member of the operational Ground staff of an overseas-owned airline, provided he is still working for the same employer,

- (iii) a Minister of religion, Missionary or Member of a religious order, provided he is still working for the same employer,
 - (iv) a Qualifying Work Permit Holder, provided he is still working for the same employer,
 - (v) a representative of an overseas newspaper, news agency or Broadcasting organisation, provided he is still working for the same employer,
 - (vi) a Tier 2 (Minister of religion) Migrant, provided:
 - (1) he previously had leave as a Minister of religion, Missionary or Member of a religious order, and received his last grant of entry clearance or leave to enter in one of those categories,
 - (2) at some time during that period of leave as a Minister of religion, Missionary or Member of a religious order he was granted leave to remain as a Tier 2 (Minister of religion) Migrant, and
 - (3) he is still working for the same employer as he was when he was last in the UK with leave as a Minister of religion, Missionary or Member of a religious order,
 - (vii) a Tier 2 (sportsperson) Migrant, provided:
 - (1) he previously had leave as a Work Permit Holder [...], [and]
 - (2) at some time during that period of leave as a Work Permit Holder he was granted leave to remain as a Tier 2 (sportsperson) Migrant[.]
 - (3) [...]
 - (viii) a Tier 2 (General) or Tier 2 (intra-Company Transfer) Migrant, provided:
 - (1) in this application for leave to remain, he has been awarded points under the transitional arrangements provisions in Table 11 of Appendix A,
 - (2) his last grant of leave was as a Qualifying Work Permit Holder, a representative of an overseas newspaper, news agency or Broadcasting organisation, a Minister of religion, Missionary or Member of a religious order, a Member of the operational Ground staff of an overseas-owned airline, a Jewish agency employee, a Tier 2 (Minister of religion) Migrant or Tier 2 (sportsperson) Migrant, and
 - (3) he received his last grant of entry clearance or leave to enter in that category less than 5 years prior to this application for leave to remain.
- (c) Where:
- (i) paragraph (a) does not apply,
 - (ii) the applicant has, or was last granted, entry clearance, leave to enter or leave to remain as a Tier 2 Migrant, and
 - (iii) the applicant is working for the same employer [doing the same job] as he was at the time of that earlier grant leave to remain will be granted for a period equal to the length of the period of engagement plus 14 days, or for a period of 2 years, whichever is the shorter.
- (d) in all other cases, leave to remain will be granted for:
- (i) a period equal to the length of the period of engagement plus 14 days, or
 - (ii) 3 years whichever is the shorter.
- (e) leave to remain will be granted subject to the following conditions:
- (i) no recourse to public funds,
 - (ii) registration with the police, if this is required by paragraph 326 of these rules, and
 - (iii) no employment except:
 - (1) working for the sponsor in the employment that the Certificate of sponsorship Checking service entry records that the migrant is being sponsored to do,

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- (2) supplementary employment, and
 - (3) voluntary work.
- (f)(i) applicants who meet the requirements for leave to remain and who obtain points under paragraphs 59 to 84 of Appendix A including points under the intra-company transfer provisions in Table 10 of that Appendix shall be granted leave to remain as a Tier 2 (intra-Company Transfer) Migrant.
- (ii) applicants who meet the requirements for leave to remain and who obtain points under paragraphs 59 to 84 of Appendix A but who do not obtain points under the intra-company transfer provisions in Table 10 of that Appendix shall be granted leave to remain as a Tier 2 (General) Migrant.
- (iii) applicants who meet the requirements for leave to remain and who obtain points under paragraphs 85 to 92 of Appendix A shall be granted leave to remain as a Tier 2 (Minister of religion) Migrant.
- (iv) applicants who meet the requirements for leave to remain and who obtain points under paragraphs 93 to 100 of Appendix A shall be granted leave to remain as a Tier 2 (sportsperson) Migrant.

Note

Sub-paragraph (a) substituted by HC 314.

Words in square brackets inserted by HC 314.

Words deleted by HC 314.

245ZH Requirements for indefinite leave to remain

To qualify for indefinite leave to remain as a Tier 2 Migrant, an applicant must meet the requirements listed below. if the applicant meets these requirements, indefinite leave to remain will be granted. if the applicant does not meet these requirements, the application will be refused[.] [...]

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
- (b) The applicant must have spent a continuous period of 5 years lawfully in the UK, of which the most recent period must have been spent with leave as a Tier 2 Migrant, and the rest may be made up of leave [in any combination of the following categories]:
 - (i) as a Member of the operational Ground staff of an overseas-owned airline,
 - (ii) as a Minister of religion, Missionary or Member of a religious order,
 - (iii) as a Qualifying Work Permit Holder,
 - (iv) as a representative of an overseas newspaper, news agency or Broadcasting organisation,
 - (v) as a Tier 1 Migrant, other than a Tier 1 (Post study Work) Migrant, or
 - (vi) as a Tier 2 Migrant.
- (c) subject to paragraph (d), the sponsor that issued the Certificate of sponsorship that led to the applicant's last grant of leave must certify in writing that he still requires the applicant for employment.
- (d) The requirement in paragraph (c) does not apply if that sponsor has been issued with a further Certificate of sponsorship in respect of the applicant that would result in the applicant obtaining the necessary points under Appendix A if the applicant were to make an application for leave to remain under paragraph 245Zf.
- (e) The applicant must have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, with reference to

paragraphs 33B to [33D] of these rules, unless the applicant is under the age of 18 or aged 65 or over at the time the application is made.

Note

Words in square brackets inserted by HC 314.

Words deleted by HC 314.

Tier 5 (Youth Mobility Scheme) temporary migrants

245ZI Purpose of this route

This route is for sponsored young people from participating countries who wish to live and work temporarily in the UK.

245ZJ Entry clearance

All migrants arriving in the UK and wishing to enter as a Tier 5 (youth Mobility scheme) Temporary Migrant must have a valid entry clearance for entry under this route. If they do not have a valid entry clearance, entry will be refused.

245ZK Requirements for entry clearance

To qualify for entry clearance as a Tier 5 (youth Mobility scheme) Temporary Migrant, an applicant must meet the requirements listed below. However, whether or not the requirements listed below are met, if a citizen of a country listed in Appendix G makes an application for entry clearance which, if granted, would mean that the annual allocation of places under this route for citizens of that country would be exceeded, the application will be refused. The applicant will also be refused if the requirements listed below are not met.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal.
- (b) The applicant must be:
 - (i) a citizen of a country listed in Appendix G to these rules, or
 - (ii) a British overseas Citizen, British overseas Territories Citizen or British national (overseas), as defined by the British nationality act 1981

and must provide the specified documents to show that this requirement has been met.

- (c) The applicant must have a minimum of 40 points under paragraphs 101 to 104 of Appendix A.
- (d) The applicant must have a minimum of 10 points under paragraphs 6 to 7 of Appendix C.
- (e) The applicant must have no children under the age of 18 who are either living with him or for whom he is financially responsible.
- (f) The applicant must not previously have spent time in the UK as a Working Holidaymaker or a Tier 5 (youth Mobility scheme) Temporary Migrant.

245ZL Period and conditions of grant

Entry clearance will be granted for a period of 2 years subject to the following conditions:

- (a) no recourse to public funds,

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- (b) registration with the police, if this is required by paragraph 326 of these rules,
- (c) no employment as a professional sportsperson (including as a sports coach), or as a doctor in Training, and
- (d) no self employment, except where the following conditions are met:
 - (i) the migrant has no premises which he owns, other than his home, from which he carries out his business,
 - (ii) the total value of any equipment used in the business does not exceed £5,000, and
 - (iii) the migrant has no employees.

Tier 5 (Temporary Worker) migrants

245ZM Purpose of this route and definitions

- (a) This route is for certain types of temporary worker whose entry helps to satisfy cultural, charitable, religious or international objectives.
- (b) for the purposes of paragraphs 245ZM to [245ZS] and paragraphs 105 to [112] of Appendix A:
 - a migrant has 'consecutive engagements' if:
 - (i) more than one Certificate of sponsorship reference number has been allocated in respect of the migrant,
 - (ii) there is no gap of more than 14 days between any of the periods of engagement, and
 - (iii) all the Certificate of sponsorship Checking service references record that the migrant is being sponsored in the creative and sporting subcategory of the Tier 5 (Temporary Worker) Migrant route.

'Period of engagement' means a period beginning with the employment start date as recorded on the Certificate of sponsorship Checking service entry which relates to the Certificate of sponsorship reference number for which the migrant was awarded points under paragraphs 105 to 111 of Appendix A, and ending on the employment end date as recorded in the same entry.

Note

Words in square brackets inserted by HC 314.

245ZN Entry clearance

- (a) Subject to paragraph (b), all migrants arriving in the UK and wishing to enter as a Tier 5 (Temporary Worker) Migrant must have a valid entry clearance for entry under this route. If they do not have a valid entry clearance, entry will be refused.
- (b) A migrant arriving in the UK and wishing to enter as a Tier 5 (Temporary Worker) Migrant who does not have a valid entry clearance will not be refused entry if the following conditions are met:
 - (i) the migrant is not a visa national,
 - (ii) the Certificate of sponsorship reference number provided by the migrant leading to points being obtained under Appendix A links to an entry in the Certificate of sponsorship Checking service recording that their sponsor has sponsored them in the creative and sporting subcategory of the Tier 5 (Temporary Worker) Migrant route,
 - (iii) if the migrant has consecutive engagements, the total length of all the periods of engagement, together with any gap between those engagements, is 3 months or less,

- (iv) if the migrant does not have consecutive engagements, the total length of the period of engagement is 3 months or less, and
- (v) the migrant meets the requirements in paragraph 245ZO below.

245ZO Requirements for entry clearance or leave to enter

To qualify for entry clearance or, as the case may be, leave to enter, as a Tier 5 (Temporary Worker) Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal.
- (b) The applicant must have a minimum of 30 points under paragraphs 105 to [112] of Appendix A.
- (c) The applicant must have a minimum of 10 points under paragraphs 8 to 9 of Appendix C.

Note

Words in square brackets inserted by HC 314.

245ZP Period and conditions of grant

- (a) Where paragraph 245ZN(b) applies and the applicant has consecutive engagements, leave to enter will be granted for:
 - (i) a period commencing not more than 14 days before the beginning of the first period of engagement and ending 14 days after the end of the last period of engagement, or
 - (ii) 3 months

whichever is the shorter.

- (b) Where paragraph 245ZN(b) applies and the applicant does not have consecutive engagements, leave to enter will be granted for:
 - (i) a period commencing not more than 14 days before the beginning of the period of engagement and ending 14 days after the end of that period of engagement, or
 - (ii) 3 months

whichever is the shorter.

- (c) Where paragraph 255ZN(b) does not apply and the Certificate of sponsorship Checking service reference number for which the applicant was awarded points under Appendix A records that the applicant is being sponsored in the creative and sporting or charity workers sub-category of the Tier 5 (Temporary Worker) Migrant route, leave to enter will be granted for:
 - (i) a period commencing 14 days before the beginning of the period of engagement (or of the first period of engagement, where the applicant has consecutive engagements) and ending 14 days after the end of that period of engagement (or of the last period of engagement, where the applicant has consecutive engagements), or
 - (ii) 12 months whichever of (i) or (ii) is the shorter.
- (d) Where paragraph 255ZN(b) does not apply and the Certificate of sponsorship Checking service reference number for which the applicant was awarded points under Appendix A records that the applicant is being sponsored in the religious

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workers, government authorised exchange or international agreement subcategory of the Tier 5 (Temporary Worker) Migrant route, leave to enter will be granted for:

- (i) a period commencing 14 days before the beginning of the period of engagement and ending 14 days after the end of that period of engagement, or
- (ii) 2 years

whichever is the shorter.

- (e) leave to enter and entry clearance will be granted subject to the following conditions:
 - (i) no recourse to public funds,
 - (ii) registration with the police if this is required by paragraph 326 of these rules, and
 - (iii) no employment except:
 - (1) unless paragraph (2) applies, working for the person who for the time being is the sponsor in the employment that the Certificate of sponsorship Checking service records that the migrant is being sponsored to do for that sponsor,
 - (2) in the case of a migrant whom the Certificate of sponsorship Checking service records as being sponsored in the government authorised exchange subcategory of Tier 5 (Temporary Workers), working for any person for whom the sponsor directs him to work, provided that work is in the employment that the Certificate of sponsorship Checking service records that the migrant is being sponsored to do, and
 - (3) supplementary employment.

245ZQ Requirements for leave to remain

To qualify for leave to remain as a Tier 5 (Temporary Worker) Migrant under this rule, an applicant must meet the requirements listed below. subject to paragraph 245ZR(a), if the applicant meets these requirements, leave to remain will be granted. if the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
- (b) The applicant must have, or have last been granted, entry clearance, leave to enter or leave to remain:
 - (i) as a Tier 5 (Temporary Worker) Migrant, or
 - (ii) as a sports Visitor or entertainer Visitor, provided:
 - (1) the Certificate of sponsorship Checking service reference for which he is being awarded points in this application shows that he is being sponsored in the creative and sporting subcategory; and
 - (2) the Certificate of sponsorship reference number was allocated to the applicant before he entered the UK as a sports Visitor or entertainer Visitor.
- (c) The applicant must have a minimum of 30 points under paragraphs 105 to [112] of Appendix A.
- (d) The applicant must have a minimum of 10 points under paragraphs 8 to 9 of Appendix C.

- (e) The Certificate of sponsorship Checking service entry to which the Certificate of sponsorship reference number for which points under Appendix A were awarded relates must record that the applicant is being sponsored in the same subcategory of the Tier 5 (Temporary Worker) Migrant route as the one in which he was being sponsored when he was last granted entry clearance or leave to remain as a Tier 5 (Temporary Worker) Migrant.

Note

Words in square brackets inserted by HC 314.

245ZR Period and conditions of grant

- (a) If any calculation of period of leave comes to zero or a negative number, leave to remain will be refused.
- (b) Subject to paragraphs (c) to (f) below, leave to remain will be granted for:
- (i) the length of the period of engagement, as recorded in the Certificate of sponsorship Checking service entry, plus 14 days (or, where the applicant has consecutive engagements, a period beginning on the first day of the first period of engagement and ending 14 days after the last day of the last period of engagement) or
 - (ii) the difference between the period that the applicant has already spent in the UK since his last grant of entry clearance or leave to enter as a Tier 5 (Temporary Worker) Migrant and:
 - (1) 12 months, if he is being sponsored in the creative and sporting or charity worker subcategories, or
 - (2) 2 years, if he is being sponsored in the religious workers, government authorised exchange or international agreement subcategories, whichever of (i) or (ii) is the shorter.
- (c) Where the provisions in paragraph 245ZQ(b)(ii) apply, the migrant will be granted leave to remain for:
- (i) the period of engagement plus 14 days (or, where the applicant has consecutive engagements, a period beginning on the first day of the first period of engagement and ending 14 days after the last day of the last period of engagement), or
 - (ii) 12 months whichever of (i) or (ii) is the shorter.
- (d) Where the Certificate of sponsorship Checking service reference records that the migrant is being sponsored in the international agreement subcategory of the Tier 5 (Temporary Worker) Migrant route as an overseas government employee or a private servant in a diplomatic household, leave to remain will be granted for:
- (i) the period of engagement plus 14 days, or
 - (ii) 12 months, whichever of (i) or (ii) is the shorter, unless at the date of the application for leave to remain the applicant has spent more than 5 years continuously in the UK with leave as a Tier 5 (Temporary Worker) Migrant, in which case leave to remain will be granted for:
 - (iii) the period of engagement plus 14 days, or
 - (iv) a period equal to 6 years less X, where X is the period of time, beginning with the date on which the applicant was last granted entry clearance or leave to enter as a Tier 5 (Temporary Worker) Migrant, that the applicant has already spent in the UK as a Tier 5 (Temporary Worker) Migrant whichever of (iii) or (iv) is the shorter.
- (e) Where:
- (i) the Certificate of sponsorship Checking service reference number records that the applicant is being sponsored in the creative and sporting subcategory of the Tier 5 (Temporary Worker) Migrant route as a creative worker, and

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- (ii) the sponsor is the sponsor who sponsored the applicant when he received his last grant of leave to remain will be granted for the period set out in paragraph (f) below.
- (f) Where the conditions in paragraph (e) above are met, leave to remain will be granted for:
 - (i) the period of engagement plus 14 days (or, where the applicant has consecutive engagements, a period beginning on the first day of the first period of engagement and ending 14 days after the last day of the last period of engagement), or
 - (ii) 12 months whichever of (i) or (ii) is the shorter, unless the applicant has spent more than 1 year continuously in the UK with leave as a Tier 5 (Temporary Worker) Migrant, in which case leave to remain will be granted for:
 - (iii) the period of engagement plus 14 days (or, where the applicant has consecutive engagements, a period beginning on the first day of the first period of engagement and ending 14 days after the last day of the last period of engagement), or
 - (iv) a period equal to 2 years less X, where X is the period of time, beginning with the date on which the applicant was last granted entry clearance or leave to enter as a Tier 5 (Temporary Worker) Migrant, that the applicant has already spent in the UK as a Tier 5 (Temporary Worker) Migrant whichever of (iii) or (iv) is the shorter.
- (g) leave to remain will be granted subject to the following conditions:
 - (i) no recourse to public funds,
 - (ii) registration with the police if this is required by paragraph 326 of these rules, and
 - (iii) no employment except:
 - (1) unless paragraph (2) applies, working for the person who for the time being is the sponsor in the employment that the Certificate of sponsorship Checking service records that the migrant is being sponsored to do for that sponsor,
 - (2) in the case of a migrant whom the Certificate of sponsorship Checking service records as being sponsored in the government authorised exchange subcategory of Tier 5 (Temporary Worker) route, working for any person for whom the sponsor directs him to work, provided that work is in the employment that the Certificate of sponsorship Checking service records that the migrant is being sponsored to do, and
 - (3) supplementary employment.

Note

Paragraphs 245ZB–245ZR inserted by HC 582.

[245ZS Requirements for indefinite leave to remain

To qualify for indefinite leave to remain as a Tier 5 (Temporary Worker) Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal and must not be an illegal entrant.

- (b) The applicant must have spent a continuous period of 5 years lawfully in the UK with leave in the international agreement sub-category of Tier 5 and working as a private servant in a diplomatic household.
- (c) The applicant must have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, with reference to paragraphs 33B to 33D of these Rules, unless the applicant is under the age of 18 or aged 65 or over at the time the application is made.]

Note

Paragraphs 245ZS inserted by HC 582.

[Tier 4 (General) Student

245ZT Purpose of this route

This route is for migrants aged 16 or over who wish to study in the UK.

245ZU Entry clearance

All migrants arriving in the UK and wishing to enter as a Tier 4 (General) Student must have a valid entry clearance for entry under this route. If they do not have a valid entry clearance, entry will be refused.

245ZV Requirements for entry clearance

To qualify for entry clearance as a Tier 4 (General) Student, an applicant must meet the requirements listed below.

If the applicant meets these requirements, entry clearance will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the General Grounds for Refusal.
- (b) The applicant must have a minimum of 30 points under paragraphs 113 to 119 of Appendix A.
- (c) The applicant must have a minimum of 10 points under paragraphs 10 to 13 of Appendix C.
- (d) If the applicant wishes to undertake:
 - (i) postgraduate studies leading to a Doctorate or Masters degree by research in one of the disciplines listed in paragraph 1 of Appendix 6 to these Rules, or
 - (ii) postgraduate studies leading to a taught Masters degree in one of the disciplines listed in paragraph 2 of Appendix 6 to these Rules, or
 - (iii) a period of study or research in excess of 6 months in one of the disciplines listed in paragraphs 1 or 2 of Appendix 6 of these Rules at an institution of higher education where this forms part of an overseas postgraduate qualificationthe applicant must hold a valid Academic Technology Approval Scheme clearance certificate from the Counter-Proliferation Department of the Foreign and Commonwealth Office which relates to the course, or area of research, that the applicant will be taking and at the institution at which the applicant wishes to undertake it and must provide the specified documents to show that these requirements have been met.

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- (e) If the applicant wishes to be a postgraduate doctor or dentist on a recognised Foundation Programme:
 - (i) the applicant must have successfully completed a recognised UK degree in medicine or dentistry from:
 - (1) an institution with a Tier 4 General Sponsor Licence,
 - (2) a UK publicly funded institution of further or higher education or
 - (3) a UK bona fide private education institution which maintains satisfactory records of enrolment and attendance,
 - (ii) the applicant must have previously been granted leave:
 - (1) as a Tier 4 (General) Student, or as a Student, for the final academic year of the studies referred to in paragraph (i) above, and
 - (2) as a Tier 4 (General) Student, or as a Student, for at least one other academic year (aside from the final year) of the studies referred to in paragraph (i) above,
 - (iii) if the applicant has previously been granted leave as a Postgraduate Doctor or Dentist, the applicant must not be seeking entry clearance or leave to enter or remain to a date beyond 3 years from the date on which he was first granted leave to enter or remain in that category, and
 - (iv) if the applicant has previously been granted leave as a Tier 4 (General) Student to undertake a course as a postgraduate doctor or dentist, the applicant must not be seeking entry clearance or leave to enter or remain to a date beyond 3 years from the date on which the applicant was first granted leave to undertake such a course.
- (f) If the applicant is currently being sponsored by a Government or international scholarship agency, or within the last 12 months has come to the end of such a period of sponsorship, the applicant must provide the written consent of the sponsoring Government or agency to the application and must provide the specified documents to show that this requirement has been met.
- (g) If the course is below degree level, the grant of entry clearance the applicant is seeking must not lead to the applicant having spent more than 3 years in the UK as a Tier 4 Migrant since the age of 18 studying courses that did not consist of degree level study.
- (h) The applicant must be at least 16 years old.
- (i) Where the applicant is under 18 years of age, the application must be supported by the applicant's parents or legal guardian, or by just one parent if that parent has sole legal responsibility for the child.
- (j) Where the applicant is under 18 years of age, the applicant's parents or legal guardian, or just one parent if that parent has sole responsibility for the child, must confirm that they consent to the arrangements for the applicant's travel to, and reception and care in, the UK.

245ZW Period and conditions of grant

- (a) Subject to paragraph (b), entry clearance will be granted for the duration of the course.
- (b) In addition to the period of entry clearance granted in accordance with paragraph (a), entry clearance will also be granted for the periods set out in the following table. Notes to accompany the table appear below the table.

<i>Type of course</i>	<i>Period of entry clearance to be granted before the course starts</i>	<i>Period of entry clearance to be granted after the course ends</i>
12 months or more	1 month	4 months

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<i>Type of course</i>	<i>Period of entry clearance to be granted before the course starts</i>	<i>Period of entry clearance to be granted after the course ends</i>
6 months or more but less than 12 months	1 month	2 months
Pre-sessional course of less than 6 months	1 month	1 month
Course of less than 6 months that is not a pre-sessional course	7 days	7 days
Postgraduate doctor or dentist	1 month	1 month

Notes

- (i) If the grant of entry clearance is made less than 1 month or, in the case of a course of less than 6 months that is not a pre-sessional course, less than 7 days before the start of the course, entry clearance will be granted with immediate effect.
- (ii) A pre-sessional course is a course which prepares a student for the student's main course of study in the UK.
- (c) Entry clearance will be granted subject to the following conditions:
 - (i) no recourse to public funds,
 - (ii) registration with the police, if this is required by paragraph 326 of these Rules,
 - (iii) no employment except:
 - (1) employment during term time of no more than 20 hours per week,
 - (2) employment (of any duration) during vacations,
 - (3) employment as part of a course-related work placement which forms an assessed part of the applicant's course and provided that any period that the applicant spends on that placement does not exceed half of the total length of the course undertaken in the UK,
 - (4) employment as a Student Union Sabbatical Officer, for up to 2 years, provided the post is elective and is at the institution which is the applicant's Sponsor.
 - (5) employment as a postgraduate doctor or dentist on a recognised Foundation Programme provided that the migrant is not self employed, or employed as a Doctor in Training other than a vacancy on a recognised Foundation Programme, professional sportsperson (including a sports coach) or an entertainer, and provided that the migrant's employment would not fill a full time vacancy other than a vacancy on a recognised Foundation Programme.

245ZX Requirements for leave to remain

To qualify for leave to remain as a Tier 4 (General) Student under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the applicant will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal and must not be an illegal entrant.

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- (b) The applicant must have, or have last been granted, entry clearance, leave to enter or leave to remain:
 - (i) as a Tier 4 (General) Student,
 - (ii) as a Tier 4 (Child) Student,
 - (iii) as a Tier 1 (Post-study Work) Migrant,
 - (iv) as a Tier 2 Migrant,
 - (v) as a Participant in the International Graduates Scheme (or its predecessor, the Science and Engineering Graduates Scheme),
 - (vi) as a Participant in the Fresh Talent: Working in Scotland Scheme,
 - (vii) as a Postgraduate Doctor or Dentist,
 - (viii) as a Prospective Student,
 - (ix) as a Student,
 - (x) as a Student Nurse,
 - (xi) as a Student Re-sitting an Examination,
 - (xii) as a Student Writing Up a Thesis,
 - (xiii) as a Student Union Sabbatical Officer, or
 - (xiv) as a Work Permit Holder.
- (c) The applicant must have a minimum of 30 points under paragraphs 113 to 119 of Appendix A.
- (d) The applicant must have a minimum of 10 points under paragraphs 10 to 13 of Appendix C.
- (e) If the applicant wishes to undertake:
 - (i) postgraduate studies leading to a Doctorate or Masters degree by research in one of the disciplines listed in paragraph 1 of Appendix 6 to these Rules, or
 - (ii) postgraduate studies leading to a taught Masters degree in one of the disciplines listed in paragraph 2 of Appendix 6 to these Rules, or
 - (iii) a period of study or research in excess of 6 months in one of the disciplines listed in paragraphs 1 or 2 of Appendix 6 of these Rules at a publicly funded institution of higher education where this forms part of an overseas postgraduate qualification the applicant must hold a valid Academic Technology Approval Scheme clearance certificate from the Counter-Proliferation Department of the Foreign and Commonwealth Office which relates to the course, or area of research, that the applicant will be taking and at the institution at which the applicant wishes to undertake it and must provide the specified documents to show that these requirements have been met.
- (f) If the applicant wishes to be a postgraduate doctor or dentist on a recognised Foundation Programme:
 - (i) the applicant must have successfully completed a recognised UK degree in medicine or dentistry from:
 - (1) an institution with a Tier 4 General Sponsor Licence,
 - (2) a UK publicly funded institution of further or higher education or
 - (3) a UK bona fide private education institution which maintains satisfactory records of enrolment and attendance,
 - (ii) the applicant must have previously been granted leave:
 - (1) as a Tier 4 (General) Student, or as a Student, for the final academic year of the studies referred to in paragraph (i) above, and
 - (2) as a Tier 4 (General) Student, or as a Student, for at least one other academic year (aside from the final year) of the studies referred to in paragraph (i) above,
 - (iii) if the applicant has previously been granted leave as a Postgraduate Doctor or Dentist the applicant must not be seeking entry clearance or

leave to enter or remain to a date beyond 3 years from the date on which he was first granted leave to enter or remain in that category,

and

- (iv) if the applicant has previously been granted leave as a Tier 4 (General) Student to undertake a course as a postgraduate doctor or dentist, the applicant must not be seeking entry clearance or leave to enter or remain to a date beyond 3 years from the date on which he was first granted leave to undertake such a course.
- (g) If the applicant is currently being sponsored by a Government or international scholarship agency, or within the last 12 months has come to the end of such a period of sponsorship, the applicant must provide the unconditional written consent of the sponsoring Government or agency to the application and must provide the specified documents to show that this requirement has been met.
- (h) If the course does not involve degree level study, the grant of leave to remain the applicant is seeking must not lead to the applicant having spent more than 3 years in the UK as a Tier 4 Migrant since the age of 18 studying courses that did not consist of degree level study.
- (i) The applicant must be at least 16 years old.
- (j) Where the applicant is under 18 years of age, the application must be supported by the applicant's parents or legal guardian, or by just one parent if that parent has sole legal responsibility for the child.
- (k) Where the applicant is under 18 years of age, the applicant's parents or legal guardian, or just one parent if that parent has sole legal responsibility for the child, must confirm that they consent to the arrangements for the applicant's care in the UK.
- (l) The applicant must not be applying for leave to remain for the purpose of studies which would commence more than one month after the applicant's current entry clearance or leave to remain expires.

245ZY Period and conditions of grant

- (a) Subject to paragraphs (b) and (c) below, leave to remain will be granted for the duration of the course.
- (b) In addition to the period of leave to remain granted in accordance with paragraph (a), leave to remain will also be granted for the periods set out in the following table. Notes to accompany the table appear below the table.

<i>Type of course</i>	<i>Period of leave to remain to be granted before the course starts</i>	<i>Period of leave to remain to be granted after the course ends</i>
12 months or more	1 month	4 months
6 months or more but less than 12 months	1 month	2 months
Pre-sessional course of less than 6 months	1 month	1 month
Course of less than 6 months that is not a pre-sessional course	7 days	7 days
Postgraduate doctor or dentist	1 month	1 month

Notes

- (i) If the grant of leave to remain is being made less than 1 month or, in the case of a course of less than 6 months that is not a pre-sessional course, less than 7 days before the start of the course, leave to remain will be granted with immediate effect.

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- (ii) A pre-session course is a course which prepares a student for the student's main course of study in the UK.
- (c) Leave to remain will be granted subject to the following conditions:
- (i) no recourse to public funds,
 - (ii) registration with the police, if this is required by paragraph 326 of these Rules,
 - (iii) no employment except:
 - (1) employment during term time of no more than 20 hours per week,
 - (2) employment (of any duration) during vacations,
 - (3) employment as part of a course-related work placement which forms an assessed part of the applicant's course and provided that any period that the applicant spends on that placement does not exceed half of the total length of the course undertaken in the UK,
 - (4) employment as a Student Union Sabbatical Officer for up to 2 years provided the post is elective and is at the institution which is the applicant's Sponsor.
 - (5) employment as a postgraduate doctor or dentist on a recognised Foundation Programme

provided that the migrant is not self-employed, or employed as a Doctor in Training other than a vacancy on a recognised Foundation Programme, a professional sports person (including a sports coach) or an entertainer, and provided that the migrant's employment would not fill a full time vacancy other than a vacancy on a recognised Foundation Programme.

TIER 4 (CHILD) STUDENT

245ZZ Purpose of route

This route is for children at least 4 years old and under the age of 18 who wish to be educated in the UK.

245ZZA Entry clearance

All migrants arriving in the UK and wishing to enter as a Tier 4 (Child) Student must have a valid entry clearance for entry under this route. If they do not have a valid entry clearance, entry will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal.
- (b) The applicant must have a minimum of 30 points under paragraphs 120 to 125 of Appendix A.
- (c) The applicant must have a minimum of 10 points under paragraphs 14 to 18 of Appendix C.
- (d) The applicant must be at least 4 years old and under the age of 18.
- (e) The applicant must have no children under the age of 18 who are either living with the applicant or for whom the applicant is financially responsible.
- (f) If a foster carer or a relative (not a parent or guardian) of the applicant will be responsible for the care of the applicant:
 - (i) the arrangements for the care of the applicant by the foster carer or relative must meet the requirements laid down in guidance published by

- the United Kingdom Border Agency and the applicant must provide the specified documents to show that this requirement has been met, and
- (ii) the applicant must provide details of the care arrangements as specified in guidance published by the United Kingdom Border Agency.
 - (g) The application must be supported by the applicant's parents or legal guardian, or by just one parent if that parent has sole legal responsibility for the child.
 - (h) The applicant's parents or legal guardian, or just one parent if that parent has sole responsibility for the child, must confirm that they consent to the arrangements for the applicant's travel to, and reception and care in, the UK.

245ZZB Period and conditions of grant .

- (a) Where the applicant is under the age of 16, entry clearance will be granted for:
 - (i) a period of no more than 1 month before the course starts, plus
 - (ii) a period:
 - (1) requested by the applicant,
 - (2) equal to the length of the programme the applicant is following, or
 - (3) of 6 yearswhichever is the shorter, plus
 - (iii) 4 months.
- (b) Where the applicant is aged 16 or over, entry clearance will be granted for:
 - (i) a period of no more than 1 month before the course starts, plus
 - (ii) a period:
 - (1) requested by the applicant,
 - (2) equal to the length of the programme the applicant is following, or
 - (3) of 2 yearswhichever is the shorter, plus
 - (iii) 4 months.
- (c) Entry clearance will be granted subject to the following conditions:
 - (i) no recourse to public funds,
 - (ii) registration with the police, if this is required by paragraph 326 of these Rules,
 - (iii) no employment whilst the migrant is aged under 16,
 - (iv) no employment whilst the migrant is aged 16 or over except:
 - (1) employment during term time of no more than 20 hours per week,
 - (2) employment (of any duration) during vacations,
 - (3) employment as part of a course-related work placement which forms an assessed part of the applicant's course and provided that any period that the applicant spend on that placement does not exceed half of the total length of the course undertaken in the UK,
 - (4) employment as a Student Union Sabbatical Officer for up to 2 years provided the post is elective and is at the institution which is the applicant's Sponsor

provided that the migrant is not self employed, or employed as a Doctor in Training, a professional sportsperson (including a sports coach) or an entertainer, and provided that the migrant's employment would not fill a full time vacancy.

245ZZC Requirements for leave to remain

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To qualify for leave to remain as a Tier 4 (Child) Student under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, leave to remain will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal and must not be an illegal entrant.
- (b) The applicant must have, or have last been granted, entry clearance, leave to enter or leave to remain:
 - (i) as a Tier 4 (Child) Student,
 - (ii) as a Student, or
 - (iii) as a Prospective Student.
- (c) The applicant must have a minimum of 30 points under paragraphs 120 to 125 of Appendix A.
- (d) The applicant must have a minimum of 10 points under paragraphs 14 to 18 of Appendix C.
- (e) The applicant must be under the age of 18.
- (f) The applicant must have no children under the age of 18 who are either living with the applicant or for whom the applicant is financially responsible.
- (g) If a foster carer or a relative (not a parent or guardian) will be responsible for the care of the applicant:
 - (i) the arrangements for the care of the applicant by the foster carer or relative must meet the requirements laid down in guidance published by the United Kingdom Border Agency and the applicant must provide the specified documents to show that this requirement has been met, and
 - (ii) the applicant must provide details of the care arrangements as specified in guidance published by the United Kingdom Border Agency.
- (h) The application must be supported by the applicant's parents or legal guardian, or by just one parent if that parent has sole legal responsibility for the child.
- (i) The applicant's parents or legal guardian, or just one parent if that parent has sole legal responsibility for the child, must confirm that they consent to the arrangements for the applicant's care in the UK.
- (j) The applicant must not be applying for leave to remain for the purpose of studies which would commence more than one month after the applicant's current entry clearance or leave to remain expires.

245ZZD Period and conditions of grant

- (a) Where the applicant is under the age of 16, leave to remain will be granted for:
 - (i) a period of no more than 1 month before the course starts, plus
 - (ii) a period:
 - (1) requested by the applicant,
 - (2) equal to the length of the programme the applicant is following, or
 - (3) of 6 yearswhichever is the shorter, plus
 - (iii) 4 months.
- (b) Where the applicant is aged 16 or over, leave to remain will be granted for:
 - (i) a period of no more than 1 month before the course starts, plus
 - (ii) a period:
 - (1) requested by the applicant,
 - (2) equal to the length of the programme the applicant is following, or
 - (3) of 2 years

whichever is the shorter, plus

(iii) 4 months.

(c) Leave to remain will be granted subject to the following conditions:

(i) no recourse to public funds,

(ii) registration with the police, if this is required by paragraph 326 of these Rules,

(iii) no employment whilst the migrant is aged under 16,

(iv) no employment whilst the migrant is aged 16 or over except:

(1) employment during term time of no more than 20 hours per week,

(2) employment (of any duration) during vacations,

(3) employment as part of a course-related work placement which forms an assessed part of the applicant's course, and provided that any period that the applicant spend on that placement does not exceed half of the total length of the course undertaken in the UK,

(4) employment as a Student Union Sabbatical Officer for up to 2 years provided the post is elective and is at the institution which is the applicant's Sponsor, provided that the migrant is not self-employed, or employed as a Doctor in Training, a professional sportsperson (including a sports coach) or an entertainer, and provided that the migrant's employment would not fill a full time vacancy.]

Note

Paragraphs 245ZT to 245ZZD inserted by HC 314.

PART 7

OTHER CATEGORIES

Persons exercising rights of access to a child resident in the United Kingdom

[REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A PERSON EXERCISING RIGHTS OF ACCESS TO A CHILD RESIDENT IN THE UNITED KINGDOM

246 The requirements to be met by a person seeking leave to enter the United Kingdom to exercise access rights to a child resident in the United Kingdom are that:

- (i) the applicant is the parent of a child who is resident in the United Kingdom; and
- (ii) the parent or carer with whom the child permanently resides is resident in the United Kingdom; and
- (iii) the applicant produces evidence that he has access rights to the child in the form of:
 - (a) a Residence Order or a Contact Order granted by a Court in the United Kingdom; or
 - (b) a certificate issued by a district judge confirming the applicant's intention to maintain contact with the child; and
- (iv) the applicant intends to continue to take an active role in the child's upbringing; and
- (v) the child is under the age of 18; and
- (vi) there will be adequate accommodation for the applicant and any dependants without recourse to public funds in accommodation which the applicant owns or occupies exclusively; and

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- (vii) the applicant will be able to maintain himself and any dependants adequately without recourse to public funds; and
- (viii) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER THE UNITED KINGDOM AS A PERSON EXERCISING RIGHTS OF ACCESS TO A CHILD RESIDENT IN THE UNITED KINGDOM

247 Leave to enter as a person exercising access rights to a child resident in the United Kingdom may be granted for 12 months in the first instance, provided that a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival.

REFUSAL OF LEAVE TO ENTER THE UNITED KINGDOM AS A PERSON EXERCISING RIGHTS OF ACCESS TO A CHILD RESIDENT IN THE UNITED KINGDOM

248 Leave to enter as a person exercising rights of access to a child resident in the United Kingdom is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.]

[REQUIREMENTS FOR LEAVE TO REMAIN IN THE UNITED KINGDOM AS A PERSON EXERCISING RIGHTS OF ACCESS TO A CHILD RESIDENT IN THE UNITED KINGDOM

248A The requirements to be met by a person seeking leave to remain in the United Kingdom to exercise access rights to a child resident in the United Kingdom are that:

- (i) the applicant is the parent of a child who is resident in the United Kingdom; and
- (ii) the parent or carer with whom the child permanently resides is resident in the United Kingdom; and
- (iii) the applicant produces evidence that he has access rights to the child in the form of:
 - (a) a Residence Order or a Contact Order granted by a Court in the United Kingdom; or
 - (b) a certificate issued by a district judge confirming the applicant's intention to maintain contact with the child; or
 - (c) a statement from the child's other parent (or, if contact is supervised, from the supervisor) that the applicant is maintaining contact with the child; and
- (iv) the applicant takes and intends to continue to take an active role in the child's upbringing; and
- (v) the child visits or stays with the applicant on a frequent and regular basis and the applicant intends this to continue; and
- (vi) the child is under the age of 18; and
- (vii) the applicant has limited leave to remain in the United Kingdom as the [spouse, civil partner, unmarried partner or same-sex partner] of a person present and settled in the United Kingdom who is the other parent of the child; and
- (viii) the applicant has not remained in breach of the immigration laws; and
- (ix) there will be adequate accommodation for the applicant and any dependants without recourse to public funds in accommodation which the applicant owns or occupies exclusively; and

- (x) the applicant will be able to maintain himself and any dependants adequately without recourse to public funds.

Note

Words in square brackets in sub-paragraph (vii) inserted by HC 582.

LEAVE TO REMAIN IN THE UNITED KINGDOM AS A PERSON EXERCISING RIGHTS OF ACCESS TO A CHILD RESIDENT IN THE UNITED KINGDOM

248B Leave to remain as a person exercising access rights to a child resident in the United Kingdom may be granted for 12 months in the first instance, provided the Secretary of State is satisfied that each of the requirements of paragraph 248A is met.

REFUSAL OF LEAVE TO REMAIN IN THE UNITED KINGDOM AS A PERSON EXERCISING RIGHTS OF ACCESS TO A CHILD RESIDENT IN THE UNITED KINGDOM

248C Leave to remain as a person exercising rights of access to a child resident in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 248A is met.

INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS A PERSON EXERCISING RIGHTS OF ACCESS TO A CHILD RESIDENT IN THE UNITED KINGDOM

248D The requirements for indefinite leave to remain in the United Kingdom as a person exercising rights of access to a child resident in the United Kingdom are that:

- (i) the applicant was admitted to the United Kingdom or granted leave to remain in the United Kingdom for a period of 12 months as a person exercising rights of access to a child and has completed a period of 12 months as a person exercising rights of access to a child; and
- (ii) the applicant takes and intends to continue to take an active role in the child's upbringing; and
- (iii) the child visits or stays with the applicant on a frequent and regular basis and the applicant intends this to continue; and
- (iv) there will be adequate accommodation for the applicant and any dependants without recourse to public funds in accommodation which the applicant owns or occupies exclusively; and
- (v) the applicant will be able to maintain himself and any dependants adequately without recourse to public funds; and
- (vi) the child is under 18 years of age; and
- [(vii) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Sub-paragraph (vii) inserted by HC 398.

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INDEFINITE LEAVE TO REMAIN AS A PERSON EXERCISING RIGHTS OF ACCESS TO A CHILD RESIDENT IN THE UNITED KINGDOM

248E Indefinite leave to remain as a person exercising rights of access to a child may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 248D is met.

REFUSAL OF INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS A PERSON EXERCISING RIGHTS OF ACCESS TO A CHILD RESIDENT IN THE UNITED KINGDOM

248F Indefinite leave to remain as a person exercising rights of access to a child is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 248D is met.]

Note

Paragraphs 246–248 substituted by Cm 4851. Paragraphs 248A–248F inserted by Cm 4851.

Holders of special vouchers

249–254 [...]

Note

Paragraphs 249–254 deleted by Cm 5597.

EEA nationals and their families

SETTLEMENT

[255 Any person (other than a student) who under, either the Immigration (European Economic Area) Order 1994, or the 2000 EEA Regulations has been issued with a residence permit or residence document valid for 5 years, and who has remained in the United Kingdom in accordance with the provisions of that Order or those Regulations (as the case may be) for [5 years] and continues to do so may, on application, have his residence permit or residence document (as the case may be) endorsed to show permission to remain in the United Kingdom indefinitely.]

Note

Substituted by Cm 4851. Words in brackets inserted by HC 1016.

Paragraph 255 continues to apply *only* for the purpose of determining an application made before 30th April 2006 for an endorsement under paragraph 255. It should otherwise be disregarded.

[255A This paragraph applies where a Swiss national has been issued with a residence permit under the 2000 EEA Regulations and, prior to 1st June 2002, remained in the United Kingdom in accordance with the provisions of these Rules and in a capacity which would have entitled that Swiss national to apply for indefinite leave to remain after a continuous period of [5 years] in that capacity in the United Kingdom. Where this paragraph applies, the period during which the Swiss national remained in the United Kingdom prior to 1st June 2002 shall be treated as a period during which he remained in the United Kingdom in accordance with the 2000 EEA Regulations for the purpose of calculating the [5 year] period referred to in paragraph 255.]

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Note

Paragraph 255A inserted by Cm 5597. Words in brackets inserted by HC 1016.

Paragraph 255A continues to apply *only* for the purpose of determining an application made before 30th April 2006 for an endorsement under paragraph 255. It should otherwise be disregarded.

[255B This paragraph applies where an Accession State national has been issued with a residence permit under the 2000 EEA Regulations and, prior to 1st May 2004, remained in the United Kingdom in accordance with the provisions of these Rules and in a capacity which would have entitled that Accession State national to apply for indefinite leave to remain after a continuous period of [5 years] in that capacity in the United Kingdom.

•

Where this paragraph applies, the period during which the Accession State national remained in the United Kingdom prior to 1st May 2004 shall be treated as a period during which he remained in the United Kingdom in accordance with the 2000 EEA Regulations for the purpose of calculating the [5 year] period referred to in paragraph 255.]

Note

Paragraph 255B inserted by HC 523. References to 5 years inserted by HC 1016.

Paragraph 255B continues to apply *only* for the purpose of determining an application made before 30th April 2006 for an endorsement under paragraph 255. It should otherwise be disregarded.

256 [...]

Note

Paragraph 256 deleted by Cm 4851.

257 [...]

[257A This paragraph applies where a Swiss national was admitted to the United Kingdom before 1st June 2002 for an initial period not exceeding 12 months pursuant to paragraph 282 and on or after that date became a qualified person or the family member of a qualified person under the 2000 EEA Regulations. Where this paragraph applies the Swiss national may, on application, have his residence permit endorsed to show permission to remain in the United Kingdom indefinitely if he meets the requirements set out in paragraph 287.]

Note

Paragraph 257A inserted by Cm 5597.

Paragraph 257A shall continue to apply *only* for the purpose of determining an application made before 30th April 2006 for an endorsement under that paragraph. It should otherwise be disregarded.

[257B This paragraph applies where an Accession State national was admitted to the United Kingdom before 1st May 2004 for an initial period not exceeding 12 months pursuant to paragraph 282 and on or after that date became a qualified person or the family member of a qualified person under the 2000 EEA Regulations. Where this paragraph applies the Accession State national may, on application, have his residence permit endorsed to show permission to remain in the United Kingdom indefinitely if he meets the requirements set out in paragraph 287.]

Note

Paragraph 257B inserted by HC 523.

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Paragraph 257B shall continue to apply *only* for the purpose of determining an application made before 30th April 2006 for an endorsement under that paragraph. It should otherwise be disregarded.

[REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE PRIMARY CARER OR RELATIVE OF AN EEA NATIONAL SELF-SUFFICIENT CHILD]

[257C The requirements to be met by a person seeking leave to enter or remain as the primary carer or relative of an EEA national self-sufficient child are that the applicant:

- (i) is:
 - (a) the primary carer; or
 - (b) the parent; or
 - (c) the sibling,

of an EEA national under the age of 18 who has a right of residence in the United Kingdom under [the 2006 EEA Regulations] as a self-sufficient person; and

- (ii) is living with the EEA national or is seeking entry to the United Kingdom in order to live with the EEA national; and
- (iii) in the case of a sibling of the EEA national:
 - (a) is under the age of 18 or has current leave to enter or remain in this capacity; and
 - (b) is unmarried [and is not a civil partner], has not formed an independent family unit and is not leading an independent life; and
- (iv) can, and will, be maintained and accommodated without taking employment or having recourse to public funds; and
- (v) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

In this paragraph, 'sibling', includes a half-brother or half-sister and a stepbrother or stepsister.]

Note

Paragraphs 257C–257E inserted by HC 164, in force 1 January 2005. Words in square brackets in sub-paragraph (iii)(b) inserted by HC 582. Words in square brackets in sub-paragraph (i) inserted by HC 1053.

[LEAVE TO ENTER OR REMAIN AS THE PRIMARY CARER OR RELATIVE OF AN EEA NATIONAL SELF-SUFFICIENT CHILD]

[257D Leave to enter or remain in the United Kingdom as the primary carer or relative of an EEA national self-sufficient child may be granted for a period not exceeding five years or the remaining period of validity of any residence permit held by the EEA national under [the 2006 EEA Regulations], whichever is the shorter, provided that, in the case of an application for leave to enter, the applicant is able to produce to the Immigration Officer, on arrival a valid entry clearance for entry in this capacity or, in the case of an application for leave to remain, the applicant is able to satisfy the Secretary of State that each of the requirements of paragraph 257C(i) to (iv) is met. Leave to enter or remain is to be subject to a condition prohibiting employment and recourse to public funds.]

Note

Paragraphs 257C–257E inserted by HC 164, in force 1 January 2005. Reference to the 2006 EEA Regulations inserted by HC 1053.

[REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE PRIMARY CARER OR RELATIVE OF AN EEA NATIONAL SELF-SUFFICIENT CHILD]

[257E Leave to enter or remain in the United Kingdom as the primary carer or relative of an EEA national self-sufficient child is to be refused if, in the case of an application for leave to enter, the applicant is unable to produce to the Immigration Officer on arrival a valid United Kingdom entry clearance for entry in this capacity or, in the case of an application for leave to remain, if the applicant is unable to satisfy the Secretary of State that each of the requirements of paragraph 257C(i) to (iv) is met.]

Note

Paragraphs 257C–257E inserted by HC 164, in force 1 January 2005.

258–261 [...]

Note

Paragraph 258–281 deleted by Cm 4851.

REGISTRATION WITH THE POLICE FOR FAMILY MEMBERS OF EEA NATIONALS

262 [*Deleted with effect from 11 May 1998 by Cmnd 3953.*]

Retired persons of independent means

263–265 [...]

Note

Paragraphs 263–265 deleted by HC 1113.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A RETIRED PERSON OF INDEPENDENT MEANS

[266 The requirements for an extension of stay as a retired person of independent means are that the applicant:

- (i) entered the United Kingdom with a valid United Kingdom entry clearance as a retired person of independent means; and
- (ii) meets the following requirements:
 - (a) has under his control and disposable in the United Kingdom an income of his own of not less than £25,000 per annum; and
 - (b) is able and willing to maintain and accommodate himself and any dependants indefinitely in the United Kingdom from his own resources with no assistance from any other person and without taking employment or having recourse to public funds; and
 - (c) can demonstrate a close connection with the United Kingdom; and
- (iii) has made the United Kingdom his main home.]

Note

Paragraphs 266 substituted by HC 1113.

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[EXTENSION OF STAY AS A RETIRED PERSON OF INDEPENDENT MEANS]

266A–~~266E~~

Note

Paragraphs 266A–266E deleted by HC 1113.

[267 An extension of stay as a retired person of independent means, with a prohibition on the taking of employment, may be granted so as to bring the person's stay in this category up to a maximum of 5 years in aggregate, provided the secretary of state is satisfied that each of the requirements of paragraph 266 is met.]

REFUSAL OF EXTENSION OF STAY AS A RETIRED PERSON OF INDEPENDENT MEANS

[268 An extension of stay as a retired person of independent means is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 266 is met.]

Note

Paragraphs 267–268 substituted by HC 1113.

INDEFINITE LEAVE TO REMAIN FOR A RETIRED PERSON OF INDEPENDENT MEANS

269 Indefinite leave to remain may be granted, on application, to a person admitted as a retired person of independent means provided he:

- (i) has spent a continuous period of [5 years] in the United Kingdom in this capacity; and
- (ii) has met the requirements of paragraph 266 throughout the [5 year] period and continues to do so.

Note

Words in square brackets substituted by HC 1016.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR A RETIRED PERSON OF INDEPENDENT MEANS

270 Indefinite leave to remain in the United Kingdom for a retired person of independent means is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 26[9] is met.

[Spouses or civil partners of persons who have or have had leave to enter or remain in the United Kingdom as retired persons of independent means]

REQUIREMENTS FOR LEAVE TO ENTER AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS A RETIRED PERSON OF INDEPENDENT MEANS

271 The requirements to be met by a person seeking leave to enter the United Kingdom as the spouse or civil partner of a person with limited leave to enter or remain in the United Kingdom as a retired person of independent means are that:

- (i) the applicant is married to or the civil partner of a person with limited leave to enter or remain in the United Kingdom as a retired person of independent means; and
- (ii) each of the parties intends to live with the other as his or her spouse or civil partners during the applicant's stay and the marriage or civil partnership is subsisting; and
- (iii) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
- (iv) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
- (v) the applicant does not intend to stay in the United Kingdom beyond any period of leave granted to his spouse or civil partner; and
- (vi) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WITH LIMITED
LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS A RETIRED PERSON OF
INDEPENDENT MEANS

272 A person seeking leave to enter the United Kingdom as the spouse or civil partner of a person with limited leave to enter or remain in the United Kingdom as a retired person of independent means may be given leave to enter for a period not in excess of that granted to the person with limited leave to enter or remain as a retired person of independent means, provided the Immigration Officer is satisfied that each of the requirements of paragraph 271 is met.

REFUSAL OF LEAVE TO ENTER AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WITH
LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS A RETIRED
PERSON OF INDEPENDENT MEANS

273 Leave to enter as the spouse or civil partner of a person with limited leave to enter or remain in the United Kingdom as a retired person of independent means is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 271 is met.

REQUIREMENTS FOR EXTENSION OF STAY AS THE SPOUSE OR CIVIL PARTNER OF A
PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED
KINGDOM AS A RETIRED PERSON OF INDEPENDENT MEANS

273A The requirements to be met by a person seeking an extension of stay in the United Kingdom as the spouse or civil partner of a person who has or has had leave to enter or remain in the United Kingdom as a retired person of independent means are that the applicant:

- (i) is married to or the civil partner of a person with limited leave to enter or remain in the United Kingdom as a retired person of independent means; or
- (ii) is married to or the civil partner of a person who has limited leave to enter or remain in the United Kingdom as a retired person of independent means and who is being granted indefinite leave to remain at the same time; or

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- (iii) is married to or the civil partner of a person who has indefinite leave to remain in the United Kingdom and who had limited leave to enter or remain as a retired person of independent means immediately before being granted indefinite leave to remain; and
- (iv) meets the requirements of paragraph 271 (ii) – (v); and
- (v) was admitted with a valid United Kingdom entry clearance for entry in this capacity.

EXTENSION OF STAY AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS A RETIRED PERSON OF INDEPENDENT MEANS

273B An extension of stay in the United Kingdom as:

- (i) the spouse or civil partner of a person who has limited leave to enter or remain as a retired person of independent means may be granted for a period not in excess of that granted to the person with limited leave to enter or remain; or
- (ii) the spouse or civil partner of a person who is being admitted at the same time for settlement or the spouse or civil partner of a person who has indefinite leave to remain may be granted for a period not exceeding 2 years, in both instances, provided the Secretary of State is satisfied that each of the requirements of paragraph 273A is met.

REFUSAL OF EXTENSION OF STAY AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS A RETIRED PERSON OF INDEPENDENT MEANS

273C An extension of stay in the United Kingdom as the spouse or civil partner of a person who has or has had leave to enter or remain in the United Kingdom as a retired person of independent means is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 273A is met.

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN FOR THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS A RETIRED PERSON OF INDEPENDENT MEANS

273D The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the spouse or civil partner of a person who has or has had leave to enter or remain in the United Kingdom as a retired person of independent means are that the applicant:

- (i) is married to or the civil partner of a person who has limited leave to enter or remain in the United Kingdom as a retired person of independent means and who is being granted indefinite leave to remain at the same time; or
- (ii) is married to or the civil partner of a person who has indefinite leave to remain in the United Kingdom and who had limited leave to enter or remain as a retired person of independent means immediately before being granted indefinite leave to remain; and
- (iii) meets the requirements of paragraph 271 (ii) – (v); and
- (iv) has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application; and

- (v) was admitted with a valid United Kingdom entry clearance for entry in this capacity.

INDEFINITE LEAVE TO REMAIN AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS A RETIRED PERSON OF INDEPENDENT MEANS

273E Indefinite leave to remain in the United Kingdom for the spouse or civil partner of a person who has or has had leave to enter or remain in the United Kingdom as a retired person of independent means may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 273D is met.

REFUSAL OF INDEFINITE LEAVE TO REMAIN AS THE SPOUSE OR CIVIL PARTNER OF A PERSON WHO HAS OR HAS HAD LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS A RETIRED PERSON OF INDEPENDENT MEANS

273F Indefinite leave to remain in the United Kingdom for the spouse or civil partner of a person who has or has had leave to enter or remain in the United Kingdom as a retired person of independent means is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 273D is met.]

Note

Paragraphs 270 to 273F inserted by HC 949.

Children of persons with limited leave to enter or remain in the United Kingdom as retired persons of independent means

REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE CHILD OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS A RETIRED PERSON OF INDEPENDENT MEANS

274 The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the child of a person with limited leave to enter or remain in the United Kingdom as a retired person of independent means are that:

- (i) he is the child of a parent who has been admitted to or allowed to remain in the United Kingdom as a retired person of independent means; and
- (ii) he is under the age of 18 or has current leave to enter or remain in this capacity; and
- (iii) he is unmarried [and is not a civil partner], has not formed an independent family unit and is not leading an independent life; and
- (iv) he can, and will, be maintained and accommodated adequately without recourse to public funds in accommodation which his parent(s) own or occupy exclusively; and
- (v) he will not stay in the United Kingdom beyond any period of leave granted to his parent(s); and
- (vi) both parents are being or have been admitted to or allowed to remain in the United Kingdom save where:
 - (a) the parent he is accompanying or joining is his sole surviving parent; or
 - (b) the parent he is accompanying or joining has had sole responsibility for his upbringing; or

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- (c) there are serious and compelling family or other considerations which make exclusion from the United Kingdom undesirable and suitable arrangements have been made for his care; and
- (vii) if seeking leave to enter, he holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, was admitted with a valid United Kingdom entry clearance for entry in this capacity.

Note

Words in square brackets inserted by HC 582.

LEAVE TO ENTER OR REMAIN AS THE CHILD OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS A RETIRED PERSON OF INDEPENDENT MEANS

275 A person seeking leave to enter or remain in the United Kingdom as the child of a person with limited leave to enter or remain in the United Kingdom as a retired person of independent means may be given leave to enter or remain in the United Kingdom for a period of leave not in excess of that granted to the person with limited leave to enter or remain as a retired person of independent means provided that, in relation to an application for leave to enter, he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity or, in the case of an application for limited leave to remain, he was admitted with a valid United Kingdom entry clearance for entry in this capacity and is able to satisfy the Secretary of State that each of the requirements of paragraph 274(i)–(vi) is met. An application for indefinite leave to remain in this category may be granted provided the applicant was admitted to the United Kingdom with a valid United Kingdom entry clearance for entry in this capacity and is able to satisfy the Secretary of State that each of the requirements of paragraph 274(i)–(vi) is met and provided indefinite leave to remain is, at the same time, being granted to the person with limited leave to enter or remain as a retired person of independent means. Leave to enter or remain is to be subject to a condition prohibiting employment except in relation to the grant of indefinite leave to remain.

REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE CHILD OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS A RETIRED PERSON OF INDEPENDENT MEANS

276 Leave to enter or remain in the United Kingdom as the child of a person with limited leave to enter or remain in the United Kingdom as a retired person of independent means is to be refused if, in relation to an application for leave to enter, a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival, or in the case of an application for limited leave to remain, if the applicant was not admitted with a valid United Kingdom entry clearance for entry in this capacity or is unable to satisfy the Secretary of State that each of the requirements of paragraph 274(i)–(vi) is met. An application for indefinite leave to remain in this category is to be refused if the applicant was not admitted with a valid United Kingdom entry clearance for entry in this capacity or is unable to satisfy the Secretary of State that each of the requirements of paragraph 274(i)–(vi) is met or if indefinite leave to remain is not, at the same time, being granted to the person with limited leave to enter or remain as a retired person of independent means.

Long residence

[LONG RESIDENCE IN THE UNITED KINGDOM]

276A For the purposes of paragraphs 276B to 276D:

- (a) 'continuous residence' means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the applicant:
 - (i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or
 - (ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or
 - (iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or
 - (iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or
 - (v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.
- (b) 'lawful residence' means residence which is continuous residence pursuant to:
 - (i) existing leave to enter or remain; or
 - (ii) temporary admission within section 11 of the 1971 Act where leave to enter or remain is subsequently granted; or
 - (iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.]

Note

Inserted by HC 538.

[REQUIREMENTS FOR AN EXTENSION OF STAY ON THE GROUND OF LONG RESIDENCE IN THE UNITED KINGDOM]

276A1 The requirement to be met by a person seeking an extension of stay on the ground of long residence in the United Kingdom is that the applicant meets all the requirements in paragraph 276B of these rules, except the requirement to have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom contained in paragraph 276B (iii).

EXTENSION OF STAY ON THE GROUND OF LONG RESIDENCE IN THE UNITED KINGDOM

276A2 An extension of stay on the ground of long residence in the United Kingdom may be granted for a period not exceeding 2 years provided that the Secretary of State is satisfied that the requirement in paragraph 276A1 is met.

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CONDITIONS TO BE ATTACHED TO EXTENSION OF STAY ON THE GROUND OF LONG RESIDENCE IN THE UNITED KINGDOM

276A3 Where an extension of stay is granted under paragraph 276A2:

- (i) if the applicant has spent less than 14 years in the UK, the grant of leave should be subject to the same conditions attached to his last period of lawful leave, or
- (ii) if the applicant has spent 14 years or more in the UK, the grant of leave should not contain any restriction on employment.

REFUSAL OF EXTENSION OF STAY ON THE GROUND OF LONG RESIDENCE IN THE UNITED KINGDOM

276A4 An extension of stay on the ground of long residence in the United Kingdom is to be refused if the Secretary of State is not satisfied that the requirement in paragraph 276A1 is met.]

Note

Paragraphs 276A1 to 276A4 inserted by HC 398.

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN ON THE GROUND OF LONG RESIDENCE IN THE UNITED KINGDOM

276B The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

- (i)
 - (a) he has had at least 10 years continuous lawful residence in the United Kingdom; or
 - [(b) he has had at least 14 years continuous residence in the United Kingdom, excluding any period spent in the United Kingdom following service of notice of liability to removal or notice of a decision to remove by way of directions under paragraphs 8 to 10A, or 12 to 14, of Schedule 2 to the Immigration Act 1971 or section 10 of the Immigration and Asylum Act 1999 Act, or of a notice of intention to deport him from the United Kingdom; and]
- (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
 - (a) age; and
 - (b) strength of connections in the United Kingdom; and
 - (c) personal history, including character, conduct, associations and employment record; and
 - (d) domestic circumstances; and
 - (e) previous criminal record and the nature of any offence of which the person has been convicted; and
 - (f) compassionate circumstances;] and
 - [(g) any representations received on the person's behalf; and (iii) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]

Note

Inserted by HC 538. Sub-paragraph (i)(b) substituted by Cm 6339. Sub-paragraph (g) inserted by HC 398.

[INDEFINITE LEAVE TO REMAIN ON THE GROUND OF LONG RESIDENCE IN THE UNITED KINGDOM]

276C Indefinite leave to remain on the ground of long residence in the United Kingdom may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 276B is met.]

Note

Inserted by HC 538.

[REFUSAL OF INDEFINITE LEAVE TO REMAIN ON THE GROUND OF LONG RESIDENCE IN THE UNITED KINGDOM]

276D Indefinite leave to remain on the ground of long residence in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276B is met.]

Note

Inserted by HC 538.

[HM Forces]

[DEFINITION OF GURKHA]

[276E For the purposes of these Rules the term ‘Gurkha’ means a citizen or national of Nepal who has served in the Brigade of Gurkhas of the British Army under the Brigade of Gurkhas’ terms and conditions of service.]

Note

Inserted by HC 1112.

[Leave to enter or remain in the United Kingdom as a Gurkha discharged from the British Army]

[REQUIREMENTS FOR INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS A GURKHA DISCHARGED FROM THE BRITISH ARMY]

[276F The requirements for indefinite leave to enter the United Kingdom as a Gurkha discharged from the British Army are that:

- (i) the applicant has completed at least four years’ service as a Gurkha with the British Army; and
- (ii) was discharged from the British Army in Nepal on completion of engagement on or after 1 July 1997; and
- (iii) was not discharged from the British Army more than 2 years prior to the date on which the application is made; and
- (iv) holds a valid United Kingdom entry clearance for entry in this capacity.]

Note

Inserted by HC 1112.

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[INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS A GURKHA DISCHARGED FROM THE BRITISH ARMY]

[276G A person seeking indefinite leave to enter the United Kingdom as a Gurkha discharged from the British Army may be granted indefinite leave to enter provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival.]

Note

Inserted by HC 1112.

[REFUSAL OF INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS A GURKHA DISCHARGED FROM THE BRITISH ARMY]

[276H Indefinite leave to enter the United Kingdom as a Gurkha discharged from the British Army is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.]

Note

Inserted by HC 1112.

[REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS A GURKHA DISCHARGED FROM THE BRITISH ARMY]

[276I The requirements for indefinite leave to remain in the United Kingdom as a Gurkha discharged from the British Army are that:

- (i) the applicant has completed at least four years' service as a Gurkha with the British Army; and
- (ii) was discharged from the British Army in Nepal on completion of engagement on or after 1 July 1997; and
- (iii) was not discharged from the British Army more than 2 years prior to the date on which the application is made; and
- (iv) on the date of application has leave to enter or remain in the United Kingdom.]

Note

Inserted by HC 1112.

[INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS A GURKHA DISCHARGED FROM THE BRITISH ARMY]

[276J A person seeking indefinite leave to remain in the United Kingdom as a Gurkha discharged from the British Army may be granted indefinite leave to remain provided the Secretary of State is satisfied that each of the requirements of paragraph 276I is met.]

Note

Inserted by HC 1112.

[REFUSAL OF INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS A GURKHA
DISCHARGED FROM THE BRITISH ARMY]

[276K Indefinite leave to remain in the United Kingdom as a Gurkha discharged from the British Army is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276I is met.]

Note

Inserted by HC 1112.

[Leave to enter or remain in the United Kingdom as a foreign or Commonwealth
citizen discharged from HM Forces]

[REQUIREMENTS FOR INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS A
FOREIGN OR COMMONWEALTH CITIZEN DISCHARGED FROM HM FORCES]

[276L The requirements for indefinite leave to enter the United Kingdom as a foreign or Commonwealth citizen discharged from HM Forces are that:

- (i) the applicant has completed at least four years' service with HM Forces; and
- (ii) was discharged from HM Forces on completion of engagement; and
- (iii) was not discharged from HM Forces more than 2 years prior to the date on which the application is made; and
- (iv) holds a valid United Kingdom entry clearance for entry in this capacity.]

Note

Inserted by HC 1112.

[INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS A FOREIGN OR
COMMONWEALTH CITIZEN DISCHARGED FROM HM FORCES]

[276M A person seeking indefinite leave to enter the United Kingdom as a foreign or Commonwealth citizen discharged from HM Forces may be granted indefinite leave to enter provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival.]

Note

Inserted by HC 1112.

[REFUSAL OF INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS A FOREIGN OR
COMMONWEALTH CITIZEN DISCHARGED FROM HM FORCES]

[276N Indefinite leave to enter the United Kingdom as a foreign or Commonwealth citizen discharged from HM Forces is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.]

Note

Inserted by HC 1112.

Appendix 5 Immigration Rules

[REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS A FOREIGN OR COMMONWEALTH CITIZEN DISCHARGED FROM HM FORCES]

[276O The requirements for indefinite leave to remain in the United Kingdom as a foreign or Commonwealth citizen discharged from HM Forces are that:

- (i) the applicant has completed at least four years' service with HM Forces; and
- (ii) was discharged from HM Forces on completion of engagement; and
- (iii) was not discharged from HM Forces more than 2 years prior to the date on which the application is made; and
- (iv) on the date of application has leave to enter or remain in the United Kingdom.]

Note

Inserted by HC 1112.

[INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS A FOREIGN OR COMMONWEALTH CITIZEN DISCHARGED FROM HM FORCES]

[276P A person seeking indefinite leave to remain in the United Kingdom as a foreign or Commonwealth citizen discharged from HM Forces may be granted indefinite leave to remain provided the Secretary of State is satisfied that each of the requirements of paragraph 276O is met.]

Note

Inserted by HC 1112.

[REFUSAL OF INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS A FOREIGN OR COMMONWEALTH CITIZEN DISCHARGED FROM HM FORCES]

[276Q Indefinite leave to remain in the United Kingdom as a foreign or Commonwealth citizen discharged from HM Forces is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276O is met.]

Note

Inserted by HC 1112.

[Spouses, civil partners, unmarried or same-sex partners of persons settled or seeking settlement in the United Kingdom in accordance with paragraphs 276E to 276Q (HM Forces rules) or of members of HM Forces who are exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and have at least 5 years' continuous service]

[Leave to enter or remain in the UK as the spouse, civil partner, unmarried or same-sex partner of a person present and settled in the United Kingdom or being granted settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service]

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[REQUIREMENTS FOR INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS THE SPOUSE, CIVIL PARTNER, UNMARRIED OR SAME-SEX PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING ADMITTED ON THE SAME OCCASION FOR SETTLEMENT UNDER PARAGRAPHS 276E TO 276Q OR OF A MEMBER OF HM FORCES WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4)(A) OF THE IMMIGRATION ACT 1971 AND HAS AT LEAST 5 YEARS' CONTINUOUS SERVICE]

[276R The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the spouse, civil partner, unmarried or same-sex partner of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service are that

- (i) the applicant is married to, or the civil partner, unmarried or same-sex partner of, a person present and settled in the United Kingdom or who is being admitted on the same occasion for settlement in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service; and
- (ii) the parties to the marriage, or civil partnership or relationship akin to marriage or civil partnership have met; and
- (iii) the parties were married or formed a civil partnership or a relationship akin to marriage or civil partnership at least 2 years ago; and
- (iv) each of the parties intends to live permanently with the other as his or her spouse, civil partner, unmarried or same-sex partner and
- (v) the marriage, civil partnership or relationship akin to marriage or civil partnership is subsisting; and
- (vi) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.]

Note

Paragraphs 276R–276Z and 276AA–276AC inserted by HC 164, in force 1 January 2005. References to civil partners and civil partnership inserted by HC 582.

Appendix 5 Immigration Rules

[INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS THE SPOUSE, CIVIL PARTNER, UNMARRIED OR SAME-SEX PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING ADMITTED ON THE SAME OCCASION FOR SETTLEMENT IN ACCORDANCE WITH PARAGRAPHS 276E TO 276Q OR OF A MEMBER OF HM FORCES WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4)(A) OF THE IMMIGRATION ACT 1971 AND HAS AT LEAST 5 YEARS' CONTINUOUS SERVICE]

[276S A person seeking leave to enter the United Kingdom as the spouse, civil partner, unmarried or same-sex partner of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service may be granted indefinite leave to enter provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival.]

Note

Paragraphs 276R–276Z and 276AA–276AC inserted by HC 164, in force 1 January 2005. References to civil partners inserted by HC 582.

[REFUSAL OF INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS THE SPOUSE, CIVIL PARTNER, UNMARRIED OR SAME-SEX PARTNER OF A PERSON PRESENT AND SETTLED IN THE UK OR BEING ADMITTED ON THE SAME OCCASION FOR SETTLEMENT IN ACCORDANCE WITH PARAGRAPHS 276E TO 276Q OR OF A MEMBER OF HM FORCES WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4)(A) OF THE IMMIGRATION ACT 1971 AND HAS AT LEAST 5 YEARS' CONTINUOUS SERVICE]

[276T Leave to enter the United Kingdom as the spouse, civil partner, unmarried or same-sex partner of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.]

Note

Paragraphs 276R–276Z and 276AA–276AC inserted by HC 164, in force 1 January 2005. References to civil partners inserted by HC 582.

[REQUIREMENT FOR INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS THE SPOUSE, CIVIL PARTNER, UNMARRIED OR SAME-SEX PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM UNDER PARAGRAPHS 276E TO 276Q OR BEING GRANTED SETTLEMENT ON THE SAME OCCASION IN ACCORDANCE WITH PARAGRAPHS 276E TO 276Q OR OF A MEMBER OF HM FORCES WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4)(A) OF THE IMMIGRATION ACT 1971 AND HAS AT LEAST 5 YEARS' CONTINUOUS SERVICE]

[276U The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the spouse, civil partner, unmarried or same-sex partner of a person present and settled in the United Kingdom or being granted settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service are that:

- (i) the applicant is married to or the civil partner or unmarried or same-sex partner of a person present and settled in the United Kingdom or being granted settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service; and
- (ii) the parties to the marriage, civil partnership or relationship akin to marriage or civil partnership have met; and
- (iii) the parties were married or formed a civil partnership or relationship akin to marriage or civil partnership at least 2 years ago; and
- (iv) each of the parties intends to live permanently with the other as his or her spouse, civil partner, unmarried or same-sex partner; and
- (v) the marriage, civil partnership or relationship akin to marriage or civil partnership is subsisting; and
- (vi) has, or has last been granted, leave to enter or remain in the United Kingdom as the spouse, civil partner, unmarried or same-sex partner.]

Note

Paragraphs 276R–276Z and 276AA–276AC inserted by HC 164, in force 1 January 2005. References to civil partners and civil partnership inserted by HC 582. Paragraphs 276R–276W, substituted by HC 314.

[INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS THE SPOUSE, CIVIL PARTNER, UNMARRIED OR SAME-SEX PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING GRANTED SETTLEMENT ON THE SAME OCCASION IN ACCORDANCE WITH PARAGRAPHS 276E TO 276Q OR OF A MEMBER OF HM FORCES WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4)(A) OF THE IMMIGRATION ACT 1971 AND HAS AT LEAST 5 YEARS' CONTINUOUS SERVICE]

[276V Indefinite leave to remain in the United Kingdom as the spouse, civil partner, unmarried or same-sex partner of a person present and settled in the United Kingdom or being granted settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 276U is met.]

Note

Paragraphs 276R–276Z and 276AA–276AC inserted by HC 164, in force 1 January 2005. References to civil partners inserted by HC 582.

[REFUSAL OF INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS THE SPOUSE, CIVIL PARTNER, UNMARRIED OR SAME-SEX PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING GRANTED SETTLEMENT ON THE SAME OCCASION IN ACCORDANCE WITH PARAGRAPHS 276E TO 276Q OR OF A MEMBER OF HM FORCES WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4)(A) OF THE IMMIGRATION ACT 1971 AND HAS AT LEAST 5 YEARS' CONTINUOUS SERVICE]

[276W Indefinite leave to remain in the United Kingdom as the spouse, civil partner, unmarried or same-sex partner of a person present and settled in the United Kingdom or being granted settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under

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section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276U is met.]

Note

Paragraphs 276R–276Z and 276AA–276AC inserted by HC 164, in force 1 January 2005. References to civil partners inserted by HC 582.

[Children of a parent, parents or a relative settled or seeking settlement in the United Kingdom under paragraphs 276E to 276Q (HM Forces rules) or of members of HM Forces who are exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and have at least 5 years' continuous service]

[Leave to enter or remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom or being granted settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service]

[REQUIREMENTS FOR INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS THE CHILD OF A PARENT, PARENTS OR A RELATIVE PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING ADMITTED FOR SETTLEMENT ON THE SAME OCCASION IN ACCORDANCE WITH PARAGRAPHS 276E TO 276Q OR OF A MEMBER OF HM FORCES WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4)(A) OF THE IMMIGRATION ACT 1971 AND HAS AT LEAST 5 YEARS' CONTINUOUS SERVICE]

[276X The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom or being admitted for settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service are that:

- (i) the applicant is seeking indefinite leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
 - (a) both parents are present and settled in the United Kingdom; or
 - (b) both parents are being admitted on the same occasion for settlement; or
 - (c) one parent is present and settled in the United Kingdom or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service and the other is being admitted on the same occasion for settlement or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service; or
 - (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service and the other parent is dead; or
 - (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service and has had sole responsibility for the child's upbringing; or

- (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
 - (ii) is under the age of 18; and
 - (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
 - (iv) holds a valid United Kingdom entry clearance for entry in this capacity.]
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[INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS THE CHILD OF A PARENT, PARENTS OR A RELATIVE PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING ADMITTED FOR SETTLEMENT ON THE SAME OCCASION IN ACCORDANCE WITH PARAGRAPHS 276E TO 276Q OR OF A MEMBER OF HM FORCES WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4)(A) OF THE IMMIGRATION ACT 1971 AND HAS AT LEAST 5 YEARS' CONTINUOUS SERVICE]

[276Y Indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom or being admitted for settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival.]

[REFUSAL OF INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS THE CHILD OF A PARENT, PARENTS OR A RELATIVE PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING ADMITTED FOR SETTLEMENT ON THE SAME OCCASION IN ACCORDANCE WITH PARAGRAPHS 276E TO 276Q OR OF A MEMBER OF HM FORCES WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4)(A) OF THE IMMIGRATION ACT 1971 AND HAS AT LEAST 5 YEARS' CONTINUOUS SERVICE]

[276Z Indefinite leave to enter the United Kingdom as the child of a parent, parents, or a relative present and settled in the United Kingdom or being admitted for settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.]

[REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS THE CHILD OF A PARENT, PARENTS OR A RELATIVE PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING GRANTED SETTLEMENT ON THE SAME OCCASION IN ACCORDANCE WITH PARAGRAPHS 276E TO 276Q OR OF A MEMBER OF HM FORCES WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4)(A) OF THE IMMIGRATION ACT 1971 AND HAS AT LEAST 5 YEARS' CONTINUOUS SERVICE]

[276AA The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom or being granted settlement on the same occasion in accordance

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with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service are that:

- (i) the applicant is seeking indefinite leave to remain with a parent, parents or a relative in one of the following circumstances:
 - (a) both parents are present and settled in the United Kingdom or being granted settlement on the same occasion; or
 - (ab) one parent is present and settled in the United Kingdom or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service and the other is being granted settlement on the same occasion or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service; or
 - (b) one parent is present and settled in the United Kingdom or being granted settlement on the same occasion or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service and the other parent is dead; or
 - (c) one parent is present and settled in the United Kingdom or being granted settlement on the same occasion or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service and has had sole responsibility for the child's upbringing; or
 - (d) one parent or a relative is present and settled in the United Kingdom or being granted settlement on the same occasion or is a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
- (ii) is under the age of 18; and
- (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
- (iv) has leave to enter or remain in the United Kingdom]

[INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS THE CHILD OF A PARENT, PARENTS OR A RELATIVE PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING GRANTED SETTLEMENT ON THE SAME OCCASION IN ACCORDANCE WITH PARAGRAPHS 276E TO 276Q OR OF A MEMBER OF HM FORCES WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4)(A) OF THE IMMIGRATION ACT 1971 AND HAS AT LEAST 5 YEARS' CONTINUOUS SERVICE]

[276AB Indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom or being granted settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service may be granted if the Secretary of State is satisfied that each of the requirements of paragraph 276AA is met.]

[REFUSAL OF INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS THE CHILD OF A PARENT, PARENTS OR A RELATIVE PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING GRANTED SETTLEMENT ON THE SAME OCCASION IN ACCORDANCE WITH PARAGRAPHS 276E TO 276Q OR OF A MEMBER OF HM FORCES WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4)(A) OF THE IMMIGRATION ACT 1971 AND HAS AT LEAST 5 YEARS' CONTINUOUS SERVICE]

[276AC Indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom or being granted settlement on the same occasion in accordance with paragraphs 276E to 276Q or of a member of HM Forces who is exempt from immigration control under section 8(4)(a) of the Immigration Act 1971 and has at least 5 years' continuous service is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276AA is met.]

Note

Paragraphs 276X to 276AC substituted by HC 314.

[Spouses, civil partners, unmarried or same-sex partners of armed forces members who are exempt from immigration control under section 8(4) of the Immigration Act 1971]

[REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE SPOUSE, CIVIL PARTNER, UNMARRIED OR SAME-SEX PARTNER OF AN ARMED FORCES MEMBER WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4) OF THE IMMIGRATION ACT 1971

[276AD The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse, civil partner, unmarried or same-sex partner of an armed forces member who is exempt from immigration control under section 8(4) of the Immigration Act 1971 are that:

(i) the applicant is married to or the civil partner, unmarried or same-sex partner of an armed forces member who is exempt from immigration control under section 8(4) of the Immigration Act 1971; and

(ii) each of the parties intends to live with the other as his or her spouse or civil partner, unmarried or same-sex partner during the applicant's stay and the marriage, civil partnership, or relationship akin to a marriage or civil partnership is subsisting; and
(iii) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
(iv) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds;

(v) the applicant does not intend to stay in the United Kingdom beyond his or her spouse's, civil partner's, unmarried or same-sex partner's enlistment in the home forces, or period of posting or training in the United Kingdom; and

(vi) where the applicant is the unmarried or same-sex partner of an armed forces member who is exempt from immigration control under section 8(4) of the Immigration Act 1971, the following requirements are also met:

(a) any previous marriage or civil partnership or relationship akin to a marriage by the applicant or the *exempt armed forces member* must have permanently broken down,

(b) the applicant and the *exempt armed forces member* must not be so closely related that they would be prohibited from marrying each other in the UK, and

(c) the applicant and the *exempt armed forces member* must have been living together in a relationship akin to marriage or civil partnership for a period of at least 2 years.]

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[LEAVE TO ENTER OR REMAIN AS THE SPOUSE, CIVIL PARTNER, UNMARRIED OR SAME-SEX PARTNER OF AN ARMED FORCES MEMBER WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4) OF THE IMMIGRATION ACT 1971]

[276AE A person seeking leave to enter or remain in the United Kingdom as the spouse, civil partner, unmarried or same-sex partner of an armed forces member who is exempt from immigration control under section 8(4) of the Immigration Act 1971 may be given leave to enter or remain in the United Kingdom for a period not exceeding 4 years or the expected duration of the enlistment, posting or training of his or her spouse, civil partner, unmarried or same-sex partner, whichever is shorter, provided that the Immigration Officer, or in the case of an application for leave to remain, the Secretary of State, is satisfied that each of the requirements of paragraph 276AD(i)–(vi) is met.]

[REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE SPOUSE, CIVIL PARTNER, UNMARRIED OR SAME-SEX PARTNER OF AN ARMED FORCES MEMBER WHO IS EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4) OF THE IMMIGRATION ACT 1971]

[276AF Leave to enter or remain in the United Kingdom as the spouse, civil partner, unmarried or same-sex partner of an armed forces member who is exempt from immigration control under section 8(4) of the Immigration Act 1971 is to be refused if the Immigration Officer, or in the case of an application for leave to remain, the Secretary of State, is not satisfied that each of the requirements of paragraph 276AD(i)–(vi) is met.]

Note

Paragraphs 276AD–276AF substituted by HC 314.

[Children of Armed Forces Members who are exempt from Immigration Control under section 8(4) of the Immigration Act 1971]

[REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE CHILD OF AN ARMED FORCES MEMBER EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4) OF THE IMMIGRATION ACT 1971]

[276AG The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the child of an armed forces member exempt from immigration control under section 8(4) of the Immigration Act 1971 are that:

- (i) he is the child of a parent who is an armed forces member exempt from immigration control under section 8(4) of the Immigration Act 1971; and
- (ii) he is under the age of 18 or has current leave to enter or remain in this capacity; and
- (iii) he is unmarried [and is not a civil partner], has not formed an independent family unit and is not leading an independent life; and (iv) he can and will be maintained and accommodated adequately without recourse to public funds in accommodation which his parent(s) own or occupy exclusively; and
- (v) he will not stay in the United Kingdom beyond the period of his parent's enlistment in the home forces, or posting or training in the United Kingdom; and
- (vi) his other parent is being or has been admitted to or allowed to remain in the United Kingdom save where:

- (a) the parent he is accompanying or joining is his sole surviving parent; or
- (b) the parent he is accompanying or joining has had sole responsibility for his upbringing; or
- (c) there are serious and compelling family or other considerations which make exclusion from the United Kingdom undesirable and suitable arrangements have been made for his care.]

Note

Paragraphs 276AG–276AI inserted by HC 346. Words in square brackets in sub-paragraph (iii) inserted by HC 582.

[LEAVE TO ENTER OR REMAIN AS THE CHILD OF AN ARMED FORCES MEMBER EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4) OF THE IMMIGRATION ACT 1971]

[276AH A person seeking leave to enter or remain in the United Kingdom as the child of an armed forces member exempt from immigration control under section 8(4) of the Immigration Act 1971 may be given leave to enter or remain in the United Kingdom for a period not exceeding 4 years or the duration of the enlistment, posting or training of his parent, whichever is the shorter, provided that the Immigration Officer, or in the case of an application for leave to remain, the Secretary of State, is satisfied that each of the requirements of 276AG(i)–(vi) is met.]

Note

Paragraphs 276AG–276AI inserted by HC 346.

[REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE CHILD OF AN ARMED FORCES MEMBER EXEMPT FROM IMMIGRATION CONTROL UNDER SECTION 8(4) OF THE IMMIGRATION ACT 1971]

[276AI Leave to enter or remain in the United Kingdom as the child of an armed forces member exempt from immigration control under section 8(4) of the Immigration Act 1971 is to be refused if the Immigration Officer, or in the case of an application for leave to remain, the Secretary of State, is not satisfied that each of the requirements of paragraph 276AG(i)–(vi) is met.]

Note

Paragraphs 276AG–276AI inserted by HC 346.

PART 8 FAMILY MEMBERS

Spouses [and civil partners]

277 Nothing in these Rules shall be construed as permitting a person to be granted entry clearance, leave to enter, leave to remain or variation of leave as a spouse [or civil partner] of another if [either the applicant] [or the sponsor will be aged under [21]] on the date of arrival in the United Kingdom or (as the case may be) on the date on which the leave to remain or variation of leave would be granted.

Note

Words in square brackets substituted by HC 1113.

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[278 Nothing in these Rules shall be construed as allowing a person to be granted entry clearance, leave to enter, leave to remain or variation of leave as the spouse of a man or woman (the sponsor) if:

- (i) his or her marriage to the sponsor is polygamous; and
- (ii) there is another person living who is the husband or wife of the sponsor and who:
 - (a) is, or at any time since his or her marriage to the sponsor has been, in the United Kingdom; or
 - (b) has been granted a certificate of entitlement in respect of the right of abode mentioned in Section 2(1)(a) of the Immigration Act 1988 or an entry clearance to enter the United Kingdom as the husband or wife of the sponsor.

For the purpose of this paragraph a marriage may be polygamous although at its inception neither party had any other spouse.]

Note

In paragraph 277 words in first square brackets substituted by HC 164; words in second square brackets substituted and inserted by HC 538. Paragraph 278 substituted by Cm 4851. References to civil partners inserted by HC 582.

[279 Paragraph 278 does not apply to any person who seeks entry clearance, leave to enter, leave to remain or variation of leave where:

- (i) he or she has been in the United Kingdom before 1 August 1988 having been admitted for the purpose of settlement as the husband or wife of the sponsor; or
- (ii) he or she has, since their marriage to the sponsor, been in the United Kingdom at any time when there was no such other spouse living as is mentioned in paragraph 278 (ii).

But where a person claims that paragraph 278 does not apply to them because they have been in the United Kingdom in circumstances which cause them to fall within sub-paragraphs (i) or (ii) of that paragraph, it shall be for them to prove that fact.]

Note

Paragraph 279 substituted by Cm 4851.

[280 For the purposes of paragraphs 278 and 279 the presence of any wife or husband in the United Kingdom in any of the following circumstances shall be disregarded:

- (i) as a visitor; or
- (ii) an illegal entrant; or
- (iii) in circumstances whereby a person is deemed by Section 11(1) of the Immigration Act 1971 not to have entered the United Kingdom.]

Note

Paragraph 280 substituted by Cm 4851.

Spouses [or civil partners] of persons present and settled in the United Kingdom or being admitted on the same occasion for settlement

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS THE SPOUSE [OR CIVIL PARTNER] OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING ADMITTED ON THE SAME OCCASION FOR SETTLEMENT

[281 The requirements to be met by a person seeking leave to enter the United Kingdom with a view to settlement as the spouse [or civil partner] of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement are that:

- [(i)
- (a) the applicant is married to [, or the civil partner of,] a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; or
- [(b)
- (i) the applicant is married to or the civil partner of a person who has a right of abode in the United Kingdom or indefinite leave to enter or remain in the United Kingdom and is on the same occasion seeking admission to the United Kingdom for the purposes of settlement and the parties were married or formed a civil partnership at least 4 years ago, since which time they have been living together outside the United Kingdom; and
 - (ii) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application; and]
- (ii) the parties to the marriage [or civil partnership] have met; and
 - (iii) each of the parties intends to live permanently with the other as his or her spouse [or civil partner] and the marriage [or civil partnership] is subsisting; and
 - (iv) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
 - (v) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
 - (vi) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

[For the purposes of this paragraph and paragraphs 282–289 a member of HM Forces serving overseas, or a permanent member of HM Diplomatic Service or a comparable UK-based staff member of the British Council on a tour of duty abroad, or a staff member of the Department for International Development who is a British Citizen or is settled in the United Kingdom, is to be regarded as present and settled in the United Kingdom.]

Note

Substituted by HC 26, para 1 with effect from 5 June 1997. Sub-paragraph (i)(a) substituted by HC 538. Words beginning ‘For the purposes’ substituted by Cm 5597. References to civil partners and civil partnership inserted by HC 582. Sub-paragraph (b) inserted by HC 398.

LEAVE TO ENTER AS THE SPOUSE [OR CIVIL PARTNER] OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING ADMITTED FOR SETTLEMENT ON THE SAME OCCASION

[282 A person seeking leave to enter the United Kingdom as the spouse or civil partner of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement may:

- (a) in the case of a person within paragraph 281(i)(a), be admitted for an initial period not exceeding [27 months], or
- (b) in the case of a person who meets both of the requirements in paragraph 281(i)(b), be granted indefinite leave to enter; or
- (c) in the case of a person who meets the requirement in paragraph 281(i)(b)(i), but not the requirement in paragraph 281(i)(b)(ii) to have sufficient knowledge of the English language and about life in the United Kingdom, be admitted for an

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initial period not exceeding [27 months], in all cases provided the Immigration Officer is satisfied that each of the relevant requirements of paragraph 281 is met.]

Note

Substituted by HC 398. In sub-paragraphs (a) and (c) words '27 months' substituted by HC 971.

REFUSAL OF LEAVE TO ENTER AS THE SPOUSE [OR CIVIL PARTNER] OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING ADMITTED ON THE SAME OCCASION FOR SETTLEMENT

283 Leave to enter the United Kingdom as the spouse [or civil partner] of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement is to be refused [if the Immigration Officer is not satisfied that each of the requirements of paragraph 281 is met.]

Note

References to civil partners inserted by HC 582. Text beginning 'if the Immigration Officer' amended by HC 398.

REQUIREMENTS FOR AN EXTENSION OF STAY AS THE SPOUSE [OR CIVIL PARTNER] OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

[284 The requirements for an extension of stay as the spouse [or civil partner] of a person present and settled in the United Kingdom are that:

- [(i) the applicant has limited leave to enter or remain in the United Kingdom [which was given in accordance with any of the provisions of these Rules], other than where as a result of that leave he would not have been in the United Kingdom beyond 6 months from the date on which he was admitted to the United Kingdom on this occasion in accordance with these Rules, unless the leave in question is limited leave to enter as a fiancé [or proposed civil partner] [or unless the leave in question was granted to the applicant as the spouse, civil partner, unmarried or same-sex partner of a Tier 1 Migrant and that spouse or partner is the same person in relation to whom the applicant is applying for an extension of stay under this rule.]; and]
- (ii) is married to [, or the civil partner of,] a person present and settled in the United Kingdom; and
- (iii) the parties to the marriage [or civil partnership] have met; and
- (iv) the applicant has not remained in breach of the immigration laws; and
- (v) the marriage [or civil partnership] has not taken place after a decision has been made to deport the applicant or he has been recommended for deportation or been given notice under Section 6(2) of the Immigration Act 1971 [or been given directions for his removal under section 10 of the Immigration and Asylum Act 1999]; and
- (vi) each of the parties intends to live permanently with the other as his or her spouse [or civil partner] and the marriage [or civil partnership] is subsisting; and
- (vii) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
- (viii) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds.]

Note

Substituted by HC 26, para 2 with effect from 5 June 1997. Sub-paragraph (i) substituted by Cm 5949. Words in square brackets within sub-paragraph (i) inserted by Cm 6339. References to civil partners and civil partnership inserted by HC 582, except in sub-paragraph (i) – inserted by HC 1016. Sub-paragraph (i) words in square brackets beginning ‘or unless the leave’ inserted by HC 607. Sub-paragraph (v) words in square brackets beginning ‘or been given’ inserted by HC 971.

EXTENSION OF STAY AS THE SPOUSE [OR CIVIL PARTNER] OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

285 An extension of stay as the spouse [or civil partner] of a person present and settled in the United Kingdom may be granted for a period of [2 years] in the first instance, provided the Secretary of State is satisfied that each of the requirements of paragraph 284 is met.

Note

Words in square brackets inserted by HC 538. References to civil partners inserted by HC 582.

REFUSAL OF EXTENSION OF STAY AS THE SPOUSE [OR CIVIL PARTNER] OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

286 An extension of stay as the spouse [or civil partner] of a person present and settled in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 284 is met.

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN FOR THE SPOUSE [OR CIVIL PARTNER] OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

[287

- (a) The requirements for indefinite leave to remain for the spouse [or civil partner] of a person present and settled in the United Kingdom are that:
- [(i)
 - [(a) the applicant was admitted to the United Kingdom for a period not exceeding 27 months or given an extension of stay for a period of 2 years in accordance with paragraphs 281 to 286 of these Rules and has completed a period of 2 years as the spouse or civil partner of a person present and settled in the United Kingdom; or];
 - [(b) the applicant was admitted to the United Kingdom for a period not exceeding 27 months or given an extension of stay for a period of 2 years in accordance with paragraphs 295AA to 295F of these Rules and during that period married or formed a civil partnership with the person whom he or she was admitted or granted an extension of stay to join and has completed a period of 2 years as the unmarried or same-sex partner and then the spouse or civil partner of a person present and settled in the United Kingdom; or];
 - (c) was admitted to the United Kingdom in accordance with leave granted under paragraph 282(c) of these rules; or
 - [(d) the applicant was admitted to the UK or given an extension of stay as the spouse or civil partner of a [Tier 1 Migrant], and then

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- obtained an extension of stay under paragraphs 281 to 286 of these Rules and has completed a period of 2 years as the spouse or civil partner of the person who is now present and settled here; or
- (e) the applicant was admitted to the UK or given an extension of stay as the unmarried or same-sex partner of a [Tier 1 Migrant] and during that period married or formed a civil partnership with the person whom he or she was admitted or granted an extension of stay to join and has completed a period of 2 years as the unmarried or same-sex partner and then the spouse or civil partner of the person who is now present and settled in the UK; and]
 - (ii) the applicant is still the spouse of the person he or she was admitted or granted an extension of stay to join and the marriage [or civil partnership] is subsisting; and
 - (iii) each of the parties intends to live permanently with the other as his or her spouse [or civil partner]; and
 - (iv) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
 - (v) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
 - [(vi) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.]
- (b) The requirements for indefinite leave to remain for the bereaved spouse [or civil partner] of a person who was present and settled in the United Kingdom are that:
- [(i)
 - [(a) the applicant was admitted to the United Kingdom for a period not exceeding 27 months or given an extension of stay for a period of 2 years as the spouse or civil partner of a person present and settled in the United Kingdom in accordance with paragraphs 281 to 286 of these Rules; or];
 - [(b) the applicant was admitted to the United Kingdom for a period not exceeding 27 months or given an extension of stay for a period of 2 years as the unmarried or same-sex partner of a person present and settled in the United Kingdom in accordance with paragraphs 295AA to 295F of these Rules and during that period married or formed a civil partnership with the person whom he or she was admitted or granted an extension of stay to join; and];
 - (ii) the person whom the applicant was admitted or granted an extension of stay to join died during that [...] period; and
 - (iii) the applicant was still the spouse [or civil partner] of the person he or she was admitted or granted an extension of stay to join at the time of the death; and
 - (iv) each of the parties intended to live permanently with the other as his or her spouse [or civil partner] and the marriage [or civil partnership] was subsisting at the time of the death.]

Note

Paragraph 287 substituted by Cm 4851. Words in square brackets substituted by HC 538. References to civil partners inserted by HC 582. Sub-paragraph (a)(vi) inserted by HC 398. Sub-paragraph (a)(i)(d)–(e) inserted by HC 321. In sub-paragraphs (a)(i)(d) and (a)(i)(e) words

'Tier 1 Migrant' in square brackets substituted by HC 607. Sub-paragraphs (a)(i)(a) and (a)(i)(b) substituted by HC 971. Sub-paragraphs (b)(i)(a) and (b)(i)(b) substituted by HC 971. In sub-paragraph (b)(ii) words removed by HC 971.

INDEFINITE LEAVE TO REMAIN FOR THE SPOUSE [OR CIVIL PARTNER] OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

288 Indefinite leave to remain for the spouse [or civil partner] of a person present and settled in the United Kingdom may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 287 is met.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR THE SPOUSE [OR CIVIL PARTNER] OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

289 Indefinite leave to remain for the spouse [or civil partner] of a person present and settled in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 287 is met.

[REFUSAL OF INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS THE VICTIM OF DOMESTIC VIOLENCE]

289A The requirements to be met by a person who is the victim of domestic violence and who is seeking indefinite leave to remain in the United Kingdom are that the applicant:

- [(i) was admitted to the United Kingdom for a period not exceeding 27 months or given an extension of stay for a period of 2 years as the spouse or civil partner of a person present and settled here; or];
- [(ii) was admitted to the United Kingdom for a period not exceeding 27 months or given an extension of stay for a period of 2 years as the unmarried or same-sex partner of a person present and settled here; and]
- (iii) the relationship with their [spouse, civil partner, unmarried partner or same-sex partner] , as appropriate, was subsisting at the beginning of the relevant period of leave or extension of stay referred to in (i) or (ii) above; and
- (iv) is able to produce such evidence as may be required by the Secretary of State to establish that the relationship was caused to permanently break down before the end of that period as a result of domestic violence.]

Note

Inserted by HC 104. Words in brackets substituted by HC 538. Words in brackets in sub-paragraph (iii) inserted by HC 582. Sub-paragraphs (i) and (ii) substituted by HC 971.

[INDEFINITE LEAVE TO REMAIN AS THE VICTIM OF DOMESTIC VIOLENCE]

289B Indefinite leave to remain as the victim of domestic violence may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 289A is met.]

Note

Inserted by HC 538.

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[REFUSAL OF INDEFINITE LEAVE TO REMAIN AS THE VICTIM OF DOMESTIC VIOLENCE]

289C Indefinite leave to remain as the victim of domestic violence is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 287A is met.]

Note

Inserted by HC 538.

Fiancé(e)s [and proposed civil partners]

[289AA Nothing in these Rules shall be construed as permitting a person to be granted entry clearance, leave to enter or variation of leave as a fiancé(e) [or proposed civil partner] if [either the applicant] or the sponsor will aged under [21] on the date of arrival of the applicant in the United Kingdom or (as the case may be) on the date on which the leave to enter or variation of leave would be granted.]

Note

Paragraph 289AA inserted by HC 538. Words in square brackets substituted by HC 164; word [21] in square brackets substituted by HC 1113.

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A FIANCÉ(E) [OR PROPOSED CIVIL PARTNER] (IE WITH A VIEW TO MARRIAGE [OR CIVIL PARTNERSHIP] AND PERMANENT SETTLEMENT IN THE UNITED KINGDOM)

[290 The requirements to be met by a person seeking leave to enter the United Kingdom as a fiancé(e) [or proposed civil partner] are that:

- (i) the applicant is seeking leave to enter the United Kingdom for marriage [or civil partnership] to a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; and
- (ii) the parties to the proposed marriage [or civil partnership] have met; and
- (iii) each of the parties intends to live permanently with the other as his or her spouse [or civil partner] after the marriage[or civil partnership]; and
- (iv) adequate maintenance and accommodation without recourse to public funds will be available for the applicant until the date of the marriage[or civil partnership]; and
- (v) there will, after the marriage[or civil partnership], be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
- (vi) the parties will be able after the marriage [or civil partnership] to maintain themselves and any dependants adequately without recourse to public funds; and
- (vii) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.]

Note

Substituted by HC 26, para 3 with effect from 5 June 1997. References to proposed civil partners and civil partnership inserted by HC 582.

[290A For the purposes of paragraph 290 and paragraphs 291–295, an EEA national who holds a registration certificate or a document certifying permanent residence issued under the 2006 EEA Regulations (including an EEA national who holds a

residence permit issued under the Immigration (European Economic Area) Regulations 2000 which is treated as if it were such a certificate or document by virtue of Schedule 4 to the 2006 EEA Regulations) is to be regarded as present and settled in the United Kingdom.]

Note

Paragraph 290A inserted by Cm 5597. Amended by HC 1053.

LEAVE TO ENTER AS A FIANCÉ(E) [OR PROPOSED CIVIL PARTNER]

291 A person seeking leave to enter the United Kingdom as a fiancé(e) [or proposed civil partner] may be admitted, with a prohibition on employment, for a period not exceeding 6 months to enable the marriage [or civil partnership] to take place provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival.

REFUSAL OF LEAVE TO ENTER AS A FIANCÉ(E) [OR PROPOSED CIVIL PARTNER]

292 Leave to enter the United Kingdom as a fiancé(e) [or proposed civil partner] is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A FIANCÉ(E) [OR PROPOSED CIVIL PARTNER]

293 The requirements for an extension of stay as a fiancé(e) [or proposed civil partner] are that:

- (i) the applicant was admitted to the United Kingdom with a valid United Kingdom entry clearance as a fiancé(e); and
- (ii) good cause is shown why the marriage [or civil partnership] did not take place within the initial period of leave granted under paragraph 291; and
- (iii) there is satisfactory evidence that the marriage [or civil partnership] will take place at an early date; and
- (iv) the requirements of paragraph 290(ii)–(vi) are met.]

Note

Sub-paragraph (iv) substituted by HC 26, para 4 with effect from 5 June 1997. References to proposed civil partners and civil partnership inserted by HC 582.

EXTENSION OF STAY AS A FIANCÉ(E) [OR PROPOSED CIVIL PARTNER]

294 An extension of stay as a fiancé(e) [or proposed civil partner] may be granted for an appropriate period with a prohibition on employment to enable the marriage [or civil partnership] to take place provided the Secretary of State is satisfied that each of the requirements of paragraph 293 is met.

Note

Words in square brackets inserted by HC 582.

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REFUSAL OF EXTENSION OF STAY AS A FIANCÉ(E) [OR PROPOSED CIVIL PARTNER]

295 An extension of stay is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 293 is met.

Note

Words in square brackets inserted by HC 582.

[Leave to enter as the unmarried [or same-sex] partner of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement

[295AA Nothing in these Rules shall be construed as permitting a person to be granted entry clearance, leave to enter or variation of leave as an unmarried [or same-sex] partner if [either the applicant] or the sponsor will aged under [21] on the date of arrival of the applicant in the United Kingdom or (as the case may be) on the date on which the leave to enter or variation of leave would be granted.]

Note

Paragraph 295AA inserted by HC 538. Words in square brackets substituted by HC 164. References to same-sex partners inserted by HC 582. Word [21] in square brackets substituted by HC 1113.

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS THE UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING ADMITTED ON THE SAME OCCASION FOR SETTLEMENT

295A The requirements to be met by a person seeking leave to enter the United Kingdom with a view to settlement as the unmarried [or same-sex] partner of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement, are that:

- [(i)
 - (a) the applicant is the unmarried [or same-sex] partner of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement and the parties have been living together in a relationship akin to marriage [or civil partnership] which has subsisted for two years or more; or
 - [(b)
 - (i) the applicant is the unmarried or same-sex partner of a person who has a right of abode in the United Kingdom or indefinite leave to enter or remain in the United Kingdom and is on the same occasion seeking admission to the United Kingdom for the purposes of settlement and the parties have been living together outside the United Kingdom in a relationship akin to marriage which has subsisted for 4 years or more; and
 - (ii) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of [21] or aged 65 or over at the time he makes his application; and]
- [(iii) the parties are not involved in a consanguineous relationship with one another; and]
- [...]

- (v) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
- (vi) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
- (vii) the parties intend to live together permanently; and
- (viii) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

[For the purposes of this paragraph and paragraphs 295B–295I, a member of HM Forces serving overseas, or a permanent member of HM Diplomatic Service or a comparable UK-based staff member of the British Council on a tour of duty abroad, or a staff member of the Department for International Development who is a British Citizen or is settled in the United Kingdom, is to be regarded as present and settled in the United Kingdom.]

Note

Sub-paragraph (i)(a) substituted and sub-paragraph (iv) deleted by HC 538. Sub-paragraph (iii) inserted by Cm 5949. Final paragraph inserted by Cm 5597. References to same-sex partners and civil partnership inserted by HC 582. Sub-paragraph (i)(b) amended by HC 398.

LEAVE TO ENTER THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS THE UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING ADMITTED ON THE SAME OCCASION FOR SETTLEMENT

[295B A person seeking leave to enter the United Kingdom as the unmarried or same-sex partner of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement may:

- (a) in the case of a person within paragraph 295A(i)(a), be admitted for an initial period not exceeding [27 months], or
- (b) in the case of a person who meets both of the requirements in paragraph 295A(i)(b), be granted indefinite leave to enter, or
- (c) in the case of a person who meets the requirement in paragraph 295A(i)(b)(i), but not the requirement in paragraph of the English language and about life in the United Kingdom, be admitted for an initial period not exceeding [27 months], in all cases provided the Immigration Officer is satisfied that each of the relevant requirements of paragraph 295A is met.]

Note

Substituted by HC 398. In sub-paragraphs (a) and (c) words ‘27 months’ in square brackets substituted by HC 971.

REFUSAL OF LEAVE TO ENTER THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS THE UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM OR BEING ADMITTED ON THE SAME OCCASION FOR SETTLEMENT

295C Leave to enter the United Kingdom with a view to settlement as the unmarried [or same-sex] partner of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement, is to be refused [if the Immigration Officer is not satisfied that each of the requirements of paragraph 295A is met.]

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Note

References to same-sex partners inserted by HC 582. Words beginning 'if the Immigration Office' inserted by HC 398.

Leave to remain as the unmarried [or same-sex] partner of a person present and settled in the United Kingdom

REQUIREMENTS FOR LEAVE TO REMAIN AS THE UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

295D The requirements to be met by a person seeking leave to remain as the unmarried [or same-sex] partner of a person present and settled in the United Kingdom are that:

- (i) the applicant has limited leave to remain in the United Kingdom [which was given in accordance with any of the provisions of these Rules]; and
- (ii) any previous marriage [or civil partnership] (or similar relationship) by either partner has permanently broken down; and
- (iii) the applicant is the unmarried [or same-sex] partner of a person who is present and settled in the United Kingdom; and
- (iv) the applicant has not remained in breach of the immigration laws; and
- [(v) the parties are not involved in a consanguineous relationship with one another; and]
- (vi) the parties have been living together in a relationship akin to marriage [or civil partnership] which has subsisted for two years or more; and
- (vii) the parties' relationship pre-dates any decision to deport the applicant, recommend him for deportation, give him notice under Section 6(2) of the Immigration Act 1971, or give directions for his removal under section 10 of the Immigration and Asylum Act 1999; and
- (viii) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and -
- (ix) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
- (x) the parties intend to live together permanently.

Note

Sub-paragraph (v) inserted by Cm 5949. Words in square brackets in sub-paragraph (i) inserted by Cm 6339. References to same-sex partners and civil partnership inserted by HC 582.

LEAVE TO REMAIN AS THE UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

295E Leave to remain as the unmarried [or same-sex] partner of a person present and settled in the United Kingdom may be granted for a period of 2 years in the first instance provided that the Secretary of State is satisfied that each of the requirements of paragraph 295D are met.

Note

References to same-sex partners inserted by HC 582.

REFUSAL OF LEAVE TO REMAIN AS THE UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

295F Leave to remain as the unmarried [or same-sex] partner of a person present and settled in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 295D is met.

Note

References to same-sex partners inserted by HC 582.

•

Indefinite leave to remain as the unmarried [or same-sex] partner of a person present and settled in the United Kingdom

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN AS THE UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

295G The requirements to be met by a person seeking indefinite leave to remain as the unmarried [or same-sex] partner of a person present and settled in the United Kingdom are that:

- [(i)
 - (a) the applicant was admitted to the United Kingdom [for a period not exceeding 27 months] or given an extension of stay for a period of 2 years in accordance with paragraphs 295AA to 295F of these Rules and has completed a period of 2 years as the unmarried or same-sex partner of a person present and settled here; or
 - (b) the applicant was admitted to the UK or given an extension of stay as the unmarried or same-sex partner of a [Tier 1 Migrant], and then obtained an extension of stay under paragraphs 295AA to 295F of these Rules and has completed a period of 2 years as the unmarried or same-sex partner of the person who is now present and settled here; or
 - (c) the applicant was admitted to the United Kingdom in accordance with leave granted under paragraph 295B(c) of these rules; and]
- (ii) the applicant is still the unmarried [or same-sex] partner of the person he was admitted or granted an extension of stay to join and the relationship is still subsisting; and
- (iii) each of the parties intends to live permanently with the other as his partner; and
- (iv) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
- (v) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
- (vi) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.

Note

Words in square brackets in sub paragraph (i) inserted by Cm 6339. References to same-sex partners inserted by HC 582. Sub-paragraphs (i)(a) and (vi) inserted by HC 398. Sub-paragraphs (i)(a), (i)(b) and (i)(c) inserted by HC 420. In sub-paragraph (i)(b) words 'Tier 1 Migrant' in square brackets substituted by HC 607. In sub-paragraph (i)(a) words in square brackets beginning 'for a period' inserted by HC 971.

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INDEFINITE LEAVE TO REMAIN AS THE UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

295H Indefinite leave to remain as the unmarried [or same-sex] partner of a person present and settled in the United Kingdom may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 295G is met.

Note

References to same-sex partners inserted by HC 582.

REFUSAL OF INDEFINITE LEAVE TO REMAIN AS THE UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

295I Indefinite leave to remain as the unmarried [or same-sex] partner of a person present and settled in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 295G is met.

Note

References to same-sex partners inserted by HC 582.

Leave to enter or remain as the unmarried [or same-sex] partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128–193; 200–239; or 263–270

REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193; 200–239; OR 263–270

295J The requirements to be met by a person seeking leave to enter or remain as the unmarried [or same-sex] partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128–193; 200–239; or 263–270; are that:

- (i) the applicant is the unmarried [or same-sex] partner of a person who has limited leave to enter or remain in the United Kingdom under paragraphs 128–193; 200–239; or 263–270; and
- (ii) any previous marriage [or civil partnership] (or similar relationship) by either partner has permanently broken down; and
- [(iii) the parties are not involved in a consanguineous relationship with one another; and]
- (iv) the parties have been living together in a relationship akin to marriage [or civil partnership] which has subsisted for 2 years or more; and
- (v) each of the parties intends to live with the other as his partner during the applicant's stay; and
- (vi) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and
- (vii) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and
- (viii) the applicant does not intend to stay in the United Kingdom beyond any period of leave granted to his partner; and
- (ix) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, was admitted with a valid United Kingdom entry clearance for entry in this capacity.

Note

Sub-paragraph (iii) inserted by Cm 5949. References to same-sex partners and civil partnerships inserted by HC 582.

LEAVE TO ENTER OR REMAIN AS THE UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193; 200–239; OR 263–270

[295K If the applicant is seeking leave to enter or remain as the unmarried or same-sex partner of a Highly Skilled Migrant, any leave which is granted will be subject to a condition prohibiting Employment as a Doctor in Training, unless the applicant is in the UK and has, or has last been granted, entry clearance, leave to enter or remain (which was not subject to a condition prohibiting Employment as a Doctor in Training) as the unmarried or same-sex partner of a migrant granted leave under Parts 3, 4, 5 or 6 of these Rules.]

Note

Substituted by HC 321.

REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON WITH LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM UNDER PARAGRAPHS 128–193; 200–239; OR 263–270

295L Leave to enter as the unmarried [or same-sex] partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128–193; 200–239; or 263–270; is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Leave to remain as the unmarried [or same-sex] partner of a person with limited leave to enter or remain in the United Kingdom under paragraphs 128–193; 200–239; or 263–270; is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 295J is met.

Note

References to same-sex partners inserted by HC 582.

Indefinite leave to remain for the bereaved unmarried [or same-sex] partner of a person present and settled in the United Kingdom

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN FOR THE BEREAVED UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

295M The requirements to be met by a person seeking indefinite leave to remain as the bereaved unmarried [or same-sex] partner of a person present and settled in the United Kingdom, are that:

- (i) the applicant was admitted to the United Kingdom [for a period not exceeding 27 months] or given an extension of stay for a period of 2 years [in accordance with paragraphs 295AA to 295F of these Rules] as the unmarried [or same-sex] partner of a person present and settled in the United Kingdom; and
- (ii) the person whom the applicant was admitted or granted an extension of stay to join died during that [period of leave]; and

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- (iii) the applicant was still the unmarried [or same-sex] partner of the person he was admitted or granted extension of stay to join at the time of the death; and
- (iv) each of the parties intended to live permanently with the other as his partner and the relationship was subsisting at the time of the death.

Note

Words in square brackets in sub-paragraph (i) inserted by Cm 6339. References to same-sex partners inserted by HC 582. In sub-paragraph (i) words in square brackets beginning 'for a period' substituted by HC 971. In sub-paragraph (ii) words 'period of leave' in square brackets substituted by HC 971.

INDEFINITE LEAVE TO REMAIN FOR THE BEREAVED UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

295N Indefinite leave to remain for the bereaved unmarried [or same-sex] partner of a person present and settled in the United Kingdom, may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 295M is met.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR THE BEREAVED UNMARRIED [OR SAME-SEX] PARTNER OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

295O Indefinite leave to remain for the bereaved unmarried [or same-sex] partner of a person present and settled in the United Kingdom, is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 295M is met.]

Note

Paragraphs 295A–295O inserted by Cm 4851. References to same-sex partners inserted by HC 582.

Children

[296 Nothing in these Rules shall be construed as permitting a child to be granted entry clearance, leave to enter or remain, or variation of leave where his mother is party to a polygamous marriage and any application by that parent for admission or leave to remain for settlement or with a view to settlement would be refused pursuant to paragraphs 278 or 278A].

Note

Paragraphs 296 substituted by Cm 4851.

Leave to enter or remain in the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom

REQUIREMENTS FOR INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS THE CHILD OF A PARENT, PARENTS OR A RELATIVE PRESENT AND SETTLED OR BEING ADMITTED FOR SETTLEMENT IN THE UNITED KINGDOM

297 The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:

- (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
 - (a) both parents are present and settled in the United Kingdom; or
 - (b) both parents are being admitted on the same occasion for settlement; or
 - (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
 - (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
 - (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
 - (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
- (ii) is under the age of 18; and
- (iii) is not leading an independent life, is unmarried [and is not a civil partner], and has not formed an independent family unit; and
- [(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and
- (v) can, and will, be maintained adequately by the parent, parents or relative the child is seeking to join, without recourse to public funds; and
- (vi) holds a valid United Kingdom entry clearance for entry in this capacity.]

Note

Paragraph 297 (iv)–(v) substituted and paragraph 297 (vi) inserted by Cm 485. Reference to civil partners inserted by HC 582.

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS THE CHILD OF A PARENT, PARENTS OR A RELATIVE PRESENT AND SETTLED OR BEING ADMITTED FOR SETTLEMENT IN THE UNITED KINGDOM

298 The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom are that he:

- (i) is seeking to remain with a parent, parents or a relative in one of the following circumstances:
 - (a) both parents are present and settled in the United Kingdom; or
 - (b) one parent is present and settled in the United Kingdom and the other parent is dead; or
 - (c) one parent is present and settled in the United Kingdom and has had sole responsibility for the child's upbringing; or
 - (d) one parent or a relative is present and settled in the United Kingdom and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
- (ii) has limited leave to enter or remain in the United Kingdom, and
 - (a) is under the age of 18; or
 - (b) was given leave to enter or remain with a view to settlement under paragraph 302; and

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- (iii) is not leading an independent life, is unmarried [and is not a civil partner], and has not formed an independent family unit; and
- [(iv) can, and will, be accommodated adequately by the parent, parents or relative the child was admitted to join, without recourse to public funds in accommodation which the parent, parents or relative the child was admitted to join, own or occupy exclusively; and
- (v) can, and will, be maintained adequately by the parent, parents or relative the child was admitted to join, without recourse to public funds.]

Note

Paragraph 298 (iv) substituted and paragraph 298 (v) inserted by Cın 4851. Reference to civil partners inserted by HC 582.

INDEFINITE LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS THE CHILD OF A PARENT, PARENTS OR A RELATIVE PRESENT AND SETTLED OR BEING ADMITTED FOR SETTLEMENT IN THE UNITED KINGDOM

299 Indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 298 is met.

REFUSAL OF INDEFINITE LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS THE CHILD OF A PARENT, PARENTS OR A RELATIVE PRESENT AND SETTLED OR BEING ADMITTED FOR SETTLEMENT IN THE UNITED KINGDOM

300 Indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 298 is met.

REQUIREMENTS FOR LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS THE CHILD OF A PARENT OR PARENTS GIVEN LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT

301 The requirements to be met by a person seeking limited leave to enter or remain in the United Kingdom with a view to settlement as the child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement are that he:

- (i) is seeking leave to enter to accompany or join or remain with a parent or parents in one of the following circumstances:
 - (a) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is

- being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement; or
- (b) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement and has had sole responsibility for the child's upbringing; or
 - (c) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
- (ii) is under the age of 18; and
 - (iii) is not leading an independent life, is unmarried [and is not a civil partner], and has not formed an independent family unit; and
 - [(iv) can, and will, be accommodated adequately without recourse to public funds, in accommodation which the parent or parents own or occupy exclusively; and
 - (iva) can, and will, be maintained adequately by the parent or parents without recourse to public funds; and]
 - (v) (where an application is made for limited leave to remain with a view to settlement) has limited leave to enter or remain in the United Kingdom; and
 - (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, was admitted with a valid United Kingdom entry clearance for entry in this capacity.

Note

Paragraph 301(iv) substituted and paragraph 301(iva) inserted by Cm 4851. Reference to civil partners inserted by HC 582.

LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS THE CHILD OF A PARENT OR PARENTS GIVEN LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT

302 A person seeking limited leave to enter the United Kingdom with a view to settlement as the child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement may be admitted for a period not exceeding [27 months] provided he is able, on arrival, to produce to the Immigration Officer a valid United Kingdom entry clearance for entry in this capacity. A person seeking limited leave to remain in the United Kingdom with a view to settlement as the child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement may be given limited leave to remain for a period not exceeding [27 months] provided the Secretary of State is satisfied that each of the requirements of paragraph 301(i)–(v) is met.

Note

Words in square brackets substituted by HC 971.

REFUSAL OF LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS THE CHILD OF A PARENT OR PARENTS GIVEN LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT

303 Limited leave to enter the United Kingdom with a view to settlement as the child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited

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leave to remain in the United Kingdom with a view to settlement as the child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 301(i)–(v) is met.

[Leave to enter and extension of stay in the United Kingdom as the child of a parent who is being, or has been admitted to the United Kingdom as a fiancé(e) [or proposed civil partner]

REQUIREMENTS FOR LIMITED LEAVE TO ENTER THE UNITED KINGDOM AS THE CHILD OF A FIANCÉ(E) [OR PROPOSED CIVIL PARTNER]

303A The requirements to be met by a person seeking limited leave to enter the United Kingdom as the child of a fiancé(e) [or proposed civil partner], are that:

- (i) he is seeking to accompany or join a parent who is, on the same occasion that the child seeks admission, being admitted as a fiancé(e) [or proposed civil partner], or who has been admitted as a fiancé(e); and
- (ii) he is under the age of 18; and
- (iii) he is not leading an independent life, is unmarried [and is not a civil partner], and has not formed an independent family unit; and
- (iv) he can, and will, be maintained and accommodated adequately without recourse to public funds with the parent admitted or being admitted as a fiancé(e); and
- (v) there are serious and compelling family or other considerations which make the child's exclusion undesirable, that suitable arrangements have been made for his care in the United Kingdom, and there is no other person outside the United Kingdom who could reasonably be expected to care for him; and
- (vi) he holds a valid United Kingdom entry clearance for entry in this capacity.

Note

Inserted by Cm 4851. Words in square brackets inserted by HC 582.

LIMITED LEAVE TO ENTER THE UNITED KINGDOM AS THE CHILD OF A PARENT WHO IS BEING, OR HAS BEEN ADMITTED TO THE UNITED KINGDOM AS A FIANCÉ(E) [OR PROPOSED CIVIL PARTNER]

303B A person seeking limited leave to enter the United Kingdom as the child of a fiancé(e) [or proposed civil partner], may be granted limited leave to enter the United Kingdom for a period not in excess of that granted to the fiancé(e) [or proposed civil partner], provided that a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Where the period of limited leave granted to a fiancé(e) [or proposed civil partner] will expire in more than 6 months, a person seeking limited leave to enter as the child of the fiancé(e) should be granted leave for a period not exceeding six months.

Note

Inserted by Cm 4851. Words in square brackets inserted by HC 582.

REFUSAL OF LIMITED LEAVE TO ENTER THE UNITED KINGDOM AS THE CHILD OF A PARENT WHO IS BEING, OR HAS BEEN ADMITTED TO THE UNITED KINGDOM AS A FIANCÉ(E) [OR PROPOSED CIVIL PARTNER]

303C Limited leave to enter the United Kingdom as the child of a fiancé(e) [or proposed civil partner], is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

Note

Inserted by Cm 4851. Words in square brackets inserted by HC 582.

REQUIREMENTS FOR AN EXTENSION OF STAY IN THE UNITED KINGDOM AS THE CHILD OF A FIANCÉ(E) [OR PROPOSED CIVIL PARTNER]

303D The requirements to be met by a person seeking an extension of stay in the United Kingdom as the child of a fiancé(e) [or proposed civil partner] are that:

- (i) the applicant was admitted with a valid United Kingdom entry clearance as the child of a fiancé(e) [or proposed civil partner]; and
- (ii) the applicant is the child of a parent who has been granted limited leave to enter, or an extension of stay, as a fiancé(e) [or proposed civil partner]; and
- (iii) the requirements of paragraph 303A(ii)–(v) are met.

Note

Inserted by Cm 4851. Words in square brackets inserted by HC 582.

EXTENSION OF STAY IN THE UNITED KINGDOM AS THE CHILD OF A FIANCÉ(E) [OR PROPOSED CIVIL PARTNER]

303E An extension of stay as the child of a fiancé(e) [or proposed civil partner] may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 303D is met.

Note

Inserted by Cm 4851. Words in square brackets inserted by HC 582.

REFUSAL OF AN EXTENSION OF STAY IN THE UNITED KINGDOM AS THE CHILD OF A FIANCÉ(E) [OR PROPOSED CIVIL PARTNER]

303F An extension of stay as the child of a fiancé(e) [or proposed civil partner] is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 303D is met.]

Note

Inserted by Cm 4851. Words in square brackets inserted by HC 582.

Children born in the United Kingdom who are not British citizens

304 This paragraph and paragraphs 305–309 apply only to dependent children under 18 years of age [who are unmarried and are not civil partners and] who were born in the United Kingdom on or after 1 January 1983 (when the British Nationality

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Act 1981 came into force) but who, because neither of their parents was a British citizen or settled in the United Kingdom at the time of their birth, are not British citizens and are therefore subject to immigration control. Such a child requires leave to enter where admission to the United Kingdom is sought, and leave to remain where permission is sought for the child to be allowed to stay in the United Kingdom. If he qualifies for entry clearance, leave to enter or leave to remain under any other part of these Rules, a child who was born in the United Kingdom but is not a British citizen may be granted entry clearance, leave to enter or leave to remain in accordance with the provisions of that other part.

Note

Words in square brackets inserted by HC 582.

REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS THE CHILD OF A PARENT OR PARENTS GIVEN LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM

305 The requirements to be met by a child born in the United Kingdom who is not a British citizen who seeks leave to enter or remain in the United Kingdom as the child of a parent or parents given leave to enter or remain in the United Kingdom are that he:

- (i)
 - (a) is accompanying or seeking to join or remain with a parent or parents who have, or are given, leave to enter or remain in the United Kingdom; or
 - (b) is accompanying or seeking to join or remain with a parent or parents one of whom is a British citizen or has the right of abode in the United Kingdom; or
 - (c) is a child in respect of whom the parental rights and duties are vested solely in a local authority; and
- (ii) is under the age of 18; and
- (iii) was born in the United Kingdom; and
- (iv) is not leading an independent life, is unmarried [and is not a civil partner], and has not formed an independent family unit; and
- (v) (where an application is made for leave to enter) has not been away from the United Kingdom for more than 2 years.

Note

Words in square brackets inserted by HC 582.

LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM

306 A child born in the United Kingdom who is not a British citizen and who requires leave to enter or remain in the circumstances set out in paragraph 304 may be given leave to enter for the same period as his parent or parents where paragraph 305(i)(a) applies, provided the Immigration Officer is satisfied that each of the requirements of paragraph 305(ii)–(v) is met. Where leave to remain is sought, the child may be granted leave to remain for the same period as his parent or parents where paragraph 305(i)(a) applies, provided the Secretary of State is satisfied that each of the requirements of paragraph 305(ii)–(iv) is met. Where the parent or parents have or are given periods of leave of different duration, the child may be given leave to whichever period is longer except that if the parents are living apart the child should be given leave for the same period as the parent who has day to day responsibility for him.

307 If a child does not qualify for leave to enter or remain because neither of his parents has a current leave (and neither of them is a British citizen or has the right of abode), he will normally be refused leave to enter or remain, even if each of the requirements of paragraph 305(ii)–(v) has been satisfied. However, he may be granted leave to enter or remain for a period not exceeding 3 months if both of his parents are in the United Kingdom and it appears unlikely that they will be removed in the immediate future, and there is no other person outside the United Kingdom who could reasonably be expected to care for him.

308 A child born in the United Kingdom who is not a British citizen and who requires leave to enter or remain in the United Kingdom in the circumstances set out in paragraph 304 may be given indefinite leave to enter where paragraph 305(i)(b) or (i)(c) applies provided the Immigration Officer is satisfied that each of the requirements of paragraph 305(ii)–(v) is met. Where an application is for leave to remain, such a child may be granted indefinite leave to remain where paragraph 305(i)(b) or (i)(c) applies, provided the Secretary of State is satisfied that each of the requirements of paragraph 305(ii)–(iv) is met.

REFUSAL OF LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM

309 Leave to enter the United Kingdom where the circumstances set out in paragraph 304 apply is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 305 is met. Leave to remain for such a child is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 305(i)–(iv) is met.

Adopted children

[309A For the purposes of adoption under paragraphs 310–316C a de facto adoption shall be regarded as having taken place if:

- (a) at the time immediately preceding the making of the application for entry clearance under these Rules the adoptive parent or parents have been living abroad (in applications involving two parents both must have lived abroad together) for at least a period of time equal to the first period mentioned in sub-paragraph (b)(i) and must have cared for the child for at least a period of time equal to the second period material in that sub-paragraph; and
- (b) during their time abroad, the adoptive parent or parents have:
 - (i) lived together for a minimum period of 18 months, of which the 12 months immediately preceding the application for entry clearance must have been spent living together with the child; and
 - (ii) have assumed the role of the child's parents, since the beginning of the 18 month period, so that there has been a genuine transfer of parental responsibility.]

Note

Inserted by HC 538.

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REQUIREMENTS FOR INDEFINITE LEAVE TO ENTER THE UNITED KINGDOM AS THE ADOPTED CHILD OF A PARENT OR PARENTS PRESENT AND SETTLED OR BEING ADMITTED FOR SETTLEMENT IN THE UNITED KINGDOM

310 The requirements to be met in the case of a child seeking indefinite leave to enter the United Kingdom as the adopted child of a parent or parents present and settled or being admitted for settlement in the United Kingdom are that he:

- (i) is seeking leave to enter to accompany or join an adoptive parent or parents in one of the following circumstances:
 - (a) both parents are present and settled in the United Kingdom; or
 - (b) both parents are being admitted on the same occasion for settlement; or
 - (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
 - (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
 - (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
 - (f) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; [or]
 - [(g) in the case of a de facto adoption one parent has a right of abode in the United Kingdom or indefinite leave to enter or remain in the United Kingdom and is seeking admission to the United Kingdom on the same occasion for the purposes of settlement; and]
- (ii) is under the age of 18; and
- (iii) is not leading an independent life, is unmarried [and is not a civil partner], and has not formed an independent family unit; and
- [(iv) can, and will, be accommodated [and maintained] adequately without recourse to public funds in accommodation which the adoptive parent or parents own or occupy exclusively; and]
- [...]
- [(vi)
 - (a) was adopted in accordance with a decision taken by the competent administrative authority or court in his country of origin or the country in which he is resident[, being a country whose adoption orders are recognised by the United Kingdom]; or
 - (b) is the subject of a de facto adoption; and]
- (vii) was adopted at a time when:
 - (a) both adoptive parents were resident together abroad; or
 - (b) either or both adoptive parents were settled in the United Kingdom; and
- (viii) has the same rights and obligations as any other child of the [adoptive parent's or parents' family]; and
- (ix) was adopted due to the inability of the original parent(s) or current carer(s) to care for him and there has been a genuine transfer of parental responsibility to the adoptive parents; and
- (x) has lost or broken his ties with his family of origin; and
- (xi) was adopted, but the adoption is not one of convenience arranged to facilitate his admission to or remaining in the United Kingdom; and
- (xii) holds a valid United Kingdom entry clearance for entry in this capacity.

Note

Paragraph 310(iv) substituted, paragraph 310(v) inserted and subsequent paragraphs renumbered by Cm 4851. Words in square brackets in sub-paragraph (i)(f), (i)(g), (iv), (vi) and (viii) substituted and sub-paragraph (v) deleted by HC 538. Words in square brackets in (vi)(a) inserted by Cm 5253. Words in square brackets in sub-paragraph (iii) inserted by HC 582.

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN IN THE UNITED KINGDOM AS THE ADOPTED CHILD OF A PARENT OR PARENTS PRESENT AND SETTLED IN THE UNITED KINGDOM

311 The requirements to be met in the case of a child seeking indefinite leave to remain in the United Kingdom as the adopted child of a parent or parents present and settled in the United Kingdom are that he:

- (i) is seeking to remain with an adoptive parent or parents in one of the following circumstances:
 - (a) both parents are present and settled in the United Kingdom; or
 - (b) one parent is present and settled in the United Kingdom and the other parent is dead; or
 - (c) one parent is present and settled in the United Kingdom and has had sole responsibility for the child's upbringing; or
 - (d) one parent is present and settled in the United Kingdom and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; [or]
 - [(e) in the case of a de facto adoption one parent has a right of abode in the United Kingdom or indefinite leave to enter or remain in the United Kingdom and is seeking admission to the United Kingdom on the same occasion for the purpose of settlement; and]
- (ii) has limited leave to enter or remain in the United Kingdom, and
 - (a) is under the age of 18; or
 - (b) was given leave to enter or remain with a view to settlement under paragraph 315 [or paragraph 316B]; and
- (iii) is not leading an independent life, is unmarried [and is not a civil partner], and has not formed an independent family unit; and
- [(iv) can, and will, be accommodated [and maintained] adequately without recourse to public funds in accommodation which the adoptive parent or parents own or occupy exclusively; and]
- (v) [...]
- [(vi)
 - (a) was adopted in accordance with a decision taken by the competent administrative authority or court in his country of origin or the country in which he is resident[, being a country whose adoption orders are recognised by the United Kingdom]; or
 - (b) is the subject of a de facto adoption; and]
- (vii) was adopted at a time when:
 - (a) both adoptive parents were resident together abroad; or
 - (b) either or both adoptive parents were settled in the United Kingdom; and
- (viii) has the same rights and obligations as any other child of the [adoptive parent's or parents' family]; and
- (ix) was adopted due to the inability of the original parent(s) or current carer(s) to care for him and there has been a genuine transfer of parental responsibility to the adoptive parents; and
- (x) has lost or broken his ties with his family of origin; and

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- (ix) was adopted, but the adoption is not one of convenience arranged to facilitate his admission to or remaining in the United Kingdom.

Note

Words in square brackets in paragraph 311(ii)(b) inserted, paragraph 311(iv) substituted and subsequent paragraphs renumbered by Cm 4851. Words in square brackets in sub-paragraph (i)(d), (i)(e), (iv), (vi) and (viii) substituted and (v) deleted by HC 538. Words in square brackets in (vi)(a) inserted by Cm 5253. Words in square brackets in sub-paragraph (iii) inserted by HC 582.

INDEFINITE LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS THE ADOPTED CHILD OF A PARENT OR PARENTS PRESENT AND SETTLED OR BEING ADMITTED FOR SETTLEMENT IN THE UNITED KINGDOM

312 Indefinite leave to enter the United Kingdom as the adopted child of a parent or parents present and settled or being admitted for settlement in the United Kingdom may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Indefinite leave to remain in the United Kingdom as the adopted child of a parent or parents present and settled in the United Kingdom may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 311 is met.

REFUSAL OF INDEFINITE LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS THE ADOPTED CHILD OF A PARENT OR PARENTS PRESENT AND SETTLED OR BEING ADMITTED FOR SETTLEMENT IN THE UNITED KINGDOM

313 Indefinite leave to enter the United Kingdom as the adopted child of a parent or parents present and settled or being admitted for settlement in the United Kingdom is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Indefinite leave to remain in the United Kingdom as the adopted child of a parent or parents present and settled in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 311 is met.

REQUIREMENTS FOR LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS THE ADOPTED CHILD OF A PARENT OR PARENTS GIVEN LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT

314 The requirements to be met in the case of a child seeking limited leave to enter or remain in the United Kingdom with a view to settlement as the adopted child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement are that he:

- (i) is seeking leave to enter to accompany or join or remain with a parent or parents in one of the following circumstances:
 - (a) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement; or
 - (b) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement and has had sole responsibility for the child's upbringing; or

- (c) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; or
- [(d) in the case of a de facto adoption one parent has a right of abode in the United Kingdom or indefinite leave to enter or remain in the United Kingdom and is seeking admission to the United Kingdom on the same occasion for the purpose of settlement; and]
- (ii) is under the age of 18; and
- (iii) is not leading an independent life, is unmarried [and is not a civil partner], and has not formed an independent family unit; and
- [(iv) can, and will, be accommodated [and maintained] adequately without recourse to public funds in accommodation which the adoptive parent or parents own or occupy exclusively; and]
- [(v)
 - (a) was adopted in accordance with a decision taken by the competent administrative authority or court in his country of origin or the country in which he is resident[, being a country whose adoption orders are recognised by the United Kingdom]; or
 - (b) is the subject of a de facto adoption; and]]
- (vi) was adopted at a time when:
 - (a) both adoptive parents were resident together abroad; or
 - (b) either or both adoptive parents were settled in the United Kingdom; and
- (vii) has the same rights and obligations as any other child of the [adoptive parent's or parents' family]; and
- (viii) was adopted due to the inability of the original parent(s) or current carer(s) to care for him and there has been a genuine transfer of parental responsibility to the adoptive parents; and
- (ix) has lost or broken his ties with his family of origin; and
- (x) was adopted, but the adoption is not one of convenience arranged to facilitate his admission to the United Kingdom; and
- (xi) (where an application is made for limited leave to remain with a view to settlement) has limited leave to enter or remain in the United Kingdom; and
- (xii) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

Note

Paragraph 314(iv) substituted by Cm 4851. Words in square brackets in sub-paragraph (i)(c), (i)(d), (iv), (v) and (vii) substituted and (iva) deleted by HC 538. Words in square brackets in (v)(a) inserted by Cm 5253. Words in square brackets in sub-paragraph (iii) inserted by HC 582.

LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS THE ADOPTED CHILD OF A PARENT OR PARENTS GIVEN LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT

315 A person seeking limited leave to enter the United Kingdom with a view to settlement as the adopted child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement may be admitted for a period not exceeding 12 months provided he is able, on arrival, to produce to the Immigration Officer a valid United Kingdom entry clearance for entry in this capacity. A person seeking limited leave to remain in the United Kingdom with a view to settlement as the adopted child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement may be granted limited leave for a period

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not exceeding 12 months provided the Secretary of State is satisfied that each of the requirements of paragraph 314(i)–(xi) is met.

REFUSAL OF LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS THE ADOPTED CHILD OF A PARENT OR PARENTS GIVEN LIMITED LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT

316 Limited leave to enter the United Kingdom with a view to settlement as the adopted child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom with a view to settlement as the adopted child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 314(i)–(xi) is met.

[REQUIREMENTS FOR LIMITED LEAVE TO ENTER THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS A CHILD FOR ADOPTION]

316A The requirements to be satisfied in the case of a child seeking limited leave to enter the United Kingdom for the purpose of being adopted [(which, for the avoidance of doubt, does not include a *de facto* adoption)] in the United Kingdom are that he:

- (i) is seeking limited leave to enter to accompany or join a person or persons who wish to adopt him in the United Kingdom (the ‘prospective parent(s)’), in one of the following circumstances:
 - (a) both prospective parents are present and settled in the United Kingdom; or
 - (b) both prospective parents are being admitted for settlement on the same occasion that the child is seeking admission; or
 - (c) one prospective parent is present and settled in the United Kingdom and the other is being admitted for settlement on the same occasion that the child is seeking admission; or
 - (d) one prospective parent is present and settled in the United Kingdom and the other is being given limited leave to enter or remain in the United Kingdom with a view to settlement on the same occasion that the child is seeking admission, or has previously been given such leave; or
 - (e) one prospective parent is being admitted for settlement on the same occasion that the other is being granted limited leave to enter with a view to settlement, which is also on the same occasion that the child is seeking admission; or
 - (f) one prospective parent is present and settled in the United Kingdom or is being admitted for settlement on the same occasion that the child is seeking admission, and has had sole responsibility for the child’s upbringing; or
 - (g) one prospective parent is present and settled in the United Kingdom or is being admitted for settlement on the same occasion that the child is seeking admission, and there are serious and compelling family or other considerations which would make the child’s exclusion undesirable, and suitable arrangements have been made for the child’s care; and
- (ii) is under the age of 18; and

- (iii) is not leading an independent life, is unmarried [and is not a civil partner], and has not formed an independent family unit; and
- (iv) can, and will, be maintained and accommodated adequately without recourse to public funds in accommodation which the prospective parent or parents own or occupy exclusively; and
- (v) will have the same rights and obligations as any other child of the marriage [or civil partnership]; and
- (vi) is being adopted due to the inability of the original parent(s) or current carer(s) (or those looking after him immediately prior to him being physically transferred to his prospective parent or parents) to care for him, and there has been a genuine transfer of parental responsibility to the prospective parent or parents; and
- (vii) has lost or broken or intends to lose or break his ties with his family of origin; and
- (viii) will be adopted in the United Kingdom by his prospective parent or parents [in accordance with the law relating to adoption in the United Kingdom], but the proposed adoption is not one of convenience arranged to facilitate his admission to the United Kingdom.

Note

Words in square brackets inserted by HC 538. Words in brackets in sub-paragraphs (iii) and (v) inserted by HC 582.

LIMITED LEAVE TO ENTER THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS A CHILD FOR ADOPTION

316B A person seeking limited leave to enter the United Kingdom with a view to settlement as a child for adoption may be admitted for a period not exceeding [24 months] provided he is able, on arrival, to produce to the Immigration Officer a valid United Kingdom entry clearance for entry in this capacity.

Note

Words in square brackets inserted by Cmnd 5829.

REFUSAL OF LIMITED LEAVE TO ENTER THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS A CHILD FOR ADOPTION

316C Limited leave to enter the United Kingdom with a view to settlement as a child for adoption is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.]

Note

Paragraphs 316A–316C inserted by Cm 4851.

[REQUIREMENTS FOR LIMITED LEAVE TO ENTER THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS A CHILD FOR ADOPTION UNDER THE HAGUE CONVENTION]

316D The requirements to be satisfied in the case of a child seeking limited leave to enter the United Kingdom for the purpose of being adopted in the United Kingdom under the Hague Convention are that he:

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- (i) is seeking limited leave to enter to accompany one or two people each of whom are habitually resident in the United Kingdom and who wish to adopt him under the Hague Convention ('the prospective parents');
- (ii) is the subject of an agreement made under Article 17(c) of the Hague Convention; and
- (iii) has been entrusted to the prospective parents by the competent administrative authority of the country from which he is coming to the United Kingdom for adoption under the Hague Convention; and
- (iv) is under the age of 18; and
- (v)* can, and will, be maintained and accommodated adequately without recourse to public funds in accommodation which the prospective parent or parents own or occupy exclusively; and
- (vi)* holds a valid United Kingdom entry clearance for entry in this capacity.]

Note

Paragraphs 316D–316F inserted by Cmnd 5829.

** Please note that in the printed version of Cmnd 5829 these points appear in error numbered as an alternative version of 316D (iii) and (iv).*

[LIMITED LEAVE TO ENTER THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS A CHILD FOR ADOPTION UNDER THE HAGUE CONVENTION]

316E A person seeking limited leave to enter the United Kingdom with a view to settlement as a child for adoption under the Hague Convention may be admitted for a period not exceeding 24 months provided he is able, on arrival, to produce to the Immigration Officer a valid United Kingdom entry clearance for entry in this capacity.]

Note

Paragraphs 316D–316F inserted by Cmnd 5829.

[REFUSAL OF LIMITED LEAVE TO ENTER THE UNITED KINGDOM WITH A VIEW TO SETTLEMENT AS A CHILD FOR ADOPTION UNDER THE HAGUE CONVENTION]

316F Limited leave to enter the United Kingdom with a view to settlement as a child for adoption under the Hague Convention is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.]

Note

Paragraphs 316D–316F inserted by Cmnd 5829.

Parents, grandparents and other dependent relatives of persons present and settled in the United Kingdom

REQUIREMENTS FOR INDEFINITE LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS THE PARENT, GRANDPARENT OR OTHER DEPENDENT RELATIVE OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

317 The requirements to be met by a person seeking indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom are that the person:

- (i) is related to a person present and settled in the United Kingdom in one of the following ways:
 - (a) mother or grandmother who is a widow aged 65 years or over; or
 - (b) father or grandfather who is a widower aged 65 years or over; or
 - (c) parent or grandparents travelling together of whom at least one is aged 65 or over; or
 - [(d) a parent or grandparent aged 65 or over who has entered into a second relationship of marriage or civil partnership but cannot look to the spouse, civil partner or children of that second relationship for financial support; and where the person settled in the United Kingdom is able and willing to maintain the parent or grandparent and any spouse or civil partner or child of the second relationship who would be admissible as a dependant; or]
 - (e) a parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom; or
 - (f) the son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom; and
- (ii) is joining or accompanying a person who is present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; and
- (iii) is financially wholly or mainly dependent on the relative present and settled in the United Kingdom; and
- [iv) can, and will, be accommodated adequately, together with any dependants, without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively; and
- (iva) can, and will, be maintained adequately, together with any dependants, without recourse to public funds; and]
- (v) has no other close relatives in his own country to whom he could turn for financial support; and
- (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

Note

Paragraph 317(iv) substituted and paragraph 317(iva) inserted by Cm 4851. Sub-paragraph (i)(d) inserted by HC 582.

INDEFINITE LEAVE TO ENTER OR REMAIN AS THE PARENT, GRANDPARENT OR OTHER DEPENDENT RELATIVE OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

318 Indefinite leave to enter the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Indefinite leave to remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 317(i)–(v) is met.

REFUSAL OF INDEFINITE LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM AS THE PARENT, GRANDPARENT OR OTHER DEPENDENT RELATIVE OF A PERSON PRESENT AND SETTLED IN THE UNITED KINGDOM

319 Indefinite leave to enter the United Kingdom as the parent, grandparent or other dependent relative of a person settled in the United Kingdom is to be refused if a valid

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United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Indefinite leave to remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 317(i)–(v) is met.

[Family Members of Relevant Points Based System Migrants]

[Partners of Relevant Points Based System Migrants]

Note

Headings substituted by HC 1113.

PURPOSE

[319AA In paragraphs 319A to 319K and Appendix E ‘Relevant Points Based System Migrant’ means a migrant granted leave as a Tier 1 Migrant, a Tier 2 Migrant[, a Tier 4 Migrant or a Tier 5 (Temporary Worker) Migrant].]

Note

Paragraph 319AA substituted by HC 1113.

Words in square brackets inserted by HC 314.

[319A This route is for the spouse, civil partner, unmarried or same-sex partner of a [Relevant Points Based System Migrant] (Partner of a [Relevant Points Based System Migrant]). Paragraphs 277 to 280 of these Rules apply to spouses of [Relevant Points Based System Migrant]; paragraph 277 of these Rules applies to civil partners of [Relevant Points Based System Migrant]; and paragraph 295AA of these Rules applies to unmarried and same-sex partners of [Relevant Points Based System Migrant].]

Note

Words in square brackets ‘Relevant Points Based System Migrant’ substituted by HC 1113.

ENTRY TO THE UK

319B

- [(a) Subject to paragraph (b), all migrants all migrants] arriving in the UK and wishing to enter as the Partner of a [Relevant Points Based System Migrant] must have a valid entry clearance for entry under this route. If they do not have a valid entry clearance, entry will be refused.
- [(b) a migrant arriving in the UK, and wishing to enter as a Partner of a Tier 5 (Temporary Worker) Migrant, who does not have a valid entry clearance will not be refused entry if the following conditions are met:
 - (i) the migrant wishing to enter as a Partner is not a visa national,
 - (ii) the migrant wishing to enter as a Partner is accompanying an applicant who at the same time is being granted leave to enter under paragraph 245ZN(b), and
 - (iii) the migrant wishing to enter as a Partner meets the requirements of entry clearance in paragraph 319C.]

Note

Words in square brackets substituted by HC 1113.

Sub-paragraph (b) inserted by HC 1113.

REQUIREMENTS FOR ENTRY CLEARANCE OR LEAVE TO REMAIN

319C To qualify for entry clearance or leave to remain as the Partner of a [Relevant Points Based System Migrant], an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance or leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, and if applying for leave to remain, must not be an illegal entrant.
- (b) The applicant must be the spouse or civil partner, unmarried or same-sex partner of a person who:
 - (i) has valid leave to enter or remain as a [Relevant Points Based System Migrant], or
 - (ii) is, at the same time, being granted entry clearance or leave to remain as a [Relevant Points Based System Migrant].
- (c) An applicant who is the unmarried or same-sex partner of a [Relevant Points Based System Migrant] must also meet the following requirements:
 - (i) any previous marriage or similar relationship by the applicant or the [Relevant Points Based System Migrant] with another person must have permanently broken down,
 - (ii) the applicant and the [Relevant Points Based System Migrant] must not be so closely related that they would be prohibited from marrying each other in the UK, and
 - (iii) the applicant and the [Relevant Points Based System Migrant] must have been living together in a relationship similar to marriage or civil partnership for a period of at least 2 years.
- (d) The marriage or civil partnership, or relationship similar to marriage or civil partnership, must be subsisting at the time the application is made.
- (e) The applicant and the [Relevant Points Based System Migrant] must intend to live with the other as their spouse or civil partner, unmarried or same-sex partner throughout the applicant's stay in the UK.
- (f) The applicant must not intend to stay in the UK beyond any period of leave granted to the [Relevant Points Based System Migrant].
- (g) [Unless the [Relevant Points Based System Migrant] is a Tier 1 (Investor) Migrant, there] must be a sufficient level of funds available to the applicant, as set out in Appendix E.
- (h) An applicant who is applying for leave to remain, must have, or have last been granted, leave:
 - (i) as the Partner of a [Relevant Points Based System Migrant], [...]
 - (ii) as the spouse or civil partner, unmarried or same-sex partner of a person with leave under another category of these Rules who has since been granted, or is, at the same time, being granted leave to remain as a [Relevant Points Based System Migrant], or]
 - [(iii) in any other category of these Rules, provided the Relevant Points Based System Migrant has, or is being granted, leave to remain as a Tier 5 (Temporary Worker) Migrant in the creative and sporting subcategory on the basis of having met the requirement at paragraph 245ZQ(b)(ii).]

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Note

In sub-paragraph 319C(g) words in square brackets beginning 'Unless the Tier 1 Migrant' substituted by HC 607.

Words in square brackets 'Relevant Points Based System Migrant' substituted by HC 1113.

Word deleted by HC 314.

In sub-paragraph 319C(h), words 'or' and sub-para 319C(h)(ii) inserted by HC 314.

PERIOD AND CONDITIONS OF GRANT

319D

- (a) Entry clearance and leave to remain will be granted for a period which expires on the same day as the leave granted to the [Relevant Points Based System Migrant].
- (b) Entry clearance and leave to remain under this route will be subject to the following conditions:
 - (i) no recourse to public funds,
 - (ii) registration with the police, if this is required under paragraph 326 of these Rules, [...]
 - (iii) no Employment as a Doctor in Training, unless the applicant is in the UK, and:
 - (1) has, or has last been granted, entry clearance, leave to enter or remain as the spouse, civil partner, unmarried, or same-sex partner of a migrant granted leave under Parts 3, 5 or 6 of these Rules, or
 - (2) has, or has last been granted, leave to remain as the Partner of a [Relevant Points Based System Migrant] and that grant was not subject to a condition prohibiting Employment as a Doctor in Training[, and]
 - [(iv) if the Relevant Points Based System Migrant is a Tier 4 Migrant who was granted leave for less than 12 months, no employment.]

Note

Words in square brackets 'Relevant Points Based System Migrant' substituted by HC 1113.

Word deleted by HC 314.

Words ', and' and sub-para 319D(b)(iv) inserted by HC 314.

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN

319E To qualify for indefinite leave to remain as the Partner of a [Relevant Points Based System Migrant], an applicant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused unless the applicant qualifies for leave to remain by virtue of paragraphs 33E to 33F of these Rules.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
- (b) The applicant must be the spouse or civil partner, unmarried or same-sex partner of a person who is, at the same time, being granted indefinite leave to remain as a [Relevant Points Based System Migrant].

- (c) The applicant must have, or have last been granted, leave as the Partner of the [Relevant Points Based System Migrant] who is being granted indefinite leave to remain.
- (d) The applicant and the [Relevant Points Based System Migrant] must have been living together in the UK in marriage or civil partnership, or in a relationship similar to marriage or civil partnership, for a period of at least 2 years.
- (e) The marriage or civil partnership, or relationship similar to marriage or civil partnership, must be subsisting at the time the application is made.
- (f) The applicant and the [Relevant Points Based System Migrant] must intend to live permanently with the other as their spouse or civil partner, unmarried or same-sex partner.
- (g) The applicant must have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, with reference to paragraphs 33B to 33F of these Rules, unless the applicant is aged 65 or over at the time this application is made.

Note

Words in square brackets 'Relevant Points Based System Migrant' substituted by HC 1113.

Children of [Relevant Points Based System Migrant]

PURPOSE

319F This route is for the children of [relevant Points Based system Migrant] who are under the age of 18 when they apply to enter under this route. Paragraph 296 of these Rules applies to children of [Relevant Points Based System Migrant].

Note

Words in square brackets 'Relevant Points Based System Migrant' substituted by HC 1113.

ENTRY TO THE UK

319G

- [(a) Subject to paragraph (b), all migrants arriving] in the UK and wishing to enter as the Child of a [Relevant Points Based System Migrant] must have a valid entry clearance for entry under this route. If they do not have a valid entry clearance, entry will be refused.
- [(b) a migrant arriving in the UK and wishing to enter as the child of a Tier 5 (Temporary Worker) Migrant who does not have a valid entry clearance will not be refused entry if the following conditions are met:
 - (i) the migrant wishing to enter as the child is not a visa national,
 - (ii) the migrant wishing to enter as the child is accompanying an applicant who at the same time is being granted leave to enter under 245ZN(b), and
 - (iii) the migrant wishing to enter as the child meets the requirements of entry clearance in paragraph 319H.]

Note

Words in square brackets substituted by HC 1113.

Sub-paragraph 319G(b) inserted by HC 1113.

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REQUIREMENTS FOR ENTRY CLEARANCE OR LEAVE TO REMAIN

319H To qualify for entry clearance or leave to remain under this route, an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance or leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, and if applying for leave to remain, must not be an illegal entrant.
- (b) The applicant must be the child of a parent who:
 - (i) has valid leave to enter or remain as a [Relevant Points Based System Migrant], or
 - (ii) is, at the same time, being granted entry clearance or leave to remain as a [Relevant Points Based System Migrant].
- (c) The applicant must be under the age of 18 on the date the application is made, or if over 18 and applying for leave to remain, must have, or have last been granted, leave as the Child of a [Relevant Points Based System Migrant] [or as the child of a parent who had leave under another category of these rules and who has since been granted, or is at the time being granted, leave to remain as a relevant Points Based system Migrant].
- (d) The applicant must not be married or in a civil partnership, must not have formed an independent family unit, and must not be leading an independent life.
- (e) The applicant must not intend to stay in the UK beyond any period of leave granted to the [Relevant Points Based System Migrant] parent.
- (f) Both of the applicant's parents must either be Lawfully present in the UK, or being granted entry clearance or leave to remain at the same time as the applicant, unless:
 - (i) The [Relevant Points Based System Migrant] is the applicant's sole surviving parent, or
 - (ii) The [Relevant Points Based System Migrant] parent has and has had sole responsibility for the applicant's upbringing, or
 - (iii) there are serious or compelling family or other considerations which would make it desirable not to refuse the application and suitable arrangements have been made in the UK for the applicant's care.
- (g) [Unless the [Relevant Points Based System Migrant] is a Tier 1 (Investor) Migrant, there] must be a sufficient level of funds available to the applicant, as set out in Appendix E.
- (h) An applicant who is applying for leave to remain must have, or have last been granted leave:
 - (i) as the Child of a [Relevant Points Based System Migrant], [...]
 - (ii) as the child of a parent who had leave under another category of these Rules and who has since been granted, or is, at the same time, being granted leave to remain as a [Relevant Points Based System Migrant][, or]
 - [(iii) in any other category of these Rules, provided the Relevant Points Based System Migrant has, or is being granted, leave to remain as a Tier 5 (Temporary Worker) Migrant in the creative and sporting subcategory on the basis of having met the requirement at paragraph 245ZQ(b)(ii).]

Note

Words ' , or ' and sub-para 319H(g)(iii) inserted by HC 314.

In sub-paragraph 319H(g) words in square brackets beginning 'Unless the Tier 1 Migrant' substituted by HC 607.

Words in square brackets 'Relevant Points Based System Migrant' and words beginning 'or as the child' substituted by HC 1113.
Word deleted by HC 314.

PERIOD AND CONDITIONS OF GRANT

319I

- (a) Entry clearance and leave to remain will be granted for a period which expires on the same day as the leave granted to the [Relevant Points Based System Migrant] parent.
- (b) Entry clearance and leave to remain under this route will be subject to the following conditions:
 - (i) no recourse to public funds, [...]
 - (ii) registration with the police, if this is required under paragraph 326 of these Rules[, and]
 - [(iii) if the Relevant Points Based System Migrant is a Tier 4 Migrant who was granted leave for less than 12 months, no employment.]

Note

Words in square brackets 'Relevant Points Based System Migrant' substituted by HC 1113.
Word deleted by HC 314.
Words ' , and' and sub-para 319I(b)(iii) inserted by HC 314.

REQUIREMENTS FOR INDEFINITE LEAVE TO REMAIN

319J To qualify for indefinite leave to remain under this route, an applicant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused, unless the applicant qualifies for leave to remain by virtue of paragraphs 33E to 33F of these Rules.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.
- (b) The applicant must be the child of a parent who is, at the same time, being granted indefinite leave to remain as a [Relevant Points Based System Migrant].
- (c) The applicant must have, or have last been granted, leave as the Child of the [Relevant Points Based System Migrant] who is being granted indefinite leave to remain.
- (d) The applicant must not be married or in a civil partnership, must not have formed an independent family unit, and must not be leading an independent life.
- (e) Both of an applicant's parents must either be lawfully present in the UK, or being granted entry clearance, limited leave to remain, or indefinite leave to remain at the same time as the applicant, unless:
 - (i) The [Relevant Points Based System Migrant] is the applicant's sole surviving parent, or
 - (ii) The [Relevant Points Based System Migrant] parent has and has had sole responsibility for the applicant's upbringing, or
 - (iii) there are serious or compelling family or other considerations which would make it desirable not to refuse the application and suitable arrangements have been made for the applicant's care.

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- (f) The applicant must have sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, with reference to paragraphs 33B to 33F of these Rules, unless the applicant is under the age of 18 at the time this application is made.

Note

Words 'Relevant Points Based System Migrant' in square brackets substituted by HC 1113.

DOCUMENTARY EVIDENCE

319K

- (a) Where Appendix E of these Rules states that specified documents must be provided, that means documents specified by the Secretary of State in the Tier 1 (General) [Points Based System (Dependants) Policy Guidance]. If the specified documents are not provided, the applicant will not meet the requirement for which the specified documents are required as evidence.
- (b) If the Entry Clearance Officer or Secretary of State has reasonable cause to doubt the genuineness of any document submitted by an applicant which is, or which purports to be a specified document under Appendix E of these Rules and, having taken reasonable steps to verify the document, is unable to verify that it is genuine, the document will be discounted for the purposes of this application.]

Note

Paragraphs 319A–319K inserted by HC 321. Words in square brackets substituted by HC 1113.

PART 9

GENERAL GROUNDS FOR THE REFUSAL OF ENTRY CLEARANCE, LEAVE TO ENTER OR VARIATION OF LEAVE TO ENTER OR REMAIN IN THE UNITED KINGDOM

Refusal of entry clearance or leave to enter the United Kingdom

320 In addition to the grounds for refusal of entry clearance or leave to enter set out in Parts 2–8 of these Rules, and subject to paragraph 321 below, the following grounds for the refusal of entry clearance or leave to enter apply:

GROUND ON WHICH ENTRY CLEARANCE OR LEAVE TO ENTER THE UNITED KINGDOM IS TO BE REFUSED

- (1) the fact that entry is being sought for a purpose not covered by these Rules;
- (2) the fact that the person seeking entry to the United Kingdom is currently the subject of a deportation order;
- (3) failure by the person seeking entry to the United Kingdom to produce to the Immigration Officer a valid national passport or other document satisfactorily establishing his identity and nationality;
- (4) failure to satisfy the Immigration Officer, in the case of a person arriving in the United Kingdom or seeking entry through the Channel Tunnel with the intention of entering any other part of the common travel area, that he is acceptable to the immigration authorities there;

- (5) failure, in the case of a visa national, to produce to the Immigration Officer a passport or other identity document endorsed with a valid and current United Kingdom entry clearance issued for the purpose for which entry is sought;
- (6) where the Secretary of State has personally directed that the exclusion of a person from the United Kingdom is conducive to the public good;
- (7) save in relation to a person settled in the United Kingdom or where the Immigration Officer is satisfied that there are strong compassionate reasons justifying admission, confirmation from the Medical Inspector that, for medical reasons, it is undesirable to admit a person seeking leave to enter the United Kingdom.
- (7A) where false representations have been made or false documents [or information] have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application.
- (7B) [subject to paragraph 320(7C)] where the applicant has previously breached the UK's immigration laws by:
 - (a) Overstaying,
 - (b) breaching a condition attached to his leave,
 - (c) being an Illegal Entrant,
 - (d) using Deception in an application for entry clearance, leave to enter or remain (whether successful or not), unless the applicant:
 - (i) Overstayed for 28 days or less and left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State,
 - (ii) used Deception in an application for entry clearance more than 10 years ago,
 - (iii) left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State, more than 12 months ago,
 - (iv) left the UK voluntarily, at the expense (directly or indirectly) of the Secretary of State, more than 5 years ago, or
 - (v) was removed or deported from the UK more than 10 years ago.

Where more than one breach of the UK's immigration laws has occurred, only the breach which leads to the longest period of absence from the UK will be relevant under this paragraph.]

- [(7C) Paragraph 320(7B) shall not apply in the following circumstances:
 - (a) where the applicant is applying as:
 - (i) a spouse, civil partner or unmarried or same-sex partner under paragraphs 281 or 295A,
 - (ii) a fiancé(e) or proposed civil partner under paragraph 290,
 - (iii) a parent, grandparent or other dependent relative under paragraph 317,
 - (iv) a person exercising rights of access to a child under paragraph 246, or
 - (v) a spouse, civil partner, unmarried or same-sex partner of a refugee or person with Humanitarian Protection under paragraphs 352A, 352AA, 352FA or 352FD; or
 - (b) where the individual was under the age of 18 at the time of his most recent breach of the UK's immigration laws.]

GROUND ON WHICH ENTRY CLEARANCE OR LEAVE TO ENTER THE UNITED KINGDOM SHOULD NORMALLY BE REFUSED

- (8) failure by a person arriving in the United Kingdom to furnish the Immigration Officer with such information as may be required for the purpose of deciding whether he requires leave to enter and, if so, whether and on what terms leave should be given;

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- [(8A) where the person seeking leave is outside the United Kingdom, failure by him to supply any information, documents, copy documents or medical report requested by an Immigration Officer;]
- (9) failure by a person seeking leave to enter as a returning resident to satisfy the Immigration Officer that he meets the requirements of paragraph 18 of these Rules [or that he seeks leave to enter for the same purpose as that for which his earlier leave was granted];
- (10) production by the person seeking leave to enter the United Kingdom of a national passport or travel document issued by a territorial entity or authority which is not recognised by Her Majesty's Government as a state or is not dealt with as a government by them, or which does not accept valid United Kingdom passports for the purpose of its own immigration control; or a passport or travel document which does not comply with international passport practice;
- [(11) where the applicant has previously contrived in a significant way to frustrate the intentions of these Rules. Guidance will be published giving examples of circumstances in which an applicant who has previously overstayed, breached a condition attached to his leave, been an Illegal Entrant or used Deception in an application for entry clearance, leave to enter or remain (whether successful or not) is likely to be considered as having contrived in a significant way to frustrate the intentions of these Rules.]
- (12) [...]
- (13) failure, except by a person eligible for admission to the United Kingdom for settlement or a spouse [or civil partner] eligible for admission under paragraph 282, to satisfy the Immigration Officer that he will be admitted to another country after a stay in the United Kingdom;
- (14) refusal by a sponsor of a person seeking leave to enter the United Kingdom to give, if requested to do so, an undertaking in writing to be responsible for that person's maintenance and accommodation for the period of any leave granted;
- (15) whether or not to the holder's knowledge, the making of false representations or the failure to disclose any material fact for the purpose of obtaining [an immigration employment document];
- (16) failure, in the case of a child under the age of 18 years seeking leave to enter the United Kingdom otherwise than in conjunction with an application made by his parent(s) or legal guardian, to provide the Immigration Officer, if required to do so, with written consent to the application from his parent(s) or legal guardian; save that the requirement as to written consent does not apply in the case of a child seeking admission to the United Kingdom as an asylum seeker;
- (17) save in relation to a person settled in the United Kingdom, refusal to undergo a medical examination when required to do so by the Immigration Officer;
- (18) save where the Immigration Officer is satisfied that admission would be justified for strong compassionate reasons, conviction in any country including the United Kingdom of an offence which, if committed in the United Kingdom, is punishable with imprisonment for a term of 12 months or any greater punishment or, if committed outside the United Kingdom, would be so punishable if the conduct constituting the offence had occurred in the United Kingdom;
- (19) where from information available to the Immigration Officer, it seems right to refuse leave to enter on the ground that exclusion from the United Kingdom is conducive to the public good; if, for example, in the light of the character, conduct or associations of the person seeking leave to enter it is undesirable to give him leave to enter.
- [(20) failure by a person seeking entry into the United Kingdom to comply with a requirement relating to the provision of physical data to which he is subject by regulations made under section 126 of the Nationality, Immigration and Asylum Act 2002.]
- [(21) [...]]

Note

Sub-paragraph (7A) words in square brackets inserted by HC 1113. Sub-paragraph (7B) inserted, and sub-paragraphs (11) and (12) deleted, by HC 321. In sub-paragraph (7B) words 'subject to paragraph 320(7C)' in square brackets inserted by HC 607. Sub-paragraph (7C) inserted by HC 607. Sub-paragraph (8A) inserted by HC 704. New sub-paragraph (11) inserted by HC 607. Words in square brackets in sub-paragraph (13) inserted by HC 582. Sub-paragraph (20) inserted by HC 370. Words in square brackets in sub-paragraph (15) substituted by Cm 6339. Sub-paragraph (21) deleted by HC 321.

REFUSAL OF LEAVE TO ENTER IN RELATION TO A PERSON IN POSSESSION OF AN ENTRY CLEARANCE

321 A person seeking leave to enter the United Kingdom who holds an entry clearance which was duly issued to him and is still current may be refused leave to enter only where the Immigration Officer is satisfied that:

- [(i) False representations were made or false documents were submitted (whether or not material to the application, and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for entry clearance; or]
- (ii) a change of circumstances since it was issued has removed the basis of the holder's claim to admission, except where the change of circumstances amounts solely to the person becoming over age for entry in one of the categories contained in paragraphs 296–316 of these Rules since the issue of the entry clearance; or
- (iii) refusal is justified on grounds of restricted returnability; on medical grounds; on grounds of criminal record; because the person seeking leave to enter is the subject of a deportation order or because exclusion would be conducive to the public good.

Note

Sub-paragraph 321(i) substituted by HC 321.
Words in square brackets inserted by HC 1113.

[GROUNDS ON WHICH LEAVE TO ENTER OR REMAIN WHICH IS IN FORCE IS TO BE CANCELLED AT PORT OR WHILE THE HOLDER IS OUTSIDE THE UNITED KINGDOM]

321A The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside, the United Kingdom apply:

- (1) there has been such a change in the circumstances of that person's case, since the leave was given, that it should be cancelled; or
- [(2) false representations were made or false documents were submitted (whether or not material to the application, and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for leave; or]
- (3) save in relation to a person settled in the United Kingdom or where the Immigration Officer or the Secretary of State is satisfied that there are strong compassionate reasons justifying admission, where it is apparent that, for medical reasons, it is undesirable to admit that person to the United Kingdom; or
- (4) where the Secretary of State has personally directed that the exclusion of that person from the United Kingdom is conducive to the public good; or
- (5) where from information available to the Immigration officer or the Secretary of State, it seems right to cancel leave on the ground that exclusion from the

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United Kingdom is conducive to public good; if, for example, in the light of the character, conduct or associations of that person it is undesirable for him to have leave to enter the United Kingdom; or

- (6) where that person is outside the United Kingdom, failure by that person to supply any information, documents, copy documents or medical report requested by an Immigration Officer or the Secretary of State.]

Note

Paragraph 321 replaces HC 251, para 17, which did not come under the sub-heading General in Pt IX of HC 251. Paragraph 321A inserted by HC 704. Sub-paragraph (2) substituted by HC 321.

Refusal of variation of leave to enter or remain or curtailment of leave

322 In addition to the grounds for refusal of extension of stay set out in Parts 2–8 of these Rules, the following provisions apply in relation to the refusal of an application for variation of leave to enter or remain or, where appropriate, the curtailment of leave:

[GROUNDS ON WHICH LEAVE TO REMAIN IN THE UNITED KINGDOM IS TO BE REFUSED]

- (1) the fact that variation of leave to enter or remain is being sought for a purpose not covered by these Rules.

[(1A) where false representations have been made or false documents [or information] have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application.]

[GROUNDS ON WHICH LEAVE TO REMAIN IN THE UNITED KINGDOM SHOULD NORMALLY BE REFUSED]

- (2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave;
- (3) failure to comply with any conditions attached to the grant of leave to enter or remain;
- (4) failure by the person concerned to maintain or accommodate himself and any dependants without recourse to public funds;
- (5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his character, conduct or associations or the fact that he represents a threat to national security;
- (6) refusal by a sponsor of the person concerned to give, if requested to do so, an undertaking in writing to be responsible for his maintenance and accommodation in the United Kingdom or failure to honour such an undertaking once given;
- (7) failure by the person concerned to honour any declaration or undertaking given orally or in writing as to the intended duration and/or purpose of his stay;
- (8) failure, except by a person who qualifies for settlement in the United Kingdom or by the spouse [or civil partner] of a person settled in the United Kingdom, to satisfy the Secretary of State that he will be returnable to another country if allowed to remain in the United Kingdom for a further period;

- [(9) failure by an applicant to produce within a reasonable time information, documents or other evidence required by the Secretary of State to establish his claim to remain under these Rules;]
- (10) failure, without providing a reasonable explanation, to comply with a request made on behalf of the Secretary of State to attend for interview;
- (11) failure, in the case of a child under the age of 18 years seeking a variation of his leave to enter or remain in the United Kingdom otherwise than in conjunction with an application by his parent(s) or legal guardian, to provide the Secretary of State, if required to do so, with written consent to the application from his parent(s) or legal guardian; save that the requirement as to written consent does not apply in the case of a child who has been admitted to the United Kingdom as an asylum seeker. •

Note

Headings substituted, and sub-paragraph (1A) inserted, by HC 321. Sub-paragraph (1A) words in square brackets inserted by HC 1113. Words in square brackets in sub-paragraph (8) inserted by HC 582. Sub-paragraph (9) substituted by HC 104. Sub-paragraphs (10) and (11) are also new.

GROUND(S) ON WHICH LEAVE TO ENTER OR REMAIN MAY BE CURTAILED

[323] A person's leave to enter or remain may be curtailed:

- (i) on any of the grounds set out in paragraph 322(2)–(5) above; or
- (ii) if he ceases to meet the requirements of the Rules under which his leave to enter or remain was granted
- (iii) if he is the dependant, or is seeking leave to remain as the dependant, of an asylum applicant whose claim has been refused and whose leave has been curtailed under section 7 of the 1993 Act, and he does not qualify for leave to remain in his own right; or]
- [(iv) on any of the grounds set out in paragraph 339A(i)–(vi) and paragraph 339G(i)–(vi).]

Note

Sub-paragraph (iv) inserted by Cm 6918

[CURTAILMENT OF LEAVE OR ALTERATION OF DURATION OF LEAVE IN RELATION TO A TIER 2 MIGRANT[, A TIER 5 MIGRANT OR A TIER 4 MIGRANT]]

323A In addition to the grounds specified in paragraph 323, the leave to enter or remain of a Tier 2 Migrant or a Tier 5 (Temporary Worker) Migrant may be curtailed, or its duration altered, if:

- (a) the migrant's sponsor ceases to have a sponsor licence (for whatever reason),
- (b) the migrant's sponsor transfers the business for which the migrant works [or at which the migrant is studying] to another person, that person does not have a sponsor licence and that person:
 - (i) fails to apply for a sponsor licence within 28 days of the date of the transfer of the business,
 - (ii) applies for a sponsor licence but is refused, [...]
 - (iii) applies for a sponsor licence and is granted one, but not in a category that would allow it to issue a Certificate of sponsorship to the migrant,or
- [(c) the migrant fails to commence, or ceases, working for the Sponsor, or
- (d) in the case of a Tier 4 Migrant:

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- (i) the migrant fails to commence studying with the Sponsor, or
- (ii) the migrant studies at an institution other than that which issued the visa letter on the basis of which the migrant's current entry clearance, leave to enter or leave to remain was granted unless the United Kingdom Border Agency has given its written consent for the migrant to transfer to another Sponsor, or
- (iii) the migrant ceases studying with the Sponsor

Note

Paragraph 323A inserted by HC 1113.

Words in square brackets inserted by HC 314.

Word deleted by HC 314.

Sub-paragraphs 323A(c) and (d) substituted by HC 314.

CREW MEMBERS

324 A person who has been given leave to enter to join a ship, aircraft, hovercraft, hydrofoil or international train service as a member of its crew, or a crew member who has been given leave to enter for hospital treatment, repatriation or transfer to another ship, aircraft, hovercraft, hydrofoil or international train service in the United Kingdom, is to be refused leave to remain unless an extension of stay is necessary to fulfil the purpose for which he was given leave to enter or unless he meets the requirements for an extension of stay as a spouse [or civil partner] in paragraph 284.

Note

Paragraphs 320–324 replace HC 251, paras 78–86, 99–102. Reference to civil partners in paragraph 324 inserted by HC 582.

PART 10

REGISTRATION WITH THE POLICE

[324A ...

325 For the purposes of paragraph 326, a 'relevant foreign national' is a person aged 16 or over who is:

- (i) a national or citizen of a country or territory listed in Appendix 2 to these Rules;
- (ii) a stateless person; or
- (iii) a person holding a non-national travel document.

326 (1) Subject to sub-paragraph (2) below, a condition requiring registration with the police should normally be imposed on any relevant foreign national who is:

- (i) given limited leave to enter the United Kingdom for longer than six months; or
- (ii) given limited leave to remain which has the effect of allowing him to remain in the United Kingdom for longer than six months, reckoned from the date of his arrival (whether or not such a condition was imposed when he arrived).

(2) Such a condition should not normally be imposed where the leave is given:

- (i) as a seasonal agricultural worker;

- (ii) as a [Tier 5 (Temporary Worker) Migrant, provided the Certificate of sponsorship Checking system reference for which points were awarded records that the applicant is being sponsored as an overseas government employee or a private servant in a diplomatic household];
- (iii) as a [Tier 2 (Minister of Religion) Migrant];
- (iv) on the basis of marriage to or civil partnership with a person settled in the UK or as the unmarried or same-sex partner of a person settled in the UK;
- (v) as a person exercising access rights to a child resident in the United Kingdom;
- (vi) as the parent of a child at school; or
- (vii) following the grant of asylum.

(3) Such a condition should also be imposed on any foreign national given limited leave to enter the United Kingdom where, exceptionally, the Immigration Officer considers it necessary to ensure that he complies with the terms of the leave.]

Note

Paragraph 324A deleted and paragraphs 325 and 326 substituted by HC 194, in force 4 February 2005. Sub-paragraphs 326(2)(ii), (iii): words in square brackets substituted by HC 1113. Sub-paragraph 326(2)(iv) amended by HC 582. Sub-paragraph 326(2)(iv) substituted by HC 40.

[Procedure

326A The procedures set out in these Rules shall apply to the consideration of asylum and humanitarian protection.]

Note

Inserted by HC 82.

**PART 11
ASYLUM**

Definition of asylum applicant

[327 Under the Rules an asylum applicant is a person who:

- [(a) makes a request to be recognised as a refugee under the Geneva Convention on the basis that it would be contrary to the United Kingdom's obligations under the Geneva Convention for him to be removed from or required to leave the United Kingdom; or
- (b) otherwise makes a request for international protection. 'Application for asylum' shall be construed accordingly.]

Note

Substituted by Cm 6918. Further substituted by HC 82.

[327A Every person has the right to make an application for asylum on his own behalf.]

Note

Inserted by HC 82.

Appendix 5 Immigration Rules

Applications for asylum

328 All asylum applications will be determined by the Secretary of State in accordance with the United Kingdom's obligations under the [Geneva Convention]. Every asylum application made by a person at a port or airport in the United Kingdom will be referred by the Immigration Officer for determination by the Secretary of State in accordance with these Rules.

Note

Words in brackets amended by Cm 6918.

[328A The Secretary of State shall ensure that authorities which are likely to be addressed by someone who wishes to make an application for asylum are able to advise that person how and where such an application may be made.]

Note

Words in brackets amended by HC 82.

[329 Until an asylum application has been determined by the Secretary of State or the Secretary of State has issued a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 no action will be taken to require the departure of the asylum applicant or his dependants from the United Kingdom.]

Note

Paragraph 329 substituted by HC 1112.

330 If the Secretary of State decides to grant asylum and the person has not yet been given leave to enter, the Immigration Officer will grant limited leave to enter.

[331 [If a person seeking leave to enter is refused asylum [or their application for asylum is withdrawn or treated as withdrawn under paragraph 333C of these Rules], the Immigration Officer will consider whether or not he is in a position to decide to give or refuse leave to enter without interviewing the person further. If the Immigration Officer decides that a further interview is not required he may serve the notice giving or refusing leave to enter by post. If the Immigration Officer decides that a further interview is required, he will then resume his examination to determine whether or not to grant the person] leave to enter under any other provision of these Rules. If the person fails at any time to comply with a requirement to report to an Immigration Officer for examination, the Immigration Officer may direct that the person's examination shall be treated as concluded at that time. The Immigration Officer will then consider any outstanding applications for entry on the basis of any evidence before him.]

Note

Paragraph 331 substituted by Cm 3365. Words in further square brackets inserted by HC 704. Words beginning 'or their application' inserted by HC 420.

332 If a person who has been refused leave to enter applies for asylum and that application is refused, [or withdrawn or treated as withdrawn under paragraph 333C of these Rules] leave to enter will again be refused unless the applicant qualifies for admission under any other provision of these Rules.

Note

Words in square brackets inserted by HC 420.

[333 Written notice of decisions on applications for asylum shall be given in reasonable time. Where the applicant is legally represented, notice may instead be given to the representative. Where the applicant has no legal representative and free legal assistance is not available, he shall be informed of the decision on the application for asylum and, if the application is rejected, how to challenge the decision, in a language that he may reasonably be supposed to understand.]

Note

Paragraph 333 deleted by Cm 4851 and resubstituted by HC 82.

[333A The Secretary of State shall ensure that a decision is taken by him on each application for asylum as soon as possible, without prejudice to an adequate and complete examination.

Where a decision on an application for asylum cannot be taken within six months of the date it was recorded, the Secretary of State shall either:

- (a) inform the applicant of the delay; or
- (b) if the applicant has made a specific written request for it, provide information on the timeframe within which the decision on his application is to be expected. The provision of such information shall not oblige the Secretary of State to take a decision within the stipulated time-frame.]

Note

Paragraph 333A inserted by HC 82.

[333B Applicants for asylum shall be allowed an effective opportunity to consult, at their own expense or at public expense in accordance with provision made for this by the Legal Services Commission or otherwise, a person who is authorised under Part V of the Immigration and Asylum Act 1999 to give immigration advice. This paragraph shall also apply where the Secretary of State is considering revoking a person's refugee status in accordance with these Rules.]

Note

Paragraph 333B inserted by HC 82.

Withdrawal of applications

[333C If an application for asylum is withdrawn either explicitly or implicitly, consideration of it may be discontinued. An application will be treated as explicitly withdrawn if the applicant signs the relevant form provided by the Secretary of State. An application may be treated as impliedly withdrawn if an applicant fails to attend the personal interview as provided in paragraph 339NA of these Rules unless the applicant demonstrates within a reasonable time that that failure was due to circumstances beyond his or her control. The Secretary of State will indicate on the applicant's asylum file that the application for asylum has been withdrawn and consideration of it has been discontinued.]

Note

Paragraph 333C inserted by HC 82. Substituted by HC 420.

Appendix 5 Immigration Rules

Grant of asylum

[334 An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:

- (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
- (ii) he is a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
- (iii) there are no reasonable grounds for regarding him as a danger to the security of the United Kingdom;
- (iv) he does not, having been convicted by a final judgment of a particularly serious crime, he does not constitute danger to the community of the United Kingdom; and
- (v) refusing his application would result in him being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Geneva Convention, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group.]

Note

Amended by Cm 6918.

335 If the Secretary of State decides to grant asylum to a person who has been given leave to enter (whether or not the leave has expired) or to a person who has entered without leave, the Secretary of State will vary the existing leave or grant limited leave to remain.

Refusal of asylum

336 An application which does not meet the criteria set out in paragraph 334 will be refused. [Where an application for asylum is refused, the reasons in fact and law shall be stated in the decision and information provided in writing on how to challenge the decision.]

Note

Amended by HC 82.

337 [...]

338 When a person in the United Kingdom is [notified that asylum has been refused] he may, if he is liable to removal as an illegal entrant [, removal under section 10 of the Immigration and Asylum Act 1999] or to deportation, at the same time be notified of removal directions, served with a notice of intention to make a deportation order, or served with a deportation order, as appropriate.

Note

Words beginning 'removal under' inserted by Cm 4851. Words beginning 'notified that' amended by Cm 6918.

339 [...]

Note

Paragraph 339 deleted by Cm 4851.

[Revocation or refusal to renew a grant of asylum

339A A person's grant of asylum under paragraph 334 will be revoked or not renewed if the Secretary of State is satisfied that:

- (i) he has voluntarily re-availed himself of the protection of the country of nationality;
- (ii) having lost his nationality, he has voluntarily re-acquired it; or
- (iii) he has acquired a new nationality, and enjoys the protection of the country of his new nationality;
- (iv) he has voluntarily re-established himself in the country which he left or outside which he remained owing to a fear of persecution;
- (v) he can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality;
- (vi) being a stateless person with no nationality, he is able, because the circumstances in connection with which he has been recognised a refugee have ceased to exist, to return to the country of former habitual residence;
- (vii) he should have been or is excluded from being a refugee in accordance with regulation 7 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
- (viii) his misrepresentation or omission of facts, including the use of false documents, were decisive for the grant of asylum;
- (ix) there are reasonable grounds for regarding him as a danger to the security of the United Kingdom; or
- (x) having been convicted by a final judgment of a particularly serious crime he constitutes danger to the community of the United Kingdom.

In considering (v) and (vi), the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

Where an application for asylum was made on or after the 21st October 2004, the Secretary of State will revoke or refuse to renew a person's grant of asylum where he is satisfied that at least one of the provisions in sub-paragraph (i)–(vi) apply.

339B When a person's grant of asylum is revoked or not renewed any limited leave which they have may be curtailed.

[339BA Where the Secretary of State is considering revoking refugee status in accordance with these Rules, the person concerned shall be informed in writing that the Secretary of State is reconsidering his qualification for refugee status and the reasons for the reconsideration. That person shall be given the opportunity to submit, in a personal interview or in a written statement, reasons as to why his refugee status should not be revoked. If there is a personal interview, it shall be subject to the safeguards set out in these Rules.]

Note

Inserted by HC 82.

Grant of humanitarian protection

339C A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

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- (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
- (ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
- (iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and
- (iv) he is not excluded from a grant of humanitarian protection.

Serious harm consists of:

- (i) the death penalty or execution;
- (ii) unlawful killing;
- (iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or
- (iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Exclusion from humanitarian protection

339D A person is excluded from a grant of humanitarian protection under paragraph 339C (iv) where the Secretary of State is satisfied that:

- (i) there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;
- (ii) there are serious reasons for considering that he is guilty of acts contrary to the purposes and principles of the United Nations or has committed, prepared or instigated such acts or encouraged or induced others to commit, prepare or instigate instigated such acts;
- (iii) there are serious reasons for considering that he constitutes a danger to the community or to the security of the United Kingdom; and
- (iv) prior to his admission to the United Kingdom the person committed a crime outside the scope of (i) and (ii) that would be punishable by imprisonment were it committed in the United Kingdom and the person left his country of origin solely in order to avoid sanctions resulting from the crime.

339E If the Secretary of State decides to grant humanitarian protection and the person has not yet been given leave to enter, the Secretary of State or an Immigration Officer will grant limited leave to enter. If the Secretary of State decides to grant humanitarian protection to a person who has been given limited leave to enter (whether or not that leave has expired) or a person who has entered without leave, the Secretary of State will vary the existing leave or grant limited leave to remain.

Refusal of humanitarian protection

339F Where the criteria set out in paragraph 339C is not met humanitarian protection will be refused.

Revocation of humanitarian protection

339G A person's humanitarian protection granted under paragraph 339C will be revoked or not renewed if the Secretary of State is satisfied that at least one of the following applies:

- (i) the circumstances which led to the grant of humanitarian protection have ceased to exist or have changed to such a degree that such protection is no longer required;
- (ii) the person granted humanitarian protection should have been or is excluded from humanitarian protection because there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;
- (iii) the person granted humanitarian protection should have been or is excluded from humanitarian protection because there are serious reasons for considering that he is guilty of acts contrary to the purposes and principles of the United Nations or has committed, prepared or instigated such acts or encouraged or induced others to commit, prepare or instigate such acts;
- (iv) the person granted humanitarian protection should have been or is excluded from humanitarian protection because there are serious reasons for considering that he constitutes a danger to the community or to the security of the United Kingdom;
- (v) the person granted humanitarian protection misrepresented or omitted facts, including the use of false documents, which were decisive to the grant of humanitarian protection; or
- (vi) the person granted humanitarian protection should have been or is excluded from humanitarian protection because prior to his admission to the United Kingdom the person committed a crime outside the scope of (ii) and (iii) that would be punishable by imprisonment had it been committed in the United Kingdom and the person left his country of origin solely in order to avoid sanctions resulting from the crime.

In applying (i) the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person no longer faces a real risk of serious harm;

339H When a person's humanitarian protection is revoked or not renewed any limited leave which they have may be curtailed.

[**339HA** The Secretary of State shall ensure that the personnel examining applications for asylum and taking decisions on his behalf have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.]

Note

Inserted by HC 82.

Consideration of applications

339I When the Secretary of State considers a person's asylum claim, eligibility for a grant of humanitarian protection or human rights claim it is the duty of the person to submit to the Secretary of State as soon as possible all material factors needed to

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substantiate the asylum claim or establish that he is a person eligible for humanitarian protection or substantiate the human rights claim, which the Secretary of State shall assess in cooperation with the person.

The material factors include:

- (i) the person's statement on the reasons for making an asylum claim or on eligibility for a grant of humanitarian protection or for making a human rights claim;
- (ii) all documentation at the person's disposal regarding the person's age, background (including background details of relevant relatives), identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes; and
- (iii) identity and travel documents.

[339IA For the purposes of examining individual applications for asylum:

- (i) information provided in support of an application and the fact that an application has been made shall not be disclosed to the alleged actor(s) of persecution of the applicant, and
- (ii) information shall not be obtained from the alleged actor(s) of persecution that would result in their being directly informed that an application for asylum has been made by the applicant in question and would jeopardise the physical integrity of the applicant and his dependants, or the liberty and security of his family members still living in the country of origin.

This paragraph shall also apply where the Secretary of State is considering revoking a person's

refugee status in accordance with these Rules.]

Note

Inserted by HC 82.

339J The assessment by the Secretary of State of an asylum claim, eligibility for a grant of humanitarian protection or a human rights claim will be carried out on an individual[, objective and impartial] basis. This will include taking into account in particular:

- (i) all relevant facts as they relate to the country of origin or country of return at the time of taking a decision on the grant; including laws and regulations of the country of origin or country of return and the manner in which they are applied;
- (ii) relevant statements and documentation presented by the person including information on whether the person has been or may be subject to persecution or serious harm;
- (iii) the individual position and personal circumstances of the person, including factors such as background, gender and age, so as to assess whether, on the basis of the person's personal circumstances, the acts to which the person has been or could be exposed would amount to persecution or serious harm;
- (iv) whether the person's activities since leaving the country of origin or country of return were engaged in for the sole or main purpose of creating the necessary conditions for making an asylum claim or establishing that he is a person eligible for humanitarian protection or a human rights claim, so as to assess whether these activities will expose the person to persecution or serious harm if he returned to that country; and

- (v) whether the person could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.

Note

Amended by HC 82.

[339JA Reliable and up-to-date information shall be obtained from various sources as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited. Such information shall be made available to the personnel responsible for examining applications and taking decisions and may be provided to them in the form of a consolidated country information report.

This paragraph shall also apply where the Secretary of State is considering revoking a person's refugee status in accordance with these Rules.]

Note

Inserted by HC 82.

339K The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

339L It is the duty of the person to substantiate the asylum claim or establish that he is a person eligible humanitarian protection or substantiate his human rights claim. Where aspects of the person's statements are not supported by documentary or other evidence, those aspects will not need confirmation when all of the following conditions are met:

- (i) the person has made a genuine effort to substantiate his asylum claim or establish that he is a person eligible humanitarian protection or substantiate his human rights claim;
- (ii) all material factors at the person's disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given;
- (iii) the person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case;
- (iv) the person has made an asylum claim or sought to establish that he is a person eligible for humanitarian protection or made a human rights claim at the earliest possible time, unless the person can demonstrate good reason for not having done so; and
- (v) the general credibility of the person has been established.

339M The Secretary of State may consider that a person has not substantiated his asylum claim or established that he is a person eligible for humanitarian protection or substantiated his human rights claim [and thereby reject his application for asylum, determine that he is not eligible for humanitarian protection or reject his human rights claim], if he fails, without reasonable explanation, to make a prompt and full disclosure of material facts, either orally or in writing, or otherwise to assist the Secretary of State in establishing the facts of the case; this includes, for example, [...], failure to report to a designated place to be fingerprinted, failure to complete an asylum questionnaire or failure to comply with a requirement to report to an immigration officer for examination.

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Note

Amended by HC 82. Words deleted by HC 420.

[339MA Applications for asylum shall be neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.]

Note

Inserted by HC 82.

339N In determining whether the general credibility of the person has been established the Secretary of State will apply the provisions in s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

[Personal interview]

339NA Before a decision is taken on the application for asylum, the applicant shall be given the opportunity of a personal interview on his application for asylum with a representative of the Secretary of State who is legally competent to conduct such an interview.

The personal interview may be omitted where:

- (i) the Secretary of State is able to take a positive decision on the basis of evidence available;
- (ii) the Secretary of State has already had a meeting with the applicant for the purpose of assisting him with completing his application and submitting the essential information regarding the application;
- (iii) the applicant, in submitting his application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether he is a refugee, as defined in regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
- (iv) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his claim clearly unconvincing in relation to his having been the object of persecution;
- (v) the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his particular circumstances or to the situation in his country of origin;
- (vi) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his removal; and
- (vii) it is not reasonably practicable, in particular where the Secretary of State is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his control.

The omission of a personal interview shall not prevent the Secretary of State from taking a decision on the application.

Where the personal interview is omitted, the applicant and dependants shall be given a reasonable opportunity to submit further information.]

Note

Inserted by HC 82.

[339NB

- (i) The personal interview mentioned in paragraph 339NA above shall normally take place without the presence of the applicant's family members unless the Secretary of State considers it necessary for an appropriate examination to have other family members present.
- (ii) The personal interview shall take place under conditions which ensure appropriate confidentiality.]

Note

Inserted by HC 82.

[339NC

- (i) A written report shall be made of every personal interview containing at least the essential information regarding the asylum application as presented by the applicant in accordance with paragraph 339I of these Rules.
- (ii) The Secretary of State shall ensure that the applicant has timely access to the report of the personal interview and that access is possible as soon as necessary for allowing an appeal to be prepared and lodged in due time.
- (iii) The Secretary of State shall request the applicant's approval of the contents of the report of the personal interview. Where an applicant refuses to approve the contents of the report, the reasons for this refusal shall be entered into the applicant's file.
- (iv) The refusal of an applicant to approve the contents of the report shall not prevent the Secretary of State from taking a decision on his application.]

Note

Inserted by HC 82.

[339ND The Secretary of State shall provide at public expense an interpreter for the purpose of allowing the applicant to submit his case, wherever necessary. The Secretary of State shall select an interpreter who can ensure appropriate communication between the applicant and the representative of the Secretary of State who conducts the interview.]

Note

Inserted by HC 82.

Internal relocation

339O

- (i) The Secretary of State will not make:
 - (a) a grant of asylum if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or
 - (b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.
- (ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making his decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.
- (iii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return

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Sur place claims

339P

A person may have a well-founded fear of being persecuted or a real risk of suffering serious harm based on events which have taken place since the person left the country of origin or country of return and/or activities which have been engaged in by a person since he left the country of origin or country of return, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin or country of return.

Residence Permits

339Q

- (i) The Secretary of State will issue to a person granted asylum in the United Kingdom a United Kingdom Residence Permit (UKRP) as soon as possible after the grant of asylum. The UKRP will be valid for five years and renewable, unless compelling reasons of national security or public order otherwise require or where there are reasonable grounds for considering that the applicant is a danger to the security of the UK or having been convicted by a final judgment of a particularly serious crime, the applicant constitutes a danger to the community of the UK.
- (ii) The Secretary of State will issue to a person granted humanitarian protection in the United Kingdom a UKRP as soon as possible after the grant of humanitarian protection. The UKRP will be valid for five years and renewable, unless compelling reasons of national security or public order otherwise require or where there are reasonable grounds for considering that the person granted humanitarian protection is a danger to the security of the UK or having been convicted by a final judgment of a serious crime, this person constitutes a danger to the community of the UK.
- (iii) The Secretary of State will issue a UKRP to a family member of a person granted asylum or humanitarian protection where the family member does not qualify for such status. A UKRP will be granted for a period of five years. The UKRP is renewable on the terms set out in (i) and (ii) respectively. ['Family member' for the purposes of this sub-paragraph refers only to those who are treated as dependants for the purposes of paragraph 349.]
- (iv) The Secretary of State may revoke or refuse to renew a person's UKRP where their grant of asylum or humanitarian protection is revoked under the provisions in the immigration rules.]

Note

Paragraphs 339A to 339Q inserted by Cm 6918. Sub-paragraph 339Q(iv) amended by HC 28.

[Consideration of asylum applications and human rights claims]

340 [...]

Note

Heading substituted by HC 299. Paragraph 340 deleted by Cm 6918.

341 [...]

Note

Paragraph 341 deleted by Cm 6918.

342 The actions of anyone acting as an agent of the asylum applicant [or human rights claimant] may also be taken into account in regard to the matters set out in paragraphs 340 and 341.

Note

Words in square brackets inserted by HC 299.

343 [...]

344 [...]

Note

Paragraphs 343 and 344 deleted by Cm 6918.

[Travel documents]

344A

- (i) After having received a complete application for a travel document, the Secretary of State will issue to a person granted asylum in the United Kingdom and their family members travel documents, in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside the United Kingdom, unless compelling reasons of national security or public order otherwise require.
- (ii) After having received a complete application for a travel document, the Secretary of State will issue travel documents to a person granted humanitarian protection in the United Kingdom where that person is unable to obtain a national passport or other identity documents which enable him to travel, unless compelling reasons of national security or public order otherwise require.
- (iii) Where the person referred to in (ii) can obtain a national passport or identity documents but has not done so, the Secretary of State will issue that person with a travel document where he can show that he has made reasonable attempts to obtain a national passport or identity document and there are serious humanitarian reasons for travel.

Access to Employment

344B The Secretary of State will not impose conditions restricting the employment or occupation in the United Kingdom of a person granted asylum or humanitarian protection.

Information

344C A person who is granted asylum or humanitarian protection will be provided with access to information in a language that they may reasonably be supposed to understand which sets out the rights and obligations relating to that status. The Secretary of State will provide the information as soon as possible after the grant of asylum or humanitarian protection.]

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Note

Paragraphs 344A to 344C inserted by Cm 6918.

Third country cases

[345

- (1) In a case where the Secretary of State is satisfied that the conditions set out in paragraphs 4 and 5(1), 9 and 10(1), 14 and 15(1) or 17 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 are fulfilled, he will normally decline to examine the asylum application substantively and issue a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 as appropriate.
- (2) The Secretary of State shall not issue a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 unless:
 - (i) the asylum applicant has not arrived in the United Kingdom directly from the country in which he claims to fear persecution and has had an opportunity at the border or within the third country or territory to make contact with the authorities of that third country or territory in order to seek their protection; or
 - (ii) there is other clear evidence of his admissibility to a third country or territory.

Provided that he is satisfied that a case meets these criteria, the Secretary of State is under no obligation to consult the authorities of the third country or territory before the removal of an asylum applicant to that country or territory.

- [(2A) Where a certificate is issued under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 the asylum applicant shall:
- (i) be informed in a language that he may reasonably be expected to understand regarding his removal to a safe third country;
 - (ii) be provided with a document informing the authorities of the safe third country, in the language of that country, that the asylum application has not been examined in substance by the authorities in the United Kingdom;
 - (iii) sub-paragraph 345(2A)(ii) shall not apply if removal takes place with reference to the arrangements set out in Regulation (EC) No. 343/2003 (the Dublin Regulation); and
 - (iv) if an asylum applicant removed under this paragraph is not admitted to the safe third country (not being a country to which the Dublin Regulation applies as specified in paragraph 345(2A)(iii)), subject to determining and resolving the reasons for his nonadmission, the asylum applicant shall be admitted to the asylum procedure in the UK.]
- (3) Where a certificate is issued under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 in relation to the asylum claim and the person is seeking leave to enter the Immigration Officer will consider whether or not he is in a position to decide to give or refuse leave to enter without interviewing the person further. If the Immigration Officer decides that a further interview is not required he may serve the notice giving or refusing leave to enter by post. If the Immigration Officer decides that a further interview is required, he will then resume his examination to determine whether or not to grant the person leave to enter under any other provision of these Rules. If the person fails at any time to comply with a requirement to report to an Immigration Officer for examination, the Immigration Officer may direct

that the person's examination shall be treated as concluded at that time. The Immigration Officer will then consider any outstanding applications for entry on the basis of any evidence before him.

- (4) Where a certificate is issued under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 the person may, if liable to removal as an illegal entrant, or removal under section 10 of the Immigration and Asylum Act 1999 or to deportation, at the same time be notified of removal directions, served with a notice of intention to make a deportation order, or served with a deportation order, as appropriate.]

Note

Paragraph 345 substituted by HC 1112. Sub-paragraph (2A) inserted by HC 82.

Previously rejected applications

346 ...

347 ...

Note

Paragraph 346 deleted by HC 1112.

Rights of appeal

348 ...

Note

Paragraph 348 deleted by Cm 4851.

Dependants

[349 A spouse, civil partner, unmarried or same-sex partner, or minor child accompanying a principal applicant may be included in his application for asylum as his dependant [provided, in the case of an adult dependant with legal capacity, the dependant consents to being treated as such at the time the application is lodged.] A spouse, civil partner, unmarried or same-sex partner or minor child may also claim asylum in his own right. If the principal applicant is granted asylum [or humanitarian protection] and leave to enter or remain any spouse, civil partner, unmarried or same-sex partner or minor child will be granted leave to enter or remain for the same duration. The case of any dependant who claims asylum in his own right will be [also] considered individually in accordance with paragraph 334 above. An applicant under this paragraph, including an accompanied child, may be interviewed where he makes a claim as a dependant or in his own right. If the spouse, civil partner, unmarried or same-sex partner, or minor child in question has a claim in his own right, that claim should be made at the earliest opportunity. Any failure to do so will be taken into account and may damage credibility if no reasonable explanation for it is given. Where an asylum [or humanitarian protection] application is unsuccessful, at the same time that asylum [or humanitarian protection] is refused the applicant may be notified of removal directions or served with a notice of the Secretary of State's intention to deport him, as appropriate. In this paragraph and paragraphs 350–352 a child means a person who is under 18 years of age or who, in the absence of documentary evidence establishing age, appears to be under that age. An unmarried or same sex partner for

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the purposes of this paragraph, is a person who has been living together with the principal applicant in a subsisting relationship akin to marriage or a civil partnership for two years or more.]

Note

Substituted by Cm 6918. The words 'or humanitarian protection' inserted by HC 28. Words beginning 'provided, in the case' and 'also' inserted by HC 82.

Unaccompanied children

350 Unaccompanied children may also apply for asylum and, in view of their potential vulnerability, particular priority and care is to be given to the handling of their cases.

351 A person of any age may qualify for refugee status under the Convention and the criteria in paragraph 334 apply to all cases. However, account should be taken of the applicant's maturity and in assessing the claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of his situation. An asylum application made on behalf of a child should not be refused solely because the child is too young to understand his situation or to have formed a well founded fear of persecution. Close attention should be given to the welfare of the child at all times.

[352 Any child over the age of 12 who has claimed asylum in his own right shall be interviewed about the substance of his claim unless the child is unfit or unable to be interviewed. When an interview takes place it shall be conducted in the presence of a parent, guardian, representative or another adult independent of the Secretary of State who has responsibility for the child. The interviewer shall have specialist training in the interviewing of children and have particular regard to the possibility that a child will feel inhibited or alarmed. The child shall be allowed to express himself in his own way and at his own speed. If he appears tired or distressed, the interview shall be stopped.]

Note

Substituted by HC 82.

[352ZA The Secretary of State shall as soon as possible after an unaccompanied child makes an application for asylum take measures to ensure that a representative represents and/or assists the unaccompanied child with respect to the examination of the application and ensure that the representative is given the opportunity to inform the unaccompanied child about the meaning and possible consequences of the interview and, where appropriate, how to prepare himself for the interview. The representative shall have the right to be present at the interview and ask questions and make comments in the interview, within the framework set by the interviewer.]

Note

Inserted by HC 82.

[352ZB The decision on the application for asylum shall be taken by a person who is trained to deal with asylum claims from children.]

Note

Inserted by HC 82.

[352A The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse [or civil partner] of a refugee are that:

- (i) the applicant is married to a person granted asylum in the United Kingdom; and
- (ii) the marriage [or civil partnership] did not take place after the person granted asylum left the country of his former habitual residence in order to seek asylum; and
- (iii) the applicant would not be excluded from protection by virtue of article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and
- [(iv) each of the parties intends to live permanently with the other as his or her spouse [or civil partner] and the marriage [or civil partnership] is subsisting; and]
- [(v)] if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

Note

Words in square brackets inserted by HC 582.

[352AA The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the unmarried or the same-sex partner of a refugee are that:

- (i) the applicant is the unmarried or same-sex partner of a person granted asylum in the UK on or after 9th October 2006; and
- (ii) the parties have been living together in a relationship akin to either a marriage or a civil partnership which has subsisted for two years or more; and
- (iii) the relationship existed before the person granted asylum left the country of his former habitual residence in order to seek asylum; and
- (iv) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or article 1F of the Geneva Convention if he were to seek asylum in his own right; and
- (v) each of the parties intends to live permanently with the other as his or her unmarried or same-sex partner and the relationship is subsisting; and
- (vi) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.]

Note

Inserted by Cm 6918.

352B Limited leave to enter the United Kingdom as the spouse [or civil partner] of a refugee may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the spouse [or civil partner] of a refugee may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 352A(i)–(iii) are met.

Note

Words in square brackets inserted by HC 582.

[352BA Limited leave to enter the United Kingdom as the unmarried or same-sex partner of a refugee may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the unmarried or same sex partner of a refugee may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 352AA(i)–(v) are met.]

Note

Inserted by Cm 6918.

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352C Limited leave to enter the United Kingdom as the spouse [or civil partner] of a refugee is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the spouse [or civil partner] of a refugee is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 352A(i)–(iii) are met.

Note

Words in square brackets inserted by HC 582.

[352CA Limited leave to enter the United Kingdom as the unmarried or same-sex partner of a refugee is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the unmarried or same sex partner of a refugee is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 352AA(i)–(v) are met.]

Note

Inserted by Cm 6918.

352D The requirements to be met by a person seeking leave to enter or remain in the United Kingdom [in order to join or remain with the parent who has been granted asylum in the United Kingdom] are that the applicant:

- (i) is the child of a parent who has been granted asylum in the United Kingdom; and
- (ii) is under the age of 18, and
- (iii) is not leading an independent life, is unmarried [and is not a civil partner], and has not formed an independent family unit; and
- (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum; and
- (v) would not be excluded from protection by virtue of article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and
- (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

Note

Words in square brackets inserted by HC 582.

352E Limited leave to enter the United Kingdom as the child of a refugee may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the child of a refugee may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 352D(i)–(v) are met.

352F Limited leave to enter the United Kingdom as the child of a refugee is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the child of a refugee is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 352D(i)–(v) are met.]

Note

Paragraphs 352A–352F inserted by Cm 4851. In paragraph 352A, sub-paragraph (iv) inserted and (v) renumbered by Cm 5597. Words in square brackets in 352D substituted by Cm 5597.

[352FA The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse or civil partner of a person who has been granted humanitarian protection in the United Kingdom on or after 30 August 2005 are that:

- (i) the applicant is married to or the civil partner of a person granted humanitarian protection on or after 30 August 2005; and
- (ii) the marriage or civil partnership did not take place after the person granted humanitarian protection left the country of his former habitual residence in order to seek asylum in the UK; and
- (iii) the applicant would not be excluded from a grant of humanitarian protection for any of the reasons in paragraph 339D; and
- (iv) each of the parties intend to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting; and
- (v) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

352FB Limited leave to enter the United Kingdom as the spouse or civil partner of a person granted humanitarian protection may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the spouse or civil partner of a person granted humanitarian protection may be granted provided the Secretary of State is satisfied that each of the requirements in sub paragraphs 352FA(i) – (iv) are met.

352FC Limited leave to enter the United Kingdom as the spouse or civil partner of a person granted humanitarian protection is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the spouse or civil partner of a person granted humanitarian protection is to be refused if the Secretary of State is not satisfied that each of the requirements in sub paragraphs 352FA(i)–(iv) are met.

352FD The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the unmarried or same-sex partner of a person who has been granted humanitarian protection in the United Kingdom are that:

- (i) the applicant is the unmarried or same-sex partner of a person granted humanitarian protection on or after 9th October 2006; and
- (ii) the parties have been living together in a relationship akin to either a marriage or a civil partnership which has subsisted for two years or more; and
- (iii) the relationship existed before the person granted humanitarian protection left the country of his former habitual residence in order to seek asylum; and
- (iv) the applicant would not be excluded from a grant of humanitarian protection for any of the reasons in paragraph 339D; and
- (v) each of the parties intends to live permanently with the other as his or her unmarried or same-sex partner and the relationship is subsisting; and
- (vi) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

352FE Limited leave to enter the United Kingdom as the unmarried or same-sex partner of a person granted humanitarian protection may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the unmarried or same sex partner of a person granted humanitarian protection may be granted provided the Secretary of State is satisfied that each of the requirements in subparagraphs 352FD(i)–(v) are met.

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352FF Limited leave to enter the United Kingdom as the unmarried or same-sex partner of a person granted humanitarian protection is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the unmarried or same sex partner of a person granted humanitarian protection is to be refused if the Secretary of State is not satisfied that each of the requirements in sub paragraphs 352FD(i)–(v) are met.

352FG The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with their parent who has been granted humanitarian protection in the United Kingdom on or after 30 August 2005 are that the applicant:

- (i) is the child of a parent who has been granted humanitarian protection in the United Kingdom on or after 30 August 2005; and
- (ii) is under the age of 18, and
- (iii) is not leading an independent life, is unmarried or is not in a civil partnership, and has not formed an independent family unit; and
- (iv) was part of the family unit of the person granted humanitarian protection at the time that the person granted humanitarian protection left the country of his habitual residence in order to seek asylum in the UK; and
- (v) would not be excluded from a grant of humanitarian protection for any of the reasons in paragraph 339D; and
- (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

352FH Limited leave to enter the United Kingdom as the child of a person granted humanitarian protection may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the child of a person granted humanitarian protection may be granted provided the Secretary of State is satisfied that each of the requirements in sub paragraphs 352FG(i) –(v) are met.

352FI Limited leave to enter the United Kingdom as the child of a person granted humanitarian protection is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the child of a person granted humanitarian protection is to be refused if the Secretary of State is not satisfied that each of the requirements in sub paragraphs 352FG(i)–(v) are met.]

Note

Paragraphs 352FA–352FI inserted by HC 28.

[Interpretation

352G For the purposes of this Part:

- (a) ‘Geneva Convention’ means the United Nations Convention and Protocol relating to the Status of Refugees;
- (b) ‘Country of return’ means a country or territory listed in paragraph 8(c) of Schedule 2 of the Immigration Act 1971;
- (c) ‘Country of origin’ means the country or countries of nationality or, for a stateless person, or former habitual residence.]

Note

Inserted by Cm 6918.

[PART 12
PROCEDURE]

[Fresh Claims]

[353 When a human rights or asylum claim has been refused [or withdrawn or treated as withdrawn under paragraph 333C of these Rules] and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

- (i) had not already been considered; and
- (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas.]

Note

Inserted by HC 1112. Words beginning ‘or withdrawn’ inserted by HC 420.

[353A Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.

This paragraph does not apply to submissions made overseas.]

Note

Inserted by HC 82.

354–361 [...]

Note

Paragraphs 354–361 deleted by Cm 4851.

[PART 11A
TEMPORARY PROTECTION]

[Definition of Temporary Protection Directive]

[354 For the purposes of paragraphs 355 to 356B, ‘Temporary Protection Directive’ means Council Directive 2001/55/EC of 20 July 2001 regarding the giving of temporary protection by Member States in the event of a mass influx of displaced persons.]

Note

Paragraphs 354–356B inserted by HC 164.

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[Grant of temporary protection]

[355 An applicant for temporary protection will be granted temporary protection if the Secretary of State is satisfied that:

- (i) the applicant is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and
- (ii) the applicant is a person entitled to temporary protection as defined by, and in accordance with, the Temporary Protection Directive; and
- (iii) the applicant does not hold an extant grant of temporary protection entitling him to reside in another Member State of the European Union. This requirement is subject to the provisions relating to dependants set out in paragraphs 356 to 356B and to any agreement to the contrary with the Member State in question; and
- (iv) the applicant is not excluded from temporary protection under the provisions in paragraph 355A.

355A An applicant or a dependant may be excluded from temporary protection if:

- (i) there are serious reasons for considering that:
 - (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; or
 - (b) he has committed a serious non-political crime outside the United Kingdom prior to his application for temporary protection; or
 - (c) he has committed acts contrary to the purposes and principles of the United Nations, or
- (ii) there are reasonable grounds for regarding the applicant as a danger to the security of the United Kingdom or, having been convicted by a final judgment of a particularly serious crime, to be a danger to the community of the United Kingdom.

Consideration under this paragraph shall be based solely on the personal conduct of the applicant concerned. Exclusion decisions or measures shall be based on the principle of proportionality.

355B If temporary protection is granted to a person who has been given leave to enter or remain (whether or not the leave has expired) or to a person who has entered without leave, the Secretary of State will vary the existing leave or grant limited leave to remain.

355C A person to whom temporary protection is granted will be granted limited leave to enter or remain, which is not to be subject to a condition prohibiting employment, for a period not exceeding 12 months. On the expiry of this period, he will be entitled to apply for an extension of this limited leave for successive periods of 6 months thereafter.

355D A person to whom temporary protection is granted will be permitted to return to the United Kingdom from another Member State of the European Union during the period of a mass influx of displaced persons as established by the Council of the European Union pursuant to Article 5 of the Temporary Protection Directive.

355E A person to whom temporary protection is granted will be provided with a document in a language likely to be understood by him in which the provisions relating

to temporary protection and which are relevant to him are set out. A person with temporary protection will also be provided with a document setting out his temporary protection status.

355F The Secretary of State will establish and maintain a register of those granted temporary protection. The register will record the name, nationality, date and place of birth and marital status of those granted temporary protection and their family relationship to any other person who has been granted temporary protection.

355G If a person who makes an asylum application is also eligible for temporary protection, the Secretary of State may decide not to consider the asylum application until the applicant ceases to be entitled to temporary protection.]

Note

Paragraphs 354–356B inserted by HC 164.

[Dependants]

[356 In this part:

‘dependant’ means a family member or a close relative.

‘family member’ means:

- (i) the spouse [or civil partner] of an applicant for, or a person who has been granted, temporary protection; or
- (ii) the unmarried [or same-sex] partner of an applicant for, or a person who has been granted, temporary protection where the parties have been living together in a relationship akin to marriage [or civil partnership] which has subsisted for 2 years or more; or
- (iii) the [...] minor child [(who is unmarried and not a civil partner)] of an applicant for, or a person who has been granted, temporary protection or his spouse,

who lived with the principal applicant as part of the family unit in the country of origin immediately prior to the mass influx.

‘close relative’ means:

- (i) the [adult child (who is unmarried and not a civil partner), parent or grandparent] of an applicant for, or person who has been granted, temporary protection; or
- (ii) the [...] sibling [who is unmarried and not a civil partner] or the uncle or aunt of an applicant for, or person who has been granted, temporary protection, who lived with the principal applicant as part of the family unit in the country of origin immediately prior to the mass influx and was wholly or mainly dependent upon the principal applicant at that time, and would face extreme hardship if reunification with the principal applicant did not take place.

Note

Words in square brackets inserted and deleted by HC 582.

356A A dependant may apply for temporary protection. Where the dependant falls within paragraph 356 and does not fall to be excluded under paragraph 355A, he will be granted temporary protection for the same duration and under the same conditions as the principal applicant.

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356B When considering any application by a dependant child, the Secretary of State shall take into consideration the best interests of that child.]

Note

Paragraphs 354–356B inserted by HC 164.

[PART 11B]

[Reception Conditions for non-EU asylum applicants]

[357 Part 11B only applies to asylum applicants (within the meaning of these Rules) who are not nationals of a member State.]

Note

Paragraphs 357–361 inserted by HC 194.

[357A The Secretary of State shall inform asylum applicants in a language they may reasonably be supposed to understand and within a reasonable time after their claim for asylum has been recorded of the procedure to be followed, their rights and obligations during the procedure, and the possible consequences of non-compliance and non-co-operation. They shall be informed of the likely timeframe for consideration of the application and the means at their disposal for submitting all relevant information.]

Note

Inserted by HC 82.

[Information to be provided to asylum applicants]

[358 The Secretary of State shall inform asylum applicants within a reasonable time not exceeding fifteen days after their claim for asylum has been recorded of the benefits and services that they may be eligible to receive and of the rules and procedures with which they must comply relating to them. The Secretary of State shall also provide information on non-governmental organisations and persons that provide legal assistance to asylum applicants and which may be able to help asylum applicants or provide information on available benefits and services.]

358A The Secretary of State shall ensure that the information referred to in paragraph 358 is available in writing and, to the extent possible, will provide the information in a language that asylum applicants may reasonably be supposed to understand. Where appropriate, the Secretary of State may also arrange for this information to be supplied orally.]

Note

Paragraphs 357–361 inserted by HC 194.

[Information to be provided by asylum applicants]

[358B An asylum applicant must notify the Secretary of State of his current address and of any change to his address or residential status. If not notified beforehand, any change must be notified to the Secretary of State without delay after it occurs.]

Note

Paragraphs 357–361 inserted by HC 194.

[The United Nations High Commissioner for Refugees]

358C A representative of the United Nations High Commissioner for Refugees (UNHCR) or an organisation working in the United Kingdom on behalf of the UNHCR pursuant to an agreement with the government shall:

- (a) have access to applicants for asylum, including those in detention;
- (b) have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken on applications for asylum, provided that the applicant for asylum agrees thereto;
- (c) be entitled to present his views, in the exercise of his supervisory responsibilities under Article 35 of the Geneva Convention, to the Secretary of State regarding individual applications for asylum at any stage of the procedure.

This paragraph shall also apply where the Secretary of State is considering revoking a person's refugee status in accordance with these Rules.]

Note

Inserted by HC 82.

[Documentation]

[359 The Secretary of State shall ensure that, within three working days of recording an asylum application, a document is made available to that asylum applicant, issued in his own name, certifying his status as an asylum applicant or testifying that he is allowed to remain in the United Kingdom while his asylum application is pending. For the avoidance of doubt, in cases where the Secretary of State declines to examine an application it will no longer be pending for the purposes of this rule.

359A The obligation in paragraph 359 above shall not apply where the asylum applicant is detained under the Immigration Acts, the Immigration and Asylum Act 1999 or the Nationality, Immigration and Asylum Act 2002.

359B A document issued to an asylum applicant under paragraph 359 does not constitute evidence of the asylum applicant's identity.

359C In specific cases the Secretary of State or an Immigration Officer may provide an asylum applicant with evidence equivalent to that provided under rule 359. This might be, for example, in circumstances in which it is only possible or desirable to issue a time-limited document.]

Note

Paragraphs 357–361 inserted by HC 194.

[Right to request permission to take up employment]

[360 An asylum applicant may apply to the Secretary of State for permission to take up employment which shall not include permission to become self employed or to engage in a business or professional activity if a decision at first instance has not been

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taken on the applicant's asylum application within one year of the date on which it was recorded. The Secretary of State shall only consider such an application if, in his opinion, any delay in reaching a decision at first instance cannot be attributed to the applicant.

360A If an asylum applicant is granted permission to take up employment under rule 360 this shall only be until such time as his asylum application has been finally determined.]

Note

Paragraphs 357–361 inserted by HC 194.

[Interpretation]

[361 For the purposes of this Part:

- (a) 'working day' means any day other than a Saturday or Sunday, a bank holiday, Christmas day or Good Friday;
- (b) 'member State' has the same meaning as in Schedule 1 to the European Communities Act 1972.]

Note

Paragraphs 357–361 inserted by HC 194.

PART 13

DEPORTATION [AND ADMINISTRATIVE REMOVAL UNDER SECTION 10 OF THE 1999 ACT]

A deportation order

362 A deportation order requires the subject to leave the United Kingdom and authorises his detention until he is removed. It also prohibits him from re-entering the country for as long as it is in force and invalidates any leave to enter or remain in the United Kingdom given him before the order was made or while it is in force.

[363 The circumstances in which a person is liable to deportation include:

- (i) where the Secretary of State deems the person's deportation to be conducive the public good;
- (ii) where the person is the spouse [or civil partner] or child under 18 of a person ordered to be deported; and
- (iii) where a court recommends deportation in the case of a person over the age of 17 who has been convicted of an offence punishable with imprisonment.]

Note

Words in sub-paragraph (ii) inserted by HC 582.

[363A Prior to 2 October 2000, a person would have been liable to deportation in certain circumstances in which he is now liable to administrative removal. These circumstances are listed in paragraph 394B below. However, such a person remains liable to deportation, rather than administrative removal where:

- (i) a decision to make a deportation order against him was taken before 2 October 2000; or

- (ii) the person has made a valid application under the Immigration (Regularisation Period for Overstayers) Regulations 2000.]

[364 Subject to paragraph 380, while each case will be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. In the cases detailed in paragraph 363A deportation will normally be the proper course where a person has failed to comply with or has contravened a condition or has remained without authority.]

Note

Words in square brackets in the title to Part 13 inserted by Cm 4851. Paragraph 363 substituted and paragraph 363A and words in square brackets in paragraph 364 inserted by Cm 4851. Substituted by HC 1337.

Deportation of family members

[365 Section 5 of the Immigration Act 1971 gives the Secretary of State power in certain circumstances to make a deportation order against the [spouse, civil partner or child] of a person against whom a deportation order has been made. The Secretary of State will not normally decide to deport the spouse [or civil partner] of a deportee where:

- (i) he has qualified for settlement in his own right; or
- (ii) he has been living apart from the deportee.]

Note

References to civil partners inserted by HC 582.

[366 The Secretary of State will not normally decide to deport the child of a deportee where:

- (i) he and his mother or father are living apart from the deportee; or
- (ii) he has left home and established himself on an independent basis; or
- (iii) he married [or formed a civil partnership] before deportation came into prospect.]

Note

Reference to civil partnership inserted by HC 582.

[367 In considering whether to require a spouse [or civil partner] or child to leave with the deportee, the Secretary of State will take account of [all relevant factors, including]:

- (i) the ability of the spouse [or civil partner] to maintain herself and any children in the United Kingdom, or to be maintained by relatives or friends without charge to public funds, not merely for a short period but for the foreseeable future; and
- (ii) in the case of a child of school age, the effect of removal on his education; and
- (iii) the practicability of any plans for a child's care and maintenance in this country if one or both of his parents were deported; and

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- (iv) any representations made by or on behalf of the spouse [or civil partner] or child.]

Note

References to civil partners inserted by HC 582. Words beginning 'all relevant factors' amended by HC 1337.

368 Where the Secretary of State decides that it would be appropriate to deport a member of a family as such, the decision, and the right of appeal, will be notified and it will at the same time be explained that it is open to the member of the family to leave the country voluntarily if he does not wish to appeal or if he appeals and his appeal is dismissed.

369–375 [...].

Note

Paragraphs 369–375 deleted by Cm 4851.

Hearing of appeals

376 [...]

377 [...]

[378 A deportation order may not be made while it is still open to the person to appeal against the Secretary of State's decision, or while an appeal is pending. There is no appeal within the immigration appeal system against the making of a deportation order on the recommendation of a court; but there is a right of appeal to a higher court against the recommendation itself. A deportation order may not be made while it is still open to the person to appeal against the relevant conviction, sentence or recommendation, or while such an appeal is pending.]

Note

Paragraphs 376 and 377 deleted and paragraph 378 substituted by Cm 4851.

Persons who have claimed asylum

379–379A [...]

Note

Paragraphs 379 and 379A deleted by Cm 4851.

380 A deportation order will not be made against any person if his removal in pursuance of the order would be contrary to the United Kingdom's obligations under the Convention and Protocol relating to the Status of Refugees [or the Human Rights Convention].

Note

Words in square brackets inserted by Cm 4851.

Procedure

381 When a decision to make a deportation order has been taken (otherwise than on the recommendation of a court) a notice will be given to the person concerned informing him of the decision and of his right of appeal [...].

382 [Following the issue of such a notice the Secretary of State may authorise detention or make an order restricting a person as to residence, employment or occupation and requiring him to report to the police, pending the making of a deportation order.]

383 [...].

384 If a notice of appeal is given within the period allowed, a summary of the facts of the case on the basis of which the decision was taken will be sent to the [appropriate] appellate authorities, who will notify the appellant of the arrangements for the appeal to be heard.

Note

Words in paragraph 381 deleted, paragraph 382 substituted, paragraph 383 deleted and words in square brackets in paragraph 384 inserted by Cm 4851.

Arrangements for removal

385 A person against whom a deportation order has been made will normally be removed from the United Kingdom. The power is to be exercised so as to secure the person's return to the country of which he is a national, or which has most recently provided him with a travel document, unless he can show that another country will receive him. In considering any departure from the normal arrangements, regard will be had to the public interest generally, and to any additional expense that may fall on public funds

386 The person will not be removed as the subject of a deportation order while an appeal may be brought against the removal directions or such an appeal is pending.

Supervised departure

387 [...]

Note

Paragraph 387 deleted by Cm 4851.

Returned deportees

388 Where a person returns to this country when a deportation order is in force against him, he may be deported under the original order. The Secretary of State will consider every such case in the light of all the relevant circumstances before deciding whether to enforce the order.

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Returned family members

389 Persons deported in the circumstances set out in paragraph 365–368 above (deportation of family members) may be able to seek re-admission to the United Kingdom under the Immigration Rules where:

- (i) a child reaches 18 (when he ceases to be subject to the deportation order); or
- (ii) [in the case of a spouse or civil partner, the marriage or civil partnership comes to an end.]

Note

Words in brackets amended by HC 582.

Revocation of deportation order

390 An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;
- (iii) the interests of the community, including the maintenance of an effective immigration control;
- (iv) the interests of the applicant, including any compassionate circumstances.

391 In the case of an applicant [who has been deported following conviction for a criminal offence] continued exclusion

- [(i) in the case of a conviction which is capable of being spent under the Rehabilitation of Offenders Act 1974, unless the conviction is spent within the meaning of that Act or, if the conviction is spent in less than 10 years, 10 years have elapsed since the making of the deportation order; or
- (ii) in the case of a conviction not capable of being spent under that Act, at any time, unless refusal to revoke the deportation order would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees.]

will normally be the proper course. In other cases revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before [...] the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order. [...]

Note

In sub-paragraph 391, words beginning 'who has been' in square brackets substituted by HC 607. Sub-paragraphs (i) and (ii) substituted by HC 607. Words removed by HC 607.

392 Revocation of a deportation order does not entitle the person concerned to re-enter the United Kingdom; it renders him eligible to apply for admission under the Immigration Rules. Application for revocation of the order may be made to the Entry Clearance Officer or direct to the Home Office.

Rights of appeal in relation to a decision not to revoke a deportation order

393–394 [...]

395 [There may be a right of appeal against refusal to revoke a deportation order.] Where an appeal does lie the right of appeal will be notified at the same time as the decision to refuse to revoke the order.

[Administrative Removal]

395A A person is now liable to administrative removal in certain circumstances in which he would, prior to 2 October 2000, have been liable to deportation.

395B These circumstances are set out in section 10 of the 1999 Act. They are:

- (i) failure to comply with a condition attached to his leave to enter or remain, or remaining beyond the time limited by the leave;
- (ii) where the person has obtained leave to remain by deception; and
- (iii) where the person is the spouse [, civil partner] or child under 18 of someone in respect of whom directions for removal have been given under section 10.

Note

Words in square brackets inserted by HC 582.

[395C Before a decision to remove under section 10 is given, regard will be had to all the relevant factors known to the Secretary of State, [including:

- (i) age;
- (ii) length of residence in the United Kingdom;
- (iii) strength of connections with the United Kingdom;
- (iv) personal history, including character, conduct and employment record;
- (v) domestic circumstances;
- (vi) previous criminal record and the nature of any offence of which the person has been convicted;
- (vii) compassionate circumstances;
- (viii) any representations received on the person's behalf.]

In the case of family members, the factors listed in paragraphs 365–368 must also be taken into account.]

Note

Substituted by Cm 6339. Words beginning 'including' amended by HC 1337.

395D No one shall be removed under section 10 if his removal' would be contrary to the United Kingdom's obligations under the Convention and Protocol relating to the Status of Refugees or under the Human Rights Convention.

Procedure

[395E When a decision that a person is to be removed under section 10 has been given, a notice will be given to the person concerned informing him of the decision and of any right of appeal.]

Note

Substituted by Cm 6339.

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395F Following the issue of such a notice an Immigration Officer may authorise detention or make an order restricting a person as to residence, employment or occupation and requiring him to report to the police, pending the removal.]

Note

[Paragraphs 362–395 replace HC 251, paras 155–180.] Paragraphs 393 and 394 deleted, words in square brackets in paragraph 395 inserted and paragraphs 395A to 395F inserted by Cm 4851.

[APPENDIX 1]

[Visa requirements for the United Kingdom]

1 SUBJECT TO PARAGRAPH 2 BELOW THE FOLLOWING PERSONS NEED A VISA FOR THE UNITED KINGDOM:

(a) Nationals or citizens of the following countries or territorial entities:

Afghanistan	Georgia	Philippines
Albania	Ghana	Qatar
Algeria	Guinea	[...]
Angola	Guinea-Bissau	Russia
Armenia	Guyana	Rwanda
Azerbaijan	Haiti	Sao Tome e Principe
Bahrain	India	Saudi Arabia
Bangladesh	Indonesia	Senegal
Belarus	Iran	Sierra Leone
Benin	Iraq	[...]
Bhutan	Ivory Coast	Somalia
Bosnia-Herzegovina	Jamaica	[South Africa (except for those referred to in sub-paragraph 2(g))]
[...]	Jordan	Sri Lanka
Burkina Faso	Kazakhstan	Sudan
Burma	Kenya	Surinam
Burundi	Kirgizstan	Syria
Cambodia	Korea (North)	[...]
Cameroon	Laos	Tajikistan
Cape Verde	Lebanon	Tanzania
Central African Republic	Liberia	Thailand
Chad	Libya	Togo
[People's Republic of China (except those referred to in sub-paragraph 2(d) and (e) of this Appendix)]	Macedonia	Tunisia
[Colombia]	Madagascar	Turkey
Comoros	[Malawi]	Turkmenistan
Congo	Mali	Uganda
[...]	Mauritania	Ukraine
Cuba	Moldova	United Arab Emirates
[Democratic Republic of the Congo (Zaire)]	Mongolia	Uzbekistan
Djibouti	Morocco	Vietnam
Dominican Republic	Mozambique	Yemen

Ecuador	Nepal	The territories formerly comprising the Socialist Federal Republic of Yugoslavia excluding Croatia and Slovenia.
Egypt	Niger	Zambia
Equatorial Guinea	Nigeria	Zimbabwe
Eritrea	Oman	
Ethiopia	Pakistan	
Fiji	[...]	
Gabon	Peru	

- (b) Persons who hold passports or travel documents issued by the former Soviet Union or by the former Socialist Federal Republic of Yugoslavia.
- (c) Stateless persons.
- (d) Persons who hold non-national documents.

2 THE FOLLOWING PERSONS DO NOT NEED A VISA FOR THE UNITED KINGDOM:

- (a) those who qualify for admission to the United Kingdom as returning residents in accordance with paragraph 18;
- [(b) those who seek leave to enter the United Kingdom within the period of their earlier leave and for the same purpose as that for which leave was granted, unless it:
 - (i) was for a period of six months or less; or
 - (ii) was extended by statutory instrument [or by section 3C of the Immigration Act 1971 (inserted by section 3 of the Immigration and Asylum Act 1999);]
- [...]
- [(d) those nationals or citizens of the People's Republic of China holding passports issued by Hong Kong Special Administrative Region; or
- (e) those nationals or citizens of the People's Republic of China holding passports issued by Macao Special Administrative Region.]
- [(f) those who arrive in the United Kingdom with leave to enter which is in force but which was given before arrival so long as those in question arrive within the period of their earlier leave and for the same purpose as that for which leave was granted, unless that leave—
 - (i) was for a period of six months or less, or
 - (ii) was extended by statutory instrument or by section 3C of the Immigration Act 1971 (inserted by section 3 of the Immigration and Asylum Act 1999).]
- [(g) those nationals or citizens of South Africa who hold a valid passport issued by South Africa and have previously entered the United Kingdom lawfully using that passport.]

Note
 Appendix amended by Statement of Changes in Immigration Rules with effect from 4 April 1996. Renamed Appendix 1 with effect from 11 May 1998 (Cmnd 3953). Republic of Croatia added by HC 22. People's Republic of China amended by HC 735. Maldives, Mauritius and Papua New Guinea deleted by HC 104. Jamaica inserted by HC 180. Zimbabwe inserted by HC 1301. Slovak Republic deleted by HC 95. Malawi inserted by HC 949 (with effect from 2 March 2006). Bulgaria and Romania deleted by HC 130. Republic of Croatia deleted by HC 949. South Africa inserted by HC 227. Taiwan deleted by HC 227.

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Sub-paragraphs 2(d) and (e) inserted by HC 735. Sub-paragraph 2(c) deleted by HC 389. Words in square brackets in 2(b)(ii) and sub-paragraph (f)(i) and (ii) inserted by HC 104. Sub-paragraph 2(g) inserted by HC 227.

Readers are warned that in relation to this Appendix in particular amendments are made periodically and often without prior warning.

[APPENDIX 2]

Countries or territories whose nationals or citizens are relevant foreign nationals for the purposes of Part 10 of these rules (registration with the police)

(Paragraph 324A)

Afghanistan	Iran	Qatar
Algeria	Iraq	Russia
Argentina	Israel	Saudi Arabia
Armenia	Jordan	Sudan
Azerbaijan	Kazakhstan	Syria
Bahrain	Kirgizstan	Tajikistan
Belarus	Kuwait	Tunisia
Bolivia	Lebanon	Turkey
Bhutan	Libya	Turkmenistan
Brazil	Moldova	United Arab Emirates
China	Morocco	Ukraine
Colombia	North Korea	Uzbekistan
Cuba	Oman	Yemen]
Egypt	Palestine	
Georgia	Peru	

Note

Appendix 2 added with effect from 11 May 1998 by Cmnd 3953.

[APPENDIX 3]

List of countries participating in the working holidaymaker scheme:

Antigua and Barbuda	Jamaica	Saint Vincent and the Grenadines
Australia	Kenya	Seychelles
The Bahamas	Kiribati	Sierra Leone
Bangladesh	Malawi	Singapore
Barbados	Malaysia	Solomon Islands
Belize	Maldives	South Africa
Botswana	Mauritius	Sri Lanka
Brunei Darussalam	Mozambique	Swaziland
Canada	Namibia	Tanzania, United Republic of
Cameroon	Nauru	Tonga
Dominica	New Zealand	Trinidad and Tobago
Fiji Islands	Nigeria	Tuvalu
The Gambia	Pakistan	Uganda
Ghana	Papua New Guinea	Vanuatu

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Grenada	Saint Christopher and Nevis	Western Samoa
Guyana	Saint Lucia	Zambia
India	Jamaica	Zimbabwe

Note

Appendix 3 substituted by HC 697.

[...]

Note

Appendices 4 and 5 deleted by HC 321.

APPENDIX 6

Disciplines for which an Academic Technology Approval Scheme certificate from the Counter-Proliferation Department of the Foreign and Commonwealth Office is required for the purposes of [Tier 4 of the Points Based System] of these Rules

1. DOCTORATE OR MASTERS BY RESEARCH

Subjects allied to Medicine:	
JACs codes beginning	B1 – Anatomy, Physiology and Pathology B2 – Pharmacology, Toxicology and Pharmacy B9 – Others in subjects allied to Medicine
Biological Sciences	
JACs codes beginning	C1 – Biology C2 – Botany C4 – Genetics C5 – Microbiology C7 – Molecular Biology, Biophysics and Biochemistry C9 – Others in Biological Sciences
Veterinary Sciences, Agriculture and related subjects:	
JACs codes beginning	D3 – Animal Science D9 – Others in Veterinary Sciences, Agriculture and related subjects
Physical Sciences:	
JACs codes beginning	F1 – Chemistry F2 – Materials Science F3 – Physics F5 – Astronomy F8 – Physical and Terrestrial Geographical and Environmental
	F9 – Others in Physical Sciences
Mathematical and Computer Sciences:	

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JACs codes beginning	G1 – Mathematics G2 – Operational Research G4 – Computer Science G7 – Artificial Intelligence G9 – Others in Mathematical and Computing Sciences
Engineering:	
JACs codes beginning	H1 – General Engineering H2 – Civil Engineering H3 – Mechanical Engineering H4 – Aerospace Engineering H5 – Naval Architecture H6 – Electronic and Electrical Engineering H7 – Production and Manufacturing Engineering H8 – Chemical, Process and Energy Engineering H9 – Others in Engineering
Technologies:	
JACs codes beginning	J2 – Metallurgy J4 – Polymers and Textiles J5 – Materials Technology not otherwise specified J7 – Industrial Biotechnology J9 – Others in Technology
2. Taught Masters:	
F2 – Materials Science F3 – Physics (including Nuclear Physics) H3 – Mechanical Engineering H4 – Aerospace Engineering J5 – Materials Technology/Materials Science not otherwise specified	

Note

Appendix 6 inserted by HC 40.

[APPENDIX A ATTRIBUTES

[Attributes for Tier 1(General) Migrants]

1 An applicant applying for entry clearance or leave to remain as a Tier 1 (General) Migrant must score 75 points for attributes.

1A Subject to paragraph 1B, an applicant who has a Master of Business administration degree from an institution listed in paragraph 58A of this appendix, and who provides the specified documents, will be awarded 75 points, provided he:

- (a) commenced the course of study that led to that degree on or before 29 June 2008,

- (b) applied for entry clearance or leave to remain within 12 months of the date on which he was first notified in writing, by the awarding institution, that the qualification had been awarded, and
- (c) provides the specified documents as evidence of the facts in (a) and (b).
- 1B Paragraph 1A does not apply to an applicant who is applying for leave to remain and who has, or last had, leave as Highly skilled Migrant, Tier 1 (General) Migrant, a Writer, Composer or artist or a self employed lawyer.]

2 [In respect of any applicant to whom paragraph 1a does not apply, available] points are shown in tables 1 to 4 below. Only one set of points will be awarded per table. For example, points will only be awarded for one qualification.

3 Notes to accompany the tables appear below each of the tables.

Note

Words ‘Attributes for Tier 1 (General) Migrants’ inserted by HC 607.
 Sub-paragraphs (1A) and (1B) inserted by HC 1113.
 Sub-paragraph (2): words in square brackets substituted by HC 1113.

Table 1

Qualification	Points
Bachelor’s degree	30
Master’s degree	35
PhD	50

Qualifications: notes

4 Specified documents must be provided as evidence of the qualification, unless the applicant has, or was last granted, leave as a Highly Skilled Migrant or a Tier 1 (General) Migrant and previously scored points for the same qualification in respect of which points are being claimed in this application.

5 Points will only be awarded for [an academic qualification] if an applicant’s qualification is deemed by the National Recognition Information Centre for the United Kingdom (UK NARIC) to meet or exceed the recognised standard of a Bachelor’s or Master’s degree or a PhD in the UK.

6 Points will also be awarded for vocational and professional qualifications that are deemed by UK NARIC [, or the appropriate UK professional body] to be equivalent to a Bachelor’s or Master’s degree or a PhD in the UK.

7 If the applicant has, or was last granted, leave as a Tier 1 (General) Migrant or a Highly Skilled Migrant and the qualification for which points are now claimed was, in the applicant’s last successful application for leave or for a Highly Skilled Migrant Programme Approval Letter, assessed to be of a higher level than now indicated by UK NARIC, the higher score of points will be awarded in this application too.

[7A An applicant making their first application under paragraph 245C will be awarded no points for a Bachelor’s degree.]

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Note

In paragraph 5 words in square brackets substituted by HC 607. In paragraph 6 words in square brackets inserted by HC 607.

Paragraph 7A inserted by HC 314.

Table 2

Previous earnings	Points
£16,000–£17,999	5
£18,000–£19,999	10
£20,000–£22,999	15
£23,000–£25,999	20
£26,000–£28,999	25
£29,000–£31,999	30
£32,000–£34,999	35
£35,000–£39,999	40
£40,000 or more	45

Previous earnings: notes

8 Specified documents must be provided as evidence of previous earnings.

[8A An applicant making their first application under paragraph 245C will be awarded no points for previous earnings of less than £20,000.]

Note

Paragraph 8A inserted by HC 314.

PERIOD FOR ASSESSMENT

9 Applicants should indicate in the application form for which 12-month period their earnings should be assessed.

10

- (a) For all applicants (except those referred to at paragraph 11 below) the period for assessment of earnings must:
 - (i) consist of no more than 12 months which must run consecutively, and
 - (ii) fall within the 15 months immediately preceding the application.
- (b) If the applicant:
 - (i) has been on maternity or adoption leave at some point within the 12 months preceding the application, and
 - (ii) has provided the specified documents, or where due to exceptional circumstances the specified documents are not available, has provided alternative documents which show that the requirement in (i) is met, the applicant may choose for a period of no more than 12 months spent on maternity or adoption leave to be disregarded when calculating both the 12-month and 15-month period.

11

- (a) If the applicant is a full-time student or has been a full-time student at some point within the 12 months preceding the application, and the specified documents have been provided, the period for assessment of earnings must:

- (i) consist of no more than 12 months which must run consecutively, and
- (ii) fall within the 15 months immediately preceding:
 - (1) the application, or
 - (2) the start of their full-time studies, whichever the applicant indicates.
- (b) If the applicant has taken a series of full-time courses, with a gap between each course of [not more than 12 months], and has provided the specified documents, the applicant may choose for the start of the full-time studies to be read as the 15-month period immediately preceding the start of the first course.
- (c) If the applicant:
 - (i) has been on maternity or adoption leave at some point within the 12 months preceding their application or the start of their full-time studies (whichever the applicant indicates), and
 - (ii) has provided the specified documents, or where due to exceptional circumstances the specified documents are not available, has provided alternative documents which show that the requirement in (i) is met, the applicant may choose for a period of no more than 12 months spent on maternity or adoption leave to be disregarded when calculating both the 12-month and 15-month period.
- (d) Paragraphs (a) to (c) do not apply to an applicant who has, or last had, leave as Highly Skilled Migrant [, Tier 1 (General) Migrant, Writer, Composer or Artist, or Self-employed Lawyer] and is applying for leave to remain. For those applicants, the period of earnings will be assessed as indicated in paragraph 10 above.
- 12 If the applicant has not indicated a period for assessment of earnings, or has indicated a period which does not meet the conditions in paragraphs 10 or 11 above, their earnings will be assessed against the 12-month period immediately preceding their application, assuming the specified documents have been provided. Where the specified documents have not been provided, points will not be awarded for previous earnings.

Note

In paragraph 11(b) words in square brackets substituted by HC 607. In paragraph 11(d) words in square brackets substituted by HC 607.

EARNINGS

13 Earnings include, but are not limited to:

- (a) salaries (includes full-time, part-time and bonuses),
- (b) earnings derived through self-employment,
- (c) earnings derived through business activities,
- (d) statutory and contractual maternity pay, statutory and contractual adoption pay,
- (e) allowances (such as accommodation, schooling or car allowances) which form part of an applicant's remuneration package,
- (f) dividends from investments, where it is a company in which the applicant is active in the day-to-day management, or where the applicant receives the dividend as part of their remuneration package,
- (g) property rental income, where this constitutes part of the applicant's business, and
- (h) payments in lieu of notice.

14 Where the earnings take the form of a salary or wages, they will be assessed before tax (i.e. gross salary).

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15 Where the earnings are the profits of a business derived through self-employment or other business activities, the earnings that will be assessed are the profits of the business before tax. Where the applicant only has a share of the business, the earnings that will be assessed are the profits of the business before tax to which the applicant is entitled.

16 Earnings do not include unearned sources of income, such as:

- (a) allowances (such as accommodation, schooling or car allowances) which are paid as reimbursement for monies the applicant has previously paid,
- (b) dividends from investments, unless it is a company in which the applicant is active in the day-to-day management, or unless the applicant receives the dividend as part of their remuneration package,
- (c) property rental income, unless this constitutes part of the applicant's business,
- (d) interest on savings,
- (e) funds received through inheritance,
- (f) monies paid to the applicant as a pension,
- (g) expenses where the payment constitutes a reimbursement for monies the applicant has previously outlaid,
- (h) [...] redundancy payment,
- (i) sponsorship for periods of study, [...]
- (j) state benefits[, or]

[(k) prize money or competition winnings, other than where they are directly related to the applicant's main profession or occupation.]

17 Earnings will not be taken into account if the applicant was in breach of the UK's immigration laws at the time those earnings were made.

Note

In paragraph 16 words deleted by HC 1113; words in square brackets substituted by HC 1113; sub-paragraph (k) inserted by HC 1113.

CONVERTING FOREIGN CURRENCIES

18 Earnings in a foreign currency will be converted to pound sterling (£) using the closing spot exchange rate for the last day of the period for which the applicant has claimed earnings in that currency.

19 If the applicant's earnings fall either side of a period of maternity or adoption leave, earnings in a foreign currency will be converted to pounds sterling (£) using the closing spot exchange rate which exists:

- (a) for the earnings earned before maternity or adoption leave, on the last day of the period before maternity leave, and
- (b) for the earnings earned after maternity or adoption leave, on the last day of the period after maternity leave.

20 The spot exchange rate which will be used is that which appears on www.oanda.com.

21 Once converted, earnings will be multiplied by the multiplier shown in table 2A below. The relevant country or territory is whichever country or territory the currency was earned in.

22 A multiplier will not be applied to overseas earnings (if any) of an applicant who has, or was last granted, leave as a Highly Skilled Migrant [, Tier 1 (General) Migrant, Writer, Composer or Artist, or Self-employed Lawyer] and who is applying for leave to remain.

23 Where the previous earnings claimed are in different currencies, any foreign currencies will be converted and multiplied before being added together, and then added to any UK earnings, to give a total amount.

Note

In paragraph 22 words in square brackets substituted by HC 607.

Table 2A – Multipliers for conversion of foreign currencies

Country or territory in which money was earned	Multiplier
Andorra; Aruba; Australia; Austria; Belgium; Bermuda; Canada; Cayman Islands; Channel Islands; Denmark; Finland; France; French Polynesia; Germany; Gibraltar; Guam; Hong Kong (Province of China); Iceland; Ireland; Italy; Japan; Kuwait; Liechtenstein; Luxembourg; Monaco; Netherlands; Norway; Qatar; San Marino; Singapore; Sweden; Switzerland; United Arab Emirates; United Kingdom; United States of America; Vatican.	1
American Samoa; Antigua and Barbuda; Argentina; Bahamas; Bahrain; Barbados; Botswana; Brunei Darussalam; Chile; Costa Rica; Croatia; Cyprus; Czech Republic; Estonia; Faroe Islands; Greece; Greenland; Grenada; Hungary; Israel; Korea (South); Latvia; Lebanon; Libya; Macao (Province of China); Malaysia; Malta; Mauritius; Mexico; Netherlands Antilles; New Caledonia; New Zealand; Northern Mariana Islands; Oman; Palau; Panama; Poland; Portugal; Puerto Rico; Saudi Arabia; Seychelles; Slovak Republic; Slovenia; Spain; St Kitts and Nevis; St Lucia; [Taiwan]; Trinidad and Tobago; Turks and Caicos Islands; Uruguay; Venezuela; Virgin Islands (British and US).	2.3
Albania; Algeria; Belarus; Belize; Bolivia; Bosnia & Herzegovina; Brazil; Bulgaria; Cape Verde; China (People's Republic of); Colombia; Dominica; Dominican Republic; Ecuador; Egypt; El Salvador; Fiji; Gabon; Guatemala; Honduras; Iran; Jamaica; Jordan; Kazakhstan; Lithuania; Macedonia; Maldives; Marshall Islands; Micronesia; Morocco; Namibia; Nauru; Paraguay; Peru; Philippines; Romania; Russian Federation; Samoa; South Africa; St Vincent & The Grenadines; Suriname; Swaziland; Syrian Arab Republic; Thailand; Tonga; Tunisia; Turkey; Turkmenistan; Vanuatu; West Bank and Gaza.	3.2
Angola; Armenia; Azerbaijan; Bangladesh; Benin; Bhutan; [Burma (Union of Myanmar)]; Cameroon; Comoros; Congo (Republic of); Cuba; Djibouti; Equatorial Guinea; Gambia; Georgia; Guinea; Guyana; Haiti; India; Indonesia; Iraq; Ivory Coast (Cote d'Ivoire); Kenya; Kiribati; [Kosovo]; Lesotho; Mauritania; Moldova; Mongolia; Montenegro; Nicaragua; Pakistan; Papua New Guinea; Senegal; Serbia; Solomon Islands; Sri Lanka; Sudan; aTimor L'Este (East Timor); Ukraine; Uzbekistan; Vietnam; Yemen; Zambia; Zimbabwe.	5.3

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Afghanistan; Burkina Faso; Burundi; Cambodia; Central African Republic; Congo, (Democratic Republic of); Chad; Eritrea; Ethiopia; Ghana; Guinea-Bissau; Korea (North); Kyrgyz Republic; [The Lao People's Democratic Republic]; Liberia; Madagascar; Malawi; Mali; Mayotte; Mozambique; Nepal; Niger; Nigeria; Rwanda; Sao Tome and Principe; Sierra Leone; Somalia; Tajikistan; Tanzania; Togo; Uganda.

Note

In Table 2A, words in square brackets substituted by HC 1113.
Word 'Kosovo' inserted by HC 1113.

Table 3

Applications for leave to remain where the applicant has, or was last granted, leave as a Highly Skilled Migrant or [, Tier 1 (General) Migrant, as a Writer, Composer or Artist, or Self-employed Lawyer]	Points
--	--------

If £16,000 or more of the previous earnings for which points are claimed were earned in the UK	5
--	---

Applications for entry clearance and all other application for leave to remain	Points
--	--------

If the qualification was obtained in the UK	5
---	---

If £16,000 or more of the previous earnings for which points are claimed were earned in the UK	5
--	---

Note

In Table 3, words in square brackets substituted by HC 607.

UK EXPERIENCE: NOTES

24 If an applicant has, or last had, leave as a Highly Skilled Migrant or a [Tier 1 (General) Migrant, Writer, Composer or Artist, or Self-employed Lawyer], and is applying for leave to remain, points for UK experience will only be awarded for previous earnings earned in the UK (and not qualifications obtained in the UK).

25 If the applicant is applying for entry clearance or leave to remain (except where the applicant has, or was last granted, leave as a Highly Skilled Migrant or [Tier 1 (General) Migrant, Writer, Composer or Artist, or Self-employed Lawyer], points for UK experience will only be awarded for qualifications obtained in the UK or previous earnings earned in the UK (but not both).

26 Specified documents must be provided as evidence of qualifications obtained in the UK.

27 Points will only be awarded for UK experience in respect of qualifications obtained in the UK if:

(a) (i) the qualification is a Bachelor's or Master's degree or a PhD, [...] and is deemed by UK NARIC to meet or exceed the recognized standard of a Bachelor's or Master's degree or a PhD in the UK,

{or

(ii) the qualification is a vocational or professional qualification and is deemed by the appropriate UK professional body to meet or exceed the recognised standard of a Bachelor's or Master's degree or a PhD in the UK,]

- (b) the qualification was awarded no more than 5 years before the application was made, and
- (c) at least 1 academic year, or 3 consecutive terms, of the course that led to the qualification involved full-time study in the UK.

28 For paragraph 27(b) above, the date the qualification is awarded is the date on which the applicant was first notified in writing, by the awarding institution, that the qualification had been awarded.

29 The qualification for which UK experience points are claimed can be, but does not have to be, the same as the qualification for which points are claimed under table 1.

30 Previous earnings will not be taken into account for the purpose of awarding points for UK experience if the applicant was in breach of the UK's immigration laws at the time those earnings were made.

Note

In paragraphs 24 and 25 words in square brackets substituted by HC 607. In paragraph 27 words removed by HC 607. New sub-paragraph 27(a)(ii) inserted by HC 607.

Table 4

Age (at date of application)	
Applications for entry clearance and leave to remain (unless the applicant falls into the boxes below)	Points
Under 28 years of age	20
28 or 29 years of age	10
30 or 31 years of age	5
[Applications for leave to remain where an applicant has, or has last had, leave to enter as a Tier 1 (General) Migrant, Writer, Composer or Artist, or Self-employed Lawyer]	Points
Under 31 years of age	20
31 or 32 years of age	10
33 or 34 years of age	5
Applications for leave to remain where an applicant has, or last had, leave as a Highly Skilled Migrant	Points
Under 30 years of age	20
30 or 31 years of age	10
32 or 33 years of age	5

Note

In Table 4, words in square brackets substituted by HC 607.

AGE: NOTES

31 Specified documents must be provided as evidence of age.

[ATTRIBUTES FOR TIER 1 (ENTREPRENEUR) MIGRANTS]

32 An applicant applying for entry clearance or leave to remain as a Tier 1 (Entrepreneur) Migrant must score 75 points for attributes.

Appendix 5 Immigration Rules

33 Subject to paragraph 34, available points for applications for entry clearance or leave to remain are shown in Table 5.

34 Available points for an applicant applying for leave to remain who has, or has last been granted, entry clearance, leave to enter or remain as:

- (i) a Tier 1 (Entrepreneur),
- (ii) a Businessperson, or
- (iii) an Innovator

are shown in Table 6.

35 Notes to accompany the tables appear below the respective tables.

Table 5

Investment	Points
The applicant has access to not less than £200,000.	25
The money is held in one or more regulated financial institutions.	25
The money is disposable in the UK.	25

INVESTMENT: NOTES

36 Specified documents must be provided as evidence of any investment.

37 A regulated financial institution is one which is regulated by the appropriate regulatory body for the country in which the financial institution operates. For example, where a financial institution does business in the UK, the appropriate regulator is the Financial Services Authority.

38 Money is disposable in the UK if all of the money is held in a UK based financial institution or if the money is freely transferable to the UK and convertible to sterling. Funds in a foreign currency will be converted to pounds sterling (£) using the spot exchange rate which appeared on www.oanda.com¹ on the date on which the application was made.

1 This is an external website, for which the Home Office is not responsible

Table 6

Investment and business activity	Points
The applicant has invested, or had invested on his behalf, not less than £200,000 in cash directly into one or more businesses in the UK.	20

Investment and business activity	Points
<p>The applicant has:</p> <p>(a) registered with HM Revenue and Customs as self-employed,</p> <p>or</p> <p>(b) registered a new business in which he is a director, or</p> <p>(c) registered as a director of an existing business.</p> <p>Where the applicant's last grant of entry clearance, leave to enter or leave to remain was as a Tier 1 (Entrepreneur) Migrant, the above condition must have been met within 3 months of [his entry to the UK (if he was granted entry clearance as a Tier 1 (Entrepreneur) Migrant and there is evidence to establish his date of arrival to the UK), or the date of the grant of entry clearance (if he was granted entry clearance as a Tier 1 (Entrepreneur) Migrant and there is no evidence to establish his date of arrival to the UK), or, in any other case, the date of the grant of leave to remain].</p>	20
<p>The applicant is engaged in business activity at the time of his application for leave to remain.</p>	15
<p>The applicant has:</p> <p>(a) established a new business or businesses that has or have created the equivalent of at least two new full time jobs for persons settled in the UK, or</p> <p>(b) taken over or joined an existing business or businesses and his services or investment have resulted in a net increase in the employment provided by the business or businesses for persons settled in the UK by creating the equivalent of at least two new full time jobs.</p> <p>Where the applicant's last grant of entry clearance or leave to enter or remain was as a Tier 1 (Entrepreneur) Migrant, the jobs must have existed for at least 12 months of the period for which the previous leave was granted.</p>	20

Note

In Table 6, words in square brackets substituted by HC 1113.

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INVESTMENT AND BUSINESS ACTIVITY: NOTES

39 Documentary evidence must be provided in all cases. Specified documents must be provided as evidence of any investment and business activity that took place when the applicant had leave as a Tier 1 (Entrepreneur) Migrant.

40 The investment must not include the value of any residential accommodation, property development or property management. The investment must not be in the form of a director's loan, unless it is unsecured and in favour of the business.

41 A full time job is one involving at least 30 hours' work a week. Two or more part time jobs that add up to 30 hours a week will count as one full time job. Where the applicant's last grant of entry clearance or leave was as a Tier 1 (Entrepreneur) Migrant, the jobs must have existed for a total of at least 12 months during the period during which the migrant had leave in that category. This need not consist of 12 consecutive months and the jobs need not exist at the date of application, provided they existed for at least 12 months during the period of leave that the migrant is seeking to extend.

ATTRIBUTES FOR TIER 1 (INVESTOR) MIGRANTS

42 An applicant applying for entry clearance or leave to remain as a Tier 1 (Investor) Migrant must score 75 points for attributes.

43 Subject to paragraph 44, available points for applications for entry clearance or leave to remain are shown in Table 7.

44 Available points for an applicant applying for leave to remain who has, or has last been granted, entry clearance, leave to enter or remain as:

- (i) a Tier 1 (Investor) Migrant, or
- (ii) an Investor

are shown in Table 8.

45 Notes to accompany both Table 7 and Table 8 appear below Table 8.

Table 7

Assets	Points
--------	--------

The applicant:	75
(a) has money of his own [under his control] held in a regulated financial institution and disposable in the UK amounting to not less than £1 million; or	
(b) (i) owns personal assets which, taking into account any liabilities to which they are subject, have a value exceeding £2 million, and	
(ii) has money under his control held in a regulated financial institution and disposable in the UK amounting to not less than £1 million which has been loaned to him by a financial institution regulated by the Financial Services Authority.	

Note
In Table 7, words in square brackets inserted by HC 1113.

Table 8

Assets and investment	Points
-----------------------	--------

The applicant:	30
(a) has money of his own under his control in the UK amounting to not less than £1 million, or	
(b) (i) owns personal assets which, taking into account any liabilities to which they are subject, have a value of not less than £2 million, and	
(ii) has money under his control [...] and disposable in the UK amounting to not less than £1 million which has been loaned to him by a financial institution regulated by the Financial Services Authority.	
The applicant has invested not less than £750,000 of his capital in the UK by way of UK Government bonds, share capital or loan capital in active and trading UK registered companies other than those principally engaged in property investment.	30

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Assets and investment	Points
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The investment referred to above was made within 3 months of [his entry to the UK (if he was granted entry clearance as a Tier 1 (investor) Migrant and there is evidence to establish his date of arrival to the UK), or the date of the grant of entry clearance (if he was granted entry clearance as a Tier 1 (investor) Migrant and there is no evidence to establish his date of arrival to the UK), or, in any other case, the date of the grant of leave to remain] as a Tier 1 (Investor) Migrant and the investment has been maintained for the whole of the remaining period of that leave;	15
--	----

Or

The migrant has, or was last granted, entry clearance, leave to enter or leave to remain as an Investor.

Note

In Table 8, words in square brackets substituted by HC 1113.

Words deleted by HC 314.

ASSETS AND INVESTMENT: NOTES

46 Specified documents must be provided as evidence of investment.

47 [...]

48 Money is disposable in the UK if all of the money is held in a UK based financial institution or if the money is freely transferable to the UK and convertible to sterling. Funds in a foreign currency will be converted to pounds sterling (£) using the spot exchange rate which appeared on www.oanda.com² on the date on which the application was made.

49 ‘Money of his own’, ‘personal assets’ and ‘his capital’ include money or assets belonging to the applicant’s spouse, civil partner or unmarried or same-sex partner, provided that specified documents are provided to show that the money or assets are under the applicant’s control and that he is free to invest them.

50 Investment excludes investment by the applicant by way of deposits with a bank, building society or other enterprise whose normal course of business includes the acceptance of deposits.

² This is an external website, for which the Home Office is not responsible

Note

Paragraph 47 deleted by HC 314.

ATTRIBUTES FOR TIER 1 (POST-STUDY WORK) MIGRANTS

51 An applicant applying for entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant must score 75 points for attributes.

52 Available points are shown in Table 9.

53 Notes to accompany the table appear below the table.

Table 9

Qualification	Points
The applicant has been awarded:	20
(a) a UK recognised bachelor or postgraduate degree,	
or	
(b) [a UK Postgraduate Certificate in Education.]	
(c) a Higher National Diploma ('HND') from a Scottish institution.	
(a) The applicant studied for his award at a UK institution that is a UK recognised or listed body, or which holds a sponsor licence under Tier 4 of the Points Based System,	20
or	
(b) If the applicant is claiming points for having been awarded a Higher National Diploma from a Scottish Institution, he studied for that diploma at a Scottish publicly funded institution of further or higher education, or a Scottish bona fide private education institution which maintains satisfactory records of enrolment and attendance.	
The applicant's periods of UK study and/or research towards his eligible award were undertaken whilst he had entry clearance, leave to enter or leave to remain in the UK:	20
[(a) as a Student or as a Tier 4 Migrant,	
or	
(b) under Part 8 of these Rules]	
The applicant made the application for entry clearance or leave to remain as a Tier 1 (Post-Study Work) Migrant within 12 months of obtaining the relevant qualification.	15
The applicant is applying for leave to remain and has, or was last granted, leave as a Participant in the International Graduates Scheme (or its predecessor, the Science and Engineering Graduates Scheme) or as a Participant in the Fresh Talent: Working in Scotland Scheme.	75

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Note

Words in square brackets substituted by HC 314.

QUALIFICATION: NOTES

54 Specified documents must be provided as evidence of the qualification.

55 A qualification will have been deemed to have been 'obtained' on the date on which the applicant was first notified in writing, by the awarding institution, that the qualification had been awarded.

56 A 'UK recognised body' is an institution that has been granted degree awarding powers by either a Royal Charter, an Act of Parliament or the Privy Council.

57 'UK listed body' is an institution that is not a UK recognised body but which provides full courses that lead to the award of a degree by a UK recognised body.

58 To qualify as an HND from a Scottish institution, a qualification must be at level 8 on the Scottish Credit and Qualifications Framework.]

Note

Paragraphs 32 to 56 and Tables 5 to 9 inserted by HC 607.

[LIST OF INSTITUTIONS TO WHICH PARAGRAPH 1A OF THIS APPENDIX APPLIES

58A

UK

- Ashridge
- Bradford School of Management/Nimbas
- City University: Cass
- Cranfield School of Management
- London Business School
- Manchester Business School
- University of Cambridge: Judge
- University of Oxford: Said
- University of Strathclyde
- Warwick Business School

USA

- Babson College: Olin
- Boston University School of Management
- Carnegie Mellon University
- Colombia Business School
- Cornell University: Johnson
- Dartmouth College: Tuck
- Duke University: Fuqua
- Emory University: Goizueta
- Georgetown University: McDonough
- Harvard Business School
- MIT: Sloan
- New York University: Stern

- North Western: Kellogg
- Rice University: Jones
- Stanford University
- UC Berkeley: Haas
- UCLA: Anderson
- University of Chicago
- University of Maryland: Smith
- University of North Carolina: Keenan-Flagler
- University of Pennsylvania: Wharton
- University of Rochester: Simon
- University of Southern California: Marshall
- University of Virginia: Darden
- Vanderbilt University: Owen
- Yale's School of Management

Australia

- Australian Graduate School of Management
- Melbourne Business School

Canada

- University of Toronto: Rothman
- University of Western Ontario: Ivey

Ireland

- University College Dublin

Germany

- Bradford School of Management/Nimbas

China

- Ceibs

Italy

- SDA Bocconi

Switzerland

- IMD

France

- Insead

Singapore

- Insead

Spain

- University of Michigan
- Lese Business School
- Instituto de Empresa

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Netherlands

- Bradford School of Management/Nimbias
- Rotterdam School of Management
- Universiteit Nyenrode]

ATTRIBUTES FOR TIER 2 (GENERAL) MIGRANTS AND TIER 2 (INTRA-COMPANY TRANSFER) MIGRANTS

59 An applicant applying for entry clearance or leave to remain as a Tier 2 (General) Migrant or as a Tier 2 (intra-Company Transfer) Migrant must score 50 points for attributes.

60 Subject to paragraph 61, available points for entry clearance or leave to remain are shown in Table 10.

61 Available points for leave to remain are shown in Table 11 for an applicant:

- (a) who has, or was last granted, entry clearance or leave to remain as a Tier 2 (General) Migrant or a Tier 2 (intra-Company Transfer) Migrant, provided that
 - (i) the sponsor is the same person who sponsored him when he was last granted leave, and
 - (ii) the job that the applicant is being sponsored to do is the same as the one he was sponsored to do when he was last granted leave,
- (b) who has, or was last granted, entry clearance, leave to enter or leave to remain as a Qualifying Work Permit Holder, provided that:
 - (i) the sponsor is the same person who was issued with a work permit in respect of the application when he was last granted leave, and
 - (ii) the job that the applicant is being sponsored to do is the same as the one in respect of which the work permit was issued when he was last granted leave,
- (c) who has, or was last granted, entry clearance, leave to enter or leave to remain as a Member of the operational Ground staff of an overseas-owned airline, a representative of an overseas newspaper, news agency or Broadcasting organisation, or a Jewish agency employee, provided that:
 - (i) the sponsor is the same person for whom the applicant was working, or intending to work, when he was last granted leave, and
 - (ii) the job that the applicant is being sponsored to do is the same as the one that he was doing, or intending to do, when he was last granted leave, or
- (d) who is a senior Care Worker or an established entertainer.

61 Notes to accompany Table 10 and Table 11 appear below the respective tables.

Table 10

Sponsorship	Points	Qualifications	Points	Prospective Earnings	Points
shortage occupation	50	None or below an appropriate sub-degree level qualification	0	Under £17000	0

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Sponsorship	Points	Qualifications	Points	Prospective Earnings	Points
Job offer passes Resident Labour Market Test	30	Appropriate sub-degree level qualification	5	£17000–19999.99	5
Intra-Company Transfer	30	Bachelors or Masters	10	£20000–21999.99	10
Post Study Work (see note 73)	30	PhD	15	£22000–23999.99	15
				£24000+	20

Notes

Sponsorship

63 In order to obtain points under any category in the ‘sponsorship’ column, the applicant will need to provide a valid Certificate of sponsorship reference number for sponsorship in the sub-category of Tier 2 under which he is applying.

64 A migrant cannot score points for sponsorship from Tables 10 or 11 if the job that the Certificate of sponsorship Checking service entry records that he is being sponsored to do is as a sportsperson or a Minister of religion.

65 Points can only be scored for one criterion in the sponsorship column. for example, if a company brings in an intra company transferee after applying the resident labour market test to the post, the migrant will receive 30 points, not 60.

66 A Certificate of sponsorship reference number will only be considered to be valid if the number supplied links to a Certificate of sponsorship Checking service entry that names the applicant as the migrant and confirms that the sponsor is sponsoring him in the Tier 2 category indicated by the migrant in his application for entry clearance or leave to remain (that is, as a Tier 2 (General) Migrant or a Tier 2 (intra-Company Transfer) Migrant)).

[67 A Certificate of Sponsorship reference number will only be considered to be valid if:

- (a) the Sponsor assigned that reference number to the migrant no more than 3 months before the application for entry clearance or leave to remain is made,
- (b) the application for entry clearance or leave to remain is made no more than 3 months before the start of the employment as stated on the Certificate of Sponsorship, and
- (c) that reference number must not have been cancelled by the Sponsor or by the United Kingdom Border Agency since it was assigned.]

Note

Paragraph 67 substituted by HC 314.

68 The migrant must not previously have been granted entry clearance, leave to enter or leave to remain relying on the same Certificate of sponsorship reference number. 69. no points will be awarded for sponsorship unless:

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- (a) the job that the Certificate of sponsorship Checking service entry records that the person is being sponsored to do appears on the United Kingdom Border agency's list of skilled occupations, and
- (b) the salary (which for these purposes includes such allowances as are specified as acceptable for this purpose in guidance issued by the United Kingdom Border agency) that the Certificate of sponsorship Checking service entry records that the migrant will be paid is at or above the appropriate rate for the job, as stated in guidance published by the United Kingdom Border agency.

70 In order for the applicant to be awarded points for a job offer in a shortage occupation, the job must, at the time the Certificate of sponsorship was issued, have appeared on the list of shortage occupations published by the United Kingdom Border agency, and contracted working hours must be for at least 30 hours a week. furthermore, if the United Kingdom Border agency guidance indicates that the job appears on the 'Scotland only' shortage occupation list, the job offer must be for employment in Scotland.

71 In order for the applicant to be awarded points for a job offer that passes the resident labour market test, the Certificate of sponsorship Checking service entry must indicate that the sponsor has met the requirements of that test, as defined in guidance published by the United Kingdom Border agency, in respect of the job.

72 In order for the applicant to be awarded points for being an intra-company transfer, the Certificate of sponsorship Checking service entry must confirm that the applicant will be coming to the UK to work for the sponsor as a Tier 2 (intra-Company Transfer) Migrant. [The applicant must also have been working for the Sponsor for a continuous period of at least 6 months immediately prior to the date of the application and must provide the specified documents to prove this.

During that period the applicant must have been working for the Sponsor:

- (a) outside the UK,
- (b) in the UK, provided he had leave to work for the Sponsor as a Tier 2 (Intra-Company Transfer) Migrant and/or as a Qualifying Work Permit Holder (provided that the work permit was granted because the applicant was the subject of an intra-company transfer), or
- (c) any combination of (a) and (b) above.]

Note

Words in square brackets substituted by HC 314.

73 In order for the applicant to be awarded points under post-study work, the applicant must meet the following requirements:

- (a) he must be applying for leave to remain,
- (b) he must have, or have last been granted, entry clearance or leave to remain as a Tier 1 (Post-study Work) Migrant, or as a Participant in the international Graduates' scheme (or its predecessor, the science and engineering Graduates' scheme) or as a Participant in the fresh Talent: Working in Scotland scheme,
- (c) he must have been working for the sponsor for a continuous period of at least 6 months immediately prior to the date of his application for leave to remain, and must provide the specified documents to prove this, and
- (d) the job he is being sponsored to do must be the same as the one he is doing at the time of his application.

QUALIFICATIONS

[74 Specified documents must be provided as evidence of the qualification]

Note

Paragraph 74 substituted by HC 314.

75 An ‘appropriate sub-degree level qualification’ means:

- (a) 1 or more passes at GCE a level, or
- (b) a qualification obtained in the UK that is deemed by the appropriate qualifications framework in the part of the UK in which it was obtained (as set out in United Kingdom Border agency guidance) to be equivalent to, or higher than, (a) but below degree level, or
- (c) a qualification obtained outside the UK, where the applicant provides the specified evidence to show that it is equivalent to, or higher than, (a) but below degree level.

76 Points will only be awarded for a qualification if:

- (a) an applicant’s qualification is deemed by UK ARIC, or the United Kingdom Border agency (in published guidance), to meet or exceed the recognised standard of a Bachelor’s or Master’s degree, or a PhD, in the UK, or
- (b) the qualification is below the recognised standard of a Bachelor’s or Master’s degree, or a PhD, in the UK, but the applicant submits the specified evidence to prove that it is an appropriate sub-degree level qualification (see paragraph 75).

77 Points will be awarded for a vocational or professional qualification if:

- (a) the qualification is deemed by UK NARIC [or the appropriate UK professional body] to be equivalent to a PhD, Bachelor’s or Master’s degree in the UK, or
- (b) the qualification is below the recognised standard of a Bachelor’s or Master’s degree, or a PhD, in the UK, but the applicant submits the specified evidence to prove it is an appropriate sub-degree level qualification (see paragraph 75).

Note

Words in square brackets inserted by HC 314.

78 Points can only be scored for one qualification. for example, if an applicant has both a Bachelors and a PhD, that will score 15 points and not 25.

PROSPECTIVE EARNINGS

79 The points awarded for prospective earnings will be based on the applicant’s gross annual salary (including such allowances as are specified as acceptable for this purpose in guidance issued by the United Kingdom Border agency) to be paid by the sponsor, as recorded in the Certificate of sponsorship Checking service entry to which the applicant’s Certificate of sponsorship reference number relates.

80 Where the applicant is paid hourly, points will only be awarded for earnings up to a maximum of 48 hours a week, even if the applicant works for longer than this. for example, an applicant who works 60 hours a week for £8 per hour will be awarded

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points for prospective earnings of £19968 (8x48x52), which equates to 5 points, and not £25960 (8x60x52) which would equate to 20 points.

Table 11

Sponsorship	Points	Qualifications	Points	Prospective Earnings	Points
Transitional arrangements apply (see below)	50	None or below an appropriate sub-degree level qualification	0	Below £17000	0
[Job is a shortage occupation, or applicant was awarded points when last granted leave because the job was in a shortage occupation.]	50	Appropriate sub-degree level qualification	5	£17000–19999.99	5
		Bachelors or Masters	10	£20000–21999.99	10
Other cases in which applicant has a Certificate of Sponsorship	30	PhD	15	£22000–23999.99	15
				£24000+	20

Note
Words in square brackets substituted by HC 314.

Notes

Sponsorship

[81 Paragraphs 63 to 68 and 70 apply.]

Note
Paragraph 81 substituted by HC 314.

82 No points will be awarded for sponsorship unless:

- (a)
 - (i) the job that the Certificate of sponsorship Checking service entry records that the person is being sponsored to do appears on the United Kingdom Border agency's list of skilled occupations, or
 - (ii) the applicant is a senior Care Worker or an established entertainer, and
- (b) (unless the applicant is an established entertainer) the salary that the Certificate of sponsorship Checking service entry records that the migrant will be paid is at or above the appropriate rate for the job, as stated in the list of skilled occupations referred to in (a)(i).

83 In order to score points in the transitional arrangements category, the applicant must meet the following requirements:

- (a) the applicant must have, or have last been granted, entry clearance, leave to enter or leave to remain as:
 - (i) a Qualifying Work Permit Holder,
 - (ii) a representative of an overseas newspaper, news agency or Broadcasting organisation,
 - (iii) a Member of the operational Ground staff of an overseas-owned airline,
 - (iv) a Jewish agency employee, or
 - (v) a Tier 2 (General) Migrant or a Tier 2 (intra-Company Transfer) Migrant, but only if, when he received his last grant of leave, he was awarded points under these provisions (i.e. the transitional arrangements),
- (b) unless the applicant is a senior Care Worker or an established entertainer, the sponsor must be the same person for whom the applicant was working, or intending to work, when last granted leave. In the context of an applicant whose last grant of leave was as a Qualifying Work Permit Holder, this means that the work permit must have been issued to the same employer as the applicant is applying to work for now,
- (c) unless the applicant is a senior Care Worker or an established entertainer, the job that the Certificate of sponsorship Checking service entry records the applicant as having been engaged to do must be the same job:
 - (i) in respect of which the previous work permit was issued, in the case of an applicant whose last grant of leave was as a Qualifying Work Permit Holder,
 - (ii) that the applicant was doing, or intended to do, when he received his last grant of leave, in the case of an applicant whose last grant of leave was as a representative of an overseas newspaper, news agency or Broadcasting organisation, a Member of the operational Ground staff of an overseas owned airline, or a Jewish agency employee, or
 - (iii) in respect of which the Certificate of sponsorship that led to the previous grant was issued, in the case of an applicant whose last grant of leave was as a Tier 2 (General) Migrant or a Tier 2 (intra- Company Transfer) Migrant, and
- [(d) the applicant's last grant of entry clearance or leave to enter in any of the categories listed in paragraph (a)(i) to (v) above must have been less than 5 years prior to the date that their last grant of entry clearance, leave to enter or leave to remain expires.]

Note

Sub-paragraph 81(d) substituted by HC 314.

QUALIFICATIONS AND PROSPECTIVE EARNINGS

84 Paragraphs 73 to 80 above apply.

ATTRIBUTES FOR TIER 2 (MINISTERS OF RELIGION) MIGRANTS

85 An applicant applying for entry clearance or leave to remain as a Tier 2 (Minister of religion) Migrant must score 50 points for attributes.

86 Available points are shown in Table 12 below.

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87 Notes to accompany Table 12 appear below that table.

Table 12

Criterion	Points
Certificate of Sponsorship	50

Notes

88 In order to obtain points for sponsorship, the applicant will need to provide a valid Certificate of sponsorship reference number for sponsorship in this category.

89 A Certificate of sponsorship reference number will only be considered to be valid for the purposes of this sub-category if the number supplied links to a Certificate of sponsorship Checking service entry that records the applicant as the migrant and confirms that the sponsor is sponsoring him as a Tier 2 (Minister of religion) Migrant.

90 The sponsor must have assigned the Certificate of sponsorship reference number to the migrant no more than 3 months before the application is made and the reference number must not have been cancelled by the sponsor or by the United Kingdom Border agency since then.

91 The migrant must not previously have been granted entry clearance, leave to enter or leave to remain relying on the same Certificate of sponsorship reference number.

92 In addition, the Certificate of sponsorship Checking service entry must confirm that:

- (a) the resident labour market test, as defined in guidance published by the United Kingdom Border agency, in respect of the job, has been complied with, unless the applicant has, or was last granted, entry clearance, leave to enter or leave to remain as a Tier 1 (Minister of religion) Migrant or a Minister of religion and the sponsor is the same person as he was working for, or intending to work for, when last granted leave,
- (b) the migrant:
 - (i) is qualified to do the job in respect of which he is seeking leave as a Tier 2 (Minister of religion) Migrant,
 - (ii) intends to base himself in the UK, and
 - (iii) will comply with the conditions of his leave, if his application is successful, and
- (c) the sponsor will maintain or accommodate the migrant.

ATTRIBUTES FOR TIER 2 (SPORTSPERSON) MIGRANTS

93 An applicant applying for entry clearance or leave to remain as a Tier 2 (sports person) Migrant must score 50 points for attributes.

94 Available points are shown in Table 13 below.

95 Notes to accompany Table 13 appear below that table.

Table 13

Criterion	Points
Certificate of Sponsorship	50

Notes

96 In order to obtain points for sponsorship, the applicant will need to provide a valid Certificate of sponsorship reference number for sponsorship in this subcategory.

97 A Certificate of sponsorship reference number will only be valid for the purposes of this subcategory if the number supplied links to a Certificate of sponsorship Checking service entry that names the applicant as the migrant and confirms that the sponsor is sponsoring him as a Tier 2 (sportsperson) Migrant.

98 The sponsor must have assigned the Certificate of sponsorship reference number to the migrant no more than 3 months before the application is made and the reference number must not have been cancelled by the sponsor or by the United Kingdom Border agency since then.

99 The migrant must not previously have been granted entry clearance, leave to enter or leave to remain relying on the same Certificate of sponsorship reference number.

100 In addition, the Certificate of sponsorship Checking service entry must confirm that the migrant:

- (a) is qualified to do the job in question,
- (b) has been endorsed by the Governing Body for his sport (that is, the organisation which is specified in the United Kingdom Border agency published guidance as being the Governing Body for the sport in question),
- (c) intends to base himself in the UK, and
- (d) will comply with the conditions of his leave, if his application is successful.

ATTRIBUTES FOR TIER 5 (YOUTH MOBILITY SCHEME) TEMPORARY MIGRANTS

101 An applicant applying for entry clearance as a Tier 5 (youth Mobility scheme) Temporary Migrant must score 40 points for attributes.

102 Available points are shown in Table 14 below.

103 Notes to accompany Table 14 appear below that table.

Table 14

Criterion	Points
Citizen of a country in Appendix G, or is a British overseas Citizen, British Overseas Territories Citizen or British National (Overseas.)	30
Will be 18 or over when his entry clearance becomes valid for use and was under the age of 31 on the date his application was made.	10

Notes

104 Specified documents must be provided as evidence of all of the above.

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ATTRIBUTES FOR TIER 5 (TEMPORARY WORKER) MIGRANTS

105 An applicant applying for entry clearance or leave enter or remain as a Tier 5 (Temporary Worker) Migrant must score 30 points for attributes.

106 Available points are shown in Table 15 below.

107 Notes to accompany Table 15 appear below that table.

Table 15

Criterion	Points Awarded
Holds a Tier 5 (Temporary Worker) Certificate of Sponsorship.	30

Notes

108 In order to meet the 'holds a Certificate of sponsorship' requirement, the applicant will need to provide a valid Certificate of sponsorship reference number for sponsorship in this category.

109 A Certificate of sponsorship reference number will only be considered to be valid if the number supplied links to a Certificate of sponsorship Checking service reference that names the applicant as the migrant and confirms that the sponsor is sponsoring him as a Tier 5 (Temporary Worker) Migrant in the subcategory indicated by the migrant in his application for entry clearance or leave. [...]

Note

Words deleted by HC 314.

[109A A Certificate of Sponsorship reference number will only be considered to be valid if:

- (a) the Sponsor assigned the reference number to the migrant no more than 3 months before the application for entry clearance or leave to remain is made,
- (b) the application for entry clearance or leave to remain is made no more than 3 months before the start date of the employment as stated on the Certificate of Sponsorship, and
- (c) that reference number must not have been cancelled by the Sponsor or by the United Kingdom Border Agency since it was assigned.]

Note

Paragraph 109A inserted by HC 314.

110 The migrant must not previously have been granted entry clearance, leave to enter or leave to remain relying on the same Certificate of sponsorship reference number.

111 In addition, where the Certificate of sponsorship Checking service entry shows that the Certificate of sponsorship has been issued in the creative and sporting subcategory of the Tier 5 (Temporary Worker) route to enable the applicant to work as a sportsperson, the Certificate of sponsorship Checking service entry must show that the applicant has been endorsed by the Governing Body for his sport (that is, the organisation which is specified in the United Kingdom Border agency's published guidance as being the Governing Body for the sport in question).]

[112 Points will not be awarded for a Tier 5 (Temporary Worker) Certificate of Sponsorship where the claimed basis for its issuance are the provisions under Mode 4 of the General Agreement on Trade in Services relating to intra-corporate transfers.]

[ATTRIBUTES FOR TIER 4 (GENERAL) STUDENTS

113 An applicant applying for entry clearance or leave to remain as a Tier 4 (General) Student must score 30 points for attributes.

114 Available points are shown in Table 16 below.

115 Notes to accompany Table 16 appear below that table.

Table 16

Criterion	Points awarded
Visa letter	30

Notes

116 A visa letter will only be considered to be valid if:

- (a) it was issued no more than 6 months before the application is made,
- (b) the Sponsor has not withdrawn the offer since the visa letter was issued,
- (c) the visa letter has been issued by an institution with a Tier 4 (General) Student Sponsor Licence,
- (d) the institution must still hold such a licence at the time the application for entry clearance or leave to remain is determined, and
- (e) it contains such information as is specified as mandatory in guidance published by the United Kingdom Border Agency.

117 In order to be awarded points for a visa letter, the applicant must supply any documentary evidence (e.g. qualification certificates or as specified in guidance published by the United Kingdom Border Agency for migrants) that the applicant used to obtain the offer of a place on a course from the Sponsor.

118 If the applicant is re-sitting examinations or repeating a module of a course, the applicant must not previously have re-sat the same examination or repeated the same module more than once. If this requirement is not met then no points will be awarded for the visa letter.

119 Points will only be awarded for a visa letter (even if all the above requirements are met) if the course in respect of which it is issued meets each of the following requirements:

- (a) The course must meet the United Kingdom Border Agency's minimum academic requirements, as set out in sponsor guidance published by the United Kingdom Border Agency, and must lead to an approved qualification as defined in that guidance,
- (b) Other than when the applicant is actually on a work placement, all study that forms part of the course must take place on the premises of the sponsoring educational institution.
- (c) The course must also meet one of the following requirements:
 - i. be a full time course of study that leads to a UK recognised bachelor or postgraduate degree,

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- ii. be an overseas course of degree level study that is recognised as being equivalent to a UK Higher Education course and is being provided by an overseas Higher Education Institution,
- iii. involve a minimum of 15 hours per week organised daytime study.
- (d) If the course contains a course-related work placement, any period that the applicant will be spending on that placement must not exceed half of the total length of the course spent in the United Kingdom.

ATTRIBUTES FOR TIER 4 (CHILD) STUDENTS

120 An applicant applying for entry Clearance or leave to remain as a Tier 4 (Child) Student must score 30 points for attributes.

121 Available points are show in Table 17 below.

122 Notes to accompany Table 17 appear below that table.

Table 17

Criterion	Points awarded
Visa letter	30

Notes

123 A visa letter will be considered to be valid only if:

- (a) where the applicant is under 16, it was issued by an independent, fee paying school,
- (b) it was issued no more than 6 months before the application is made,
- (c) the Sponsor has not withdrawn the offer since the visa letter was issued,
- (d) it was issued by an institution with a Tier 4 (Child) Student Sponsor Licence, and
- (e) the institution must still hold such a licence at the time the application for entry clearance or leave to remain is determined.

124 The visa letter must also contain such information as is specified as mandatory by guidance published by the United Kingdom Border Agency.

125 Points will not be awarded under Table 17 unless the course that the student will be pursuing meets one of the following requirements:

- (a) be taught in accordance with the National Curriculum,
- (b) be taught in accordance with the National Qualification Framework (NQF),
- (c) be accepted as being of equivalent academic status to (a) or (b) above by OFSTED (England), the Education and Training Inspectorate (Northern Ireland), Her Majesty's Inspectorate of Education (Scotland) or Estyn (Wales),
- (d) be provided as required by prevailing independent school education inspection standards.]

Note

Paragraphs 58A to 111 and Tables 10 to 15 inserted by HC 1113.

Paragraph 112 inserted by HC 314.

Paragraphs 113–125 inserted by HC 314.

[APPENDIX B
ENGLISH LANGUAGE

[TIER 1 MIGRANTS]

1 An applicant applying for entry clearance or leave to remain as a Tier 1 Migrant (other than as a Tier 1 (Investor) Migrant), must have 10 points for English language.

2 10 points will only be awarded [to an applicant in Tier 1 (General) or Tier 1 (Entrepreneur)] if the applicant:

- (a) has the level of English language shown in the table below and:
 - (i) provides an original English language test certificate from an English language test provider approved by the Secretary of State for these purposes, which clearly shows the applicant's name; the qualification obtained (which must meet or exceed the level shown in the table below); and the date of the award, or
 - (ii) has obtained an academic qualification (not a professional or vocational qualification) which is deemed by UK NARIC to meet or exceed the recognised standard of a Bachelor's or Master's degree or a PhD in the UK, and which UK NARIC has confirmed was taught or researched in English to the level indicated in the table below, and provides the specified documents, or

Level of English language	Points
A knowledge of English equivalent to level C1 of the Council of Europe's Common European Framework for Language Learning or above	10

- (b) is a national of one of the following countries:
 - Antigua and Barbuda
 - Australia
 - The Bahamas
 - Barbados
 - Belize
 - Canada
 - Dominica
 - Grenada
 - Guyana
 - Jamaica
 - New Zealand
 - St Kitts and Nevis
 - St Lucia
 - St Vincent and the Grenadines
 - Trinidad and Tobago
 - USA,
 and provides the specified documents, or
- (c) has obtained an academic qualification (not a professional or vocational qualification), which is deemed by UK NARIC to meet or exceed the recognised standard of a Bachelor's or Master's degree or a PhD in the UK, from an educational establishment in one of the following countries:
 - Antigua and Barbuda
 - Australia
 - The Bahamas
 - Barbados

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Belize
Dominica
Grenada
Guyana
Ireland
Jamaica
New Zealand
St Kitts and Nevis
St Lucia
St Vincent and The Grenadines
Trinidad and Tobago
the UK
the USA,
and provides the specified documents, or

- (d) has, or has last been granted, leave as a Tier 1 (General) Migrant or a Tier 1 (Entrepreneur) Migrant, or
- (e) has, or was last granted, leave as a Highly Skilled Migrant, if that leave was granted under these Rules at a time when they included the changes which came into force on 5 December 2006³, or
- (f) [...]

³ HC 1702

[3 10 points will only be awarded to an applicant in Tier 1 (Post study Work) if the applicant has achieved 75 points under Appendix A.

TIER 2 MIGRANTS

4 An applicant applying for entry clearance or leave to remain as a Tier 2 Migrant must have 10 points for english language unless:

- (a) the applicant is applying for entry clearance as a Tier 2 (Intra-Company Transfer) Migrant, or
- (b) the applicant is:
 - (i) applying for leave to remain as a Tier 2 (Intra-Company Transfer) Migrant, and
 - (ii) is not seeking a grant of leave to remain that would extend his total stay in this category beyond 3 years.

5 Where the applicant is applying as a Tier 2 (General) Migrant, a Tier 2 (Sports-person) Migrant or as a Tier 2 (Intra-Company Transfer) Migrant, 10 points will only be awarded if:

- (a) the applicant has the level of english shown in Table 1 and:
 - (i) provides an original english language test certificate from an english language test provider approved by the secretary of state for these purposes, which clearly shows the applicant's name, the qualification obtained (which must meet or exceed the level that the secretary of state specifies in guidance as being required to meet the standard laid down in Table 1) and the date of the award, or
 - (ii) has obtained an academic qualification (not a professional or vocational qualification) which is deemed by UK NARIC to meet or exceed the recognised standard of a Bachelor's or Master's degree in the UK, and provides the specified evidence to show he has the qualification and:

- (1) UK NARIC has confirmed that the degree was taught or researched in english to level C1 of the Council of Europe's Common European framework for language learning or above, or
- (2) the applicant provides the specified evidence to show that the qualification was taught or researched in english,
- (b) one or more of paragraph 2(b)–2(e) applies to the applicant
- (c) the applicant has, or was last granted:
 - (i) entry clearance, leave to enter or leave to remain as a Tier 2 (General), Tier 2 (Sportsperson) or Tier 2 (Minister of Religion) Migrant,
 - (ii) entry clearance, leave to enter or leave to remain as a Minister of Religion, Missionary or Member of a Religious Order provided that leave was granted on or after 23 August 2004, or
 - (iii) leave to remain as a Tier 2 (Intra-Company Transfer) Migrant, provided that when he was granted that leave he was required to obtain points for english language from this appendix,
- (d) the applicant is applying for leave to remain as a Tier 2 (General) or Tier 2 (Intra-Company Transfer) Migrant and has obtained points from the transitional arrangements category in Table 11 of Appendix A (see paragraph 83 of Appendix A), or
- (e) the applicant is applying for leave to remain as a Tier 2 (Sportsperson) Migrant and:
 - (i) has, or was last granted, entry clearance, leave to enter or leave to remain as a Tier 2 (Sportsperson) Migrant or a Qualifying Work Permit Holder, such grant being less than 5 years before the date of the current application for leave, and
 - (ii) is working for the same employer.

Table 1

Level of English language	Points Awarded
Competence in english to a basic user standard, including an ability to understand and use familiar everyday expressions, to introduce themselves and others and to ask and answer questions about basic personal details.	10

6 Where the applicant is applying as a Tier 2 (Minister of Religion) Migrant, 10 points will only be awarded:

- (a) if the applicant has the level of english shown in Table 2; and
 - (i) provides an original english language test certificate from an english language test provider approved by the secretary of state for these purposes, which clearly shows the applicant's name, the qualification obtained (which must meet or exceed that the secretary of state specifies in guidance as being required to meet the standard laid down in Table 2) and the date of the award, or
 - (ii) has obtained an academic qualification (not a professional or vocational qualification) which is deemed by UK NARIC to meet or exceed the recognised standard of a Bachelor's or Master's degree in the UK and both provides the specified evidence to show he has the qualification, and UK NARIC has confirmed that the degree was taught or researched in english to level C1 of the Council of Europe's Common European Framework for Language Learning or above,

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- (b) one or more of paragraph 2(b)–2(e) applies to the applicant,
- (c) the applicant has, or was last granted entry clearance, leave to enter or leave to remain as:
 - (i) a Minister of religion, Missionary or Member of a religious order, provided the leave was granted on or after 19 April 2007, or
 - (ii) a Tier 2 (Minister of Religion) Migrant, or
- (d) the applicant is applying for leave to remain as a Tier 2 (Minister of Religion) Migrant and:
 - (i) has, or was last granted, entry clearance, leave to enter or leave to remain as a Tier 2 (Minister of Religion) Migrant or as a Minister of Religion, Missionary or Member of a Religious Order, such grant being less than 5 years before the date of the current application for leave, and
 - (ii) is working for the same employer.

Table 2

Level of English language	Points Awarded
A level of english equivalent to level B2 of the Council of Europe's Common European Framework for Language Learning or above.	10]

Note

Appendix B substituted by HC 607.
 Words in square brackets inserted by HC 1113.
 Words deleted by HC 1113.
 Paragraphs 3 to 6 inserted by HC 1113.

[APPENDIX C MAINTENANCE (FUNDS)]

[1A In all cases where an applicant is required to obtain points under appendix C, the applicant must have the funds specified in the relevant part of appendix C at the date of the application and must also have had those funds for a period of time set out in the guidance specifying the specified documents for that purpose.]

[TIER 1 MIGRANTS]

1 An applicant applying for entry clearance or leave to remain as a Tier 1 Migrant (other than as a Tier 1 (Investor) Migrant) must score 10 points for funds.

2 10 points will only be awarded if an applicant:

- (a) applying for entry clearance, has the level of funds shown in the table below and provides the specified documents, or

Level of funds	Points
£2,800	10

- (b) applying for leave to remain, has the level of funds shown in the table below and provides the specified documents.

Level of funds	Points
£800	10

3 [...]

[TIER 2 MIGRANTS]

4 An applicant applying for entry clearance or leave to enter or remain as a Tier 2 Migrant must score 10 points for funds.

5 10 points will only be awarded if:

- (a) the applicant has the level of funds shown in the table below and provides the specified documents[, or]:

Level of funds	Points Awarded
£800	10
(b) the applicant has [...] entry clearance, leave to enter or leave to remain as:	
(i) a Tier 2 Migrant,	
(ii) a Jewish agency employee,	
(iii) a Member of the operational Ground staff of an overseas- owned airline,	
(iv) a Minister of Religion, Missionary or Member of a religious order,	
(v) a representative of an overseas newspaper, news agency or Broadcasting organisation, or	
(vi) a Work Permit Holder, or	
(c) he is applying for leave to remain as a Tier 2 (General) Migrant and obtains points under the post-study work provisions in Table 10 of appendix a, or	
(d) the sponsor is an a rated sponsor and provides a written undertaking that, should it become necessary, it will maintain and accommodate the migrant up to the end of the first month of his employment. [The Sponsor may limit the amount of the undertaking but any limit must be at least £800.]	

Note

Words in square brackets inserted by HC 314.

Words deleted by HC 314.

TIER 5 (YOUTH MOBILITY) TEMPORARY MIGRANTS

6 An applicant applying for entry clearance as a Tier 5 (youth Mobility) Temporary Migrant must score 10 points for funds.

7 10 points will only be awarded if an applicant has the level of funds shown in the table below and provides the specified documents:

Level of Funds	Points
£1600	10

TIER 5 (TEMPORARY WORKER) MIGRANTS

8 A migrant applying for entry clearance or leave to remain as a Tier 5 (Temporary Worker) Migrant must score 10 points for funds.

9 10 points will only be awarded if the applicant has the level of funds shown in the table below and provides the specified documents:

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Criterion	Points Awarded
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Meets one of the following criteria:

- Has £800; or
 - The Sponsor is an A rated Sponsor and the Certificate of sponsorship Checking service confirms that the sponsor has certified that that the applicant will not claim public funds during his period of leave as a Tier 5 (Temporary Worker) Migrant.
- 10]

[TIER 4 (GENERAL) STUDENTS

10 A Tier 4 (General) Student must score 10 points for funds.

11 10 points will only be awarded if the funds shown in the table below are available to the applicant and the applicant provides the specified documents to show this. Notes to accompany the table appear below the table:

Criterion	Points
-----------	--------

If studying in London:

- | | | |
|-----|---|----|
| (i) | Where the applicant is making his or her first entry clearance application under Tier 4, or is switching from another category of stay, or is seeking an extension of stay following completion of a course of study of less than six months (including a pre-sessional course), the full cost of the fees of the course (first year only if the course is longer) must be available to the applicant, together with £800 for each month of the course, up to a maximum of 9 months. For example, for a course lasting 12 months or more, the applicant must show that the course fees for the first year of the course plus £7200 are available. | 10 |
|-----|---|----|

- (ii) Where the applicant is making a subsequent entry clearance application, or is extending leave previously granted under Tier 4 or under Part 3 of these Rules, except where they are applying for an extension of stay following completion of a course of study of less than six months (including a pre-sessional course) provided the previous course was completed within the previous 4 months, the full cost of fees for the first year of their continued study is available to the applicant, together with 2 months' maintenance of £800 per month (£1600). For example, for a continued study lasting 12 months or more, the applicant must show that the course fees for the first year of the plus £1600 are available.

If studying outside London:

- (iii) Where the applicant is making his or her first entry clearance application under Tier 4, or is switching from another category of stay, or is seeking an extension of stay following completion of a course of study of less than six months (including a pre-sessional course) the full cost of the fees for the course (first year only if the course is longer) must be available to the applicant, together with £600 for each month of the course, up to a maximum of 9 months. For example, for a course lasting 12 months or more, the applicant must show that the course fees for the first year of the course plus £5400 are available.

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- (iv) Where the applicant is making a subsequent entry clearance application, or is extending leave previously granted under Tier 4 or under Part 3 of these Rules, except where they are applying for an extension of stay following completion of a course of study of less than six months (including a pre-sessional course), provided the previous study was completed within the previous 4 months, the full cost of fees for their continued study (first year only if the course is longer) must be available to the applicant, together with 2 months' maintenance of £600 per month. For example, where the continued study will last 12 months or more, the applicant must show that the course fees for one year of the course plus £1200 are available.

Notes

12 An applicant will be considered to be studying in London if the institution, or branch of the institution, at which the applicant will be studying is situated in a London Borough specified in United Kingdom Border Agency guidance. If the applicant will be studying at more than one site, one or more of which is in London and one or more outside, then the applicant will be considered to be studying in London if the applicant's visa letter states that the applicant will be spending the majority of time studying at a site or sites situated in London.

13 Guidance published by the United Kingdom Border Agency will set out when funds will be considered to be available to an applicant, including the circumstances in which the money must be that of the applicant and the extent to which a sponsorship arrangement that provides the required funds will suffice.

TIER 4 (CHILD) STUDENTS

14 A Tier 4 (Child) Student must score 10 points for funds.

15 10 points will only be awarded if the funds shown in the table below are available to the applicant, and the applicant provides the specified documents to show this. Notes to accompany the table appear below the table:

Criterion	Points
Where the child is (or will be) studying at a residential independent school – sufficient funds to pay boarding fees (being course fees plus board/lodging fees) for a year are available to the applicant.	10
Where the child is (or will be) studying at a Non-Residential Independent School • and is in a private foster care arrangement (see Notes below) or staying with and cared for by a close relative (see Notes below): sufficient funds are available to the applicant to pay school fees for a year, the foster carer or relative (who must meet such requirements as are specified in guidance published by the United Kingdom Border Agency) has undertaken to maintain and accommodate the child for the duration of the course and that foster carer or relative has funds equivalent to at least £500 per month, for up to a maximum of 9 months, to support the child while he is in the United Kingdom.	10
Where the child is (or will be) studying at a Non-Residential Independent School, is under the age of 12 and is (or will be) accompanied by a parent, sufficient funds are available to the child to pay school fees for a year, plus: <ul style="list-style-type: none"> • if no other children are accompanying the applicant and the parent, £1333 per month of stay up to a maximum of 9 months; • If other children are accompanying the applicant and the parent, £1333 per month, plus £533 per month for each additional child, up to a maximum of 9 months 	10
Where the child is aged 16 or 17 years old and is living independently and studying in London:	10

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Criterion

Points

- (i) Where the applicant is making his or her first entry clearance application under Tier 4, or is switching from another category of stay, or is seeking an extension of stay following completion of a course of study of less than six months (including a pre-sessional course), the full cost of the fees for the course (first year only where the course is longer) must be available to the applicant, together with £800 for each month of the course, up to a maximum of 9 months. For example, for a course lasting 12 months or more, the applicant must show that the course fees for the first year of the course plus £7200 are available.
- (ii) Where the applicant is making a subsequent entry clearance application, or is extending leave previously granted under Tier 4 or under Part 3 of these Rules, except where they are applying for an extension of stay following completion of a course of study of less than six months (including a pre-sessional course) provided the previous study was completed within the previous 4 months, the full cost of fees for their continued study (first year only where the course is longer) must be available to the applicant, together with 2 months' maintenance of £800 per month (£1600). For example, where the continued study will last 12 months or more, the applicant must show that the course fees for one year of the study plus £1600 are available.

Where the child is aged 16 or 17 years old, is living independently and studying outside of London:

10

Criterion

Points

- (i) Where the applicant is making his or her first entry clearance application under Tier 4, or is switching from another category of stay, or is seeking an extension of stay following completion of a course of study of less than six months (including a pre-sessional course) the full cost of the fees for the course (first year only where the course is longer) must be available to the applicant, together with £600 for each month of the course, up to a maximum of 9 months. For example, for a course lasting 12 months or more, the applicant must show that the course fees for the first year of the course plus £5400 are available.
- (ii) Where the applicant is making a subsequent entry clearance application, or is extending leave previously granted under Tier 4 or under Part 3 of these Rules, except where they are applying for an extension of stay following completion of a course of study of less than six months (including a pre-sessional course), provided the previous study was completed within the previous 4 months, the full cost of fees for their continued study (first year only if the course is longer) must be available to the applicant, together with 2 months' maintenance of £600 per month. For example, where the continued study will last 12 months or more, the applicant must show that the course fees for one year of the study plus £1200 are available.

Notes

16 Children (under 16, or under 18 if disabled) are privately fostered when they are cared for on a full-time basis by a person or persons aged 18 or over, who are not their parents or a close relative, for a period of 28 days or more.

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17 A close relative is a grandparent, brother, sister, step-parent, uncle (brother or half-brother of the child's parent) or aunt (sister or half-sister of the child's parent) who is aged 18 or over.

18 The care arrangement made for the child's care in the UK must comply with the requirements specified in guidance published by the United Kingdom Border Agency.]

Note

Appendix C substituted by HC 607.

Words in square brackets inserted by HC 1113.

Words deleted by HC 1113.

Paragraphs 4 to 9 inserted by HC 1113.

Paragraphs 10 to 18 inserted by HC 314.

APPENDIX D: IMMIGRATION RULES FOR LEAVE TO ENTER AS A HIGHLY SKILLED MIGRANT AS AT 31 MARCH 2008, AND IMMIGRATION RULES FOR LEAVE TO REMAIN AS A HIGHLY SKILLED MIGRANT AS AT 28 FEBRUARY 2008

Requirements for leave to enter the United Kingdom as a highly skilled migrant

135A The requirements to be met by a person seeking leave to enter as a highly skilled migrant are that the applicant:

- (i) must produce a valid document issued by the Home Office confirming that he meets, at the time of the issue of that document, the criteria specified by the Secretary of State for entry to the United Kingdom under the Highly Skilled Migrant Programme; and
- (ii) intends to make the United Kingdom his main home; and
- (iii) is able to maintain and accommodate himself and any dependants adequately without recourse to public funds; and
- (iv) holds a valid United Kingdom entry clearance for entry in this capacity.

Leave to enter as a highly skilled migrant

[**135B** A person seeking leave to enter the United Kingdom as a highly skilled migrant may be admitted for a period not exceeding 2 years, subject to a condition prohibiting Employment as a Doctor in Training (unless the applicant has submitted with this application a valid Highly Skilled Migrant Programme Approval Letter, where the application for that approval letter was made on or before 6 February 2008), provided the Immigration Officer is satisfied that each of the requirements of paragraph 135A is met and that the application does not fall for refusal under paragraph 135HA.]

Refusal of leave to enter as a highly skilled migrant

135C Leave to enter as a highly skilled migrant is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 135A is met or if the application falls for refusal under paragraph 135HA.]

135D The requirements for an extension of stay as a highly skilled migrant for a person who has previously been granted entry clearance or leave in this capacity, are that the applicant:

- (i) entered the United Kingdom with a valid United Kingdom entry clearance as a highly skilled migrant, or has previously been granted leave in accordance with paragraphs 135DA–135DH of these Rules; and
- (ii) has achieved at least 75 points in accordance with the criteria specified in Appendix 4 of these Rules, having provided all the documents which are set out in Appendix 5 (Part I) of these Rules which correspond to the points which he is claiming; and
- (iii)
 - (a) has produced an International English Language Testing System certificate issued to him to certify that he has achieved at least band 6 competence in English; or
 - (b) has demonstrated that he holds a qualification which was taught in English and which is of an equivalent level to a UK Bachelors degree by providing both documents which are set out in Appendix 5 (Part II) of these Rules; and
- (iv) meets the requirements of paragraph 135A(ii)–(iii).

135DA The requirements for an extension of stay as a highly skilled migrant for a work permit holder are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a work permit holder in accordance with paragraphs 128 to 132 of these Rules; and
- (ii) meets the requirements of paragraph 135A(i)–(iii).

135DB The requirements for an extension of stay as a highly skilled migrant for a student are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a student in accordance with paragraphs 57 to 62 of these Rules; and
- (ii) has obtained a degree qualification on a recognised degree course at either a United Kingdom publicly funded further or higher education institution or a bona fide United Kingdom private education institution which maintains satisfactory records of enrolment and attendance; and
- (iii) has the written consent of his official sponsor to remain as a highly skilled migrant if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing or has recently come to an end at the time of the requested extension; and
- (iv) meets the requirements of paragraph 135A(i)–(iii).

135DC The requirements for an extension of stay as a highly skilled migrant for a postgraduate doctor or postgraduate dentist are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a postgraduate doctor or a postgraduate dentist in accordance with paragraphs 70 to 75 of these Rules; and
- (ii) has the written consent of his official sponsor to such employment if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing

or has recently come to an end at the time of the requested extension; and

- (iii) meets the requirements of paragraph 135A(i)–(iii).

135DD The requirements for an extension of stay as a highly skilled migrant for a working holidaymaker are that the applicant:

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- (i) entered the United Kingdom as a working holidaymaker in accordance with paragraphs 95 to 96 of these Rules; and
- (ii) meets the requirements of paragraph 135A(i)–(iii).

135DE The requirements for an extension of stay as a highly skilled migrant for a participant in the Science and Engineering Graduates Scheme or International Graduates Scheme are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a participant in the Science and Engineering Graduates Scheme or International Graduates Scheme in accordance with paragraphs 135O to 135T of these Rules; and
- (ii) meets the requirements of paragraph 135A(i)–(iii).

135DF The requirements for an extension of stay as a highly skilled migrant for an innovator are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as an innovator in accordance with paragraphs 210A to 210E of these Rules; and
- (ii) meets the requirements of paragraph 135A(i)–(iii).

135DG [...].

135DH The requirements for an extension of stay as a highly skilled migrant for a participant in the Fresh Talent: Working in Scotland scheme are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a Fresh Talent: Working in Scotland scheme participant in accordance with paragraphs 143A to 143F of these Rules; and
- (ii) has the written consent of his official sponsor to such employment if the studies which led to him being granted leave under the Fresh Talent: Working in Scotland scheme in accordance with paragraphs 143A to 143F of these Rules, or any studies he has subsequently undertaken, were sponsored by a government or international scholarship agency; and
- (iii) meets the requirements of paragraph 135A(i)–(iii).

EXTENSION OF STAY AS A HIGHLY SKILLED MIGRANT

135E An extension of stay as a highly skilled migrant may be granted for a period not exceeding 3 years, provided that the Secretary of State is satisfied that each of the requirements of paragraph 135D, 135DA, 135DB, 135DC, 135DD, 135DE, 135DF or 135DH is met and that the application does not fall for refusal under paragraph 135HA.

REFUSAL OF EXTENSION OF STAY AS A HIGHLY SKILLED MIGRANT

135F An extension of stay as a highly skilled migrant is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 135D, 135DA, 135DB, 135DC, 135DD, 135DE, 135DF or 135DH is met or if the application falls for refusal under paragraph 135HA.

...

ADDITIONAL GROUNDS FOR REFUSAL FOR HIGHLY SKILLED MIGRANTS

135HA An application under paragraphs 135A–135H of these Rules is to be refused, even if the applicant meets all the requirements of those paragraphs, if:

- (i) the applicant submits any document which, whether or not it is material to his application, is forged or not genuine, unless the Immigration Officer or Secretary of State is satisfied that the applicant is unaware that the document is forged or not genuine; or
- (ii) the Immigration Officer or Secretary of State has cause to doubt the genuineness of any document submitted by the applicant and, having taken reasonable steps to verify the document, has been unable to verify that it is genuine.

APPENDIX E: MAINTENANCE (FUNDS) FOR THE FAMILY OF [RELEVANT POINTS BASED SYSTEM MIGRANT]

A sufficient level of funds must be available to an applicant applying as the Partner or Child of a [Relevant Points Based System Migrant]. A sufficient level of funds will only be available if the requirements below are met.

- [(a) Where the application is connected to a Tier 1 Migrant (other than a Tier 1 (Investor) Migrant) who is outside the UK or who has been in the UK for a period of less than 12 months, there must be £1600 in funds.
- (b) Where:
 - (i) paragraph (a) does not apply, and
 - (ii) the application is connected to a Relevant Points Based System Migrant who is not a Tier 1 (Investor) Migrant or a Tier 4 Migrant there must be £533 in funds.
- (ba)
 - (i) Where the application is connected to a Tier 4 Migrant:
 - (1) if the Tier 4 Migrant is studying in London (as defined in paragraph 12 of Appendix B), there must be £533 in funds for each month for which the applicant would, if successful, be granted leave under paragraph 319D(a), up to a maximum of £4,797,
 - (2) if the Tier 4 Migrant is not studying in London, there must be £400 in funds for each month for which the applicant would, if successful, be granted leave under paragraph 319D(a), up to a maximum of £3,600.]
- (c) Where the applicant is applying as the Partner of a [Relevant Points Based System Migrant], the relevant amount of funds must be available to either the applicant or the [Relevant Points Based System Migrant].
- (d) Where the applicant is applying as the Child of a [Relevant Points Based System Migrant], the relevant amount of funds must be available to the applicant, the [Relevant Points Based System Migrant], or the applicant's other parent who is Lawfully present in the UK or being granted entry clearance, or leave to enter or remain, at the same time.
- (e) Where the [Relevant Points Based System Migrant] is applying for entry clearance or leave to remain at the same time as the applicant, the amount of funds available to the applicant must be in addition to the level of funds required separately of the [Relevant Points Based System Migrant].
- [(ea) In all cases, the funds in question must be available to:
 - (i) the applicant, or

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- (ii) where he is applying as the partner of a [Relevant Points Based System Migrant], either to him or to that [Relevant Points Based System Migrant], or
 - (iii) where he is applying as the child of a [Relevant Points Based System Migrant], either to him, to the [Relevant Points Based System Migrant] or to the child's other parent who is Lawfully present in the UK or being granted entry clearance, or leave to enter or remain, at the same time at the date of the application and must have been available to that person for a period of time set out in the guidance specifying the specified documents for the purposes of Appendix E.]
- [(eb) In the following cases, sufficient funds will be deemed to be available where all of the following conditions are met:
- (i) the Relevant Points Based System Migrant to whom the application is connected has, or is being granted, leave as a Tier 2 Migrant,
 - (ii) the Sponsor of that Relevant Points Based System Migrant is A-rated, and
 - (iii) that Sponsor provides a written undertaking that, should it become necessary, it will maintain and accommodate the dependants of the Relevant Points Based System Migrant up to the end of the first month of the Relevant Points Based System Migrant's employment. The undertaking may be limited provided the limit is at least £533 per dependant.]
- (f) [In all cases the applicant must] provide the specified documents.]

Note

Appendices A–E inserted by HC 321. Paragraph 135B substituted by the published corrections to HC 321. In Appendix E sub-paragraph (ea) inserted by HC 607. Heading and words in square brackets substituted by HC 1113.

Sub-paragraphs (a) and (b) substituted by HC 314.

Sub-paragraphs (ba) and (eb) inserted by HC 314.

[APPENDIX F

IMMIGRATION RULES RELATING TO HIGHLY SKILLED MIGRANTS, THE INTERNATIONAL GRADUATES SCHEME, THE FRESH TALENT: WORKING IN SCOTLAND SCHEME, BUSINESSPERSONS, INNOVATORS, INVESTORS AND WRITERS, COMPOSERS AND ARTISTS AS AT 29 JUNE 2008

Highly skilled migrants

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A HIGHLY SKILLED MIGRANT

135A The requirements to be met by a person seeking leave to enter as a highly skilled migrant are that the applicant:

- (i) must produce a valid document issued by the Home Office confirming that he meets, at the time of the issue of that document, the criteria specified by the Secretary of State for entry to the United Kingdom under the Highly Skilled Migrant Programme; and
- (ii) intends to make the United Kingdom his main home; and
- (iii) is able to maintain and accommodate himself and any dependants adequately without recourse to public funds; and
- (iv) holds a valid United Kingdom entry clearance for entry in this capacity; and
- (v) if he makes an application for leave to enter on or after 29 February 2008, is not applying in India.

Immigration Officers at port should not refuse entry to passengers on the basis that they applied in India, if those passengers have a valid entry clearance for entry in this capacity

LEAVE TO ENTER AS A HIGHLY SKILLED MIGRANT

135B A person seeking leave to enter the United Kingdom as a highly skilled migrant may be admitted for a period not exceeding 2 years, subject to a condition prohibiting Employment as a Doctor in Training (unless the applicant has submitted with this application a valid Highly Skilled Migrant Programme Approval Letter, where the application for that approval letter was made on or before 6 February 2008), provided the Immigration Officer is satisfied that each of the requirements of paragraph 135A is met and that the application does not fall for refusal under paragraph 135HA.

REFUSAL OF LEAVE TO ENTER AS A HIGHLY SKILLED MIGRANT

135C Leave to enter as a highly skilled migrant is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 135A is met or if the application falls for refusal under paragraph 135HA.

International Graduates Scheme

REQUIREMENTS FOR LEAVE TO ENTER AS A PARTICIPANT IN THE INTERNATIONAL GRADUATES SCHEME

135O The requirements to be met by a person seeking leave to enter as a participant in the International Graduates Scheme are that he:

- (i) has successfully completed and obtained either:
 - (a) a recognised UK degree (with second class honours or above) in a subject approved by the Department for Education and Skills for the purposes of the Science and Engineering Graduates scheme, completed before 1 May 2007; or
 - (b) a recognised UK degree, Master's degree, or PhD in any subject completed on or after 1 May 2007; or
 - (c) a postgraduate certificate or postgraduate diploma in any subject completed on or after 1 May 2007;
at a UK education institution which is a recognised or listed body.
- (ii) intends to seek and take work during the period for which leave is granted in this capacity;
- (iii) can maintain and accommodate himself and any dependants without recourse to public funds;
- (iv) completed his degree, Master's degree, PhD or postgraduate certificate or diploma, in the last 12 months;
- (v) if he has previously spent time in the UK as a participant in the Science and Engineering Graduates Scheme or International Graduates Scheme, is not seeking leave to enter to a date beyond 12 months from the date he was first given leave to enter or remain under the Science and Engineering Graduates Scheme or the International Graduates Scheme;

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- (vi) intends to leave the United Kingdom if, on expiry of his leave under this scheme, he has not been granted leave to remain in the United Kingdom in accordance with paragraphs 128–135, 200–210H or 245A–245G of these Rules;
- (vii) has the written consent of his official sponsor to enter or remain in the United Kingdom under the Science and Engineering Graduates Scheme or International Graduates Scheme if his approved studies, or any studies he has subsequently undertaken, were sponsored by a government or international scholarship agency; and
- (viii) holds a valid entry clearance for entry in this capacity except where he is a British National (Overseas), a British overseas territories citizen, a British Overseas citizen, a British protected person or a person who under the British Nationality Act 1981 is a British subject.

LEAVE TO ENTER AS A PARTICIPANT IN THE INTERNATIONAL GRADUATES SCHEME

135P A person seeking leave to enter the United Kingdom as a participant in the International Graduates Scheme may be admitted for a period not exceeding 12 months provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

REFUSAL OF LEAVE TO ENTER AS A PARTICIPANT IN THE INTERNATIONAL GRADUATES SCHEME

135Q Leave to enter as a participant in the International Graduates Scheme is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 135O is met.

REQUIREMENTS FOR LEAVE TO REMAIN AS A PARTICIPANT IN THE INTERNATIONAL GRADUATES SCHEME

135R The requirements to be met by a person seeking leave to remain as a participant in the International Graduates Scheme are that he:

- (i) meets the requirements of paragraph 135O(i) to (vii); and
- (ii) has leave to enter or remain as a student or as a participant in the Science and Engineering Graduates Scheme or International Graduates Scheme in accordance with paragraphs 57–69L or 135O–135T of these Rules;
- (iii) would not, as a result of an extension of stay, remain in the United Kingdom as a participant in the International Graduates Scheme to a date beyond 12 months from the date on which he was first given leave to enter or remain in this capacity or under the Science and Engineering Graduates Scheme.

LEAVE TO REMAIN AS A PARTICIPANT IN THE INTERNATIONAL GRADUATES SCHEME

135S Leave to remain as a participant in the International Graduates Scheme may be granted if the Secretary of State is satisfied that the applicant meets each of the requirements of paragraph 135R.

REFUSAL OF LEAVE TO REMAIN AS A PARTICIPANT IN THE INTERNATIONAL GRADUATES SCHEME

135T Leave to remain as a participant in the International Graduates Scheme is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 135R is met.

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A FRESH TALENT: WORKING IN SCOTLAND SCHEME PARTICIPANT

143A The requirements to be met by a person seeking leave to enter as a Fresh Talent: Working in Scotland scheme participant are that the applicant:

- (i) has been awarded:
 - (a) a HND, by a Scottish publicly funded institution of further or higher education, or a Scottish bona fide private education institution; or
 - (b) a recognised UK undergraduate degree, Master's degree or PhD or postgraduate certificate or diploma, by a Scottish education institution which is a recognised or listed body; and
- (ii) has lived in Scotland for an appropriate period of time whilst studying for the HND, undergraduate degree, Master's degree PhD or postgraduate certificate or diploma referred to in (i) above; and
- (iii) intends to seek and take employment in Scotland during the period of leave granted under this paragraph; and
- (iv) is able to maintain and accommodate himself and any dependants adequately without recourse to public funds; and
- (v) has completed the HND, undergraduate degree, Master's degree PhD or postgraduate certificate or diploma referred to in (i) above in the last 12 months; and
- (vi) intends to leave the United Kingdom if, on expiry of his leave under this paragraph, he has not been granted leave to remain in the United Kingdom as:
 - (a) a work permit holder in accordance with paragraphs 128–135 of these Rules; or
 - (b) a Tier 1 (General) Migrant; or
 - (c) a person intending to establish themselves in business in accordance with paragraphs 200–210 of these Rules; or
 - (d) an innovator in accordance with paragraphs 210A–210H of these Rules; and
- (vii) has the written consent of his official sponsor to enter or remain in the United Kingdom as a Fresh Talent: Working in Scotland scheme participant, if the studies which led to his qualification under (i) above (or any studies he has subsequently undertaken) were sponsored by a government or international scholarship agency; and
- (viii) if he has previously been granted leave as either:
 - (a) a Fresh Talent: Working in Scotland scheme participant in accordance with this paragraph; and/or
 - (b) a participant in the Science and Engineering Graduates Scheme or International Graduates Scheme in accordance with paragraphs 135O–135T of these Rules is not seeking leave to enter under this paragraph which, when amalgamated with any previous periods of leave granted in either of these two categories, would total more than 24 months; and
- (ix) holds a valid entry clearance for entry in this capacity except where he is a British National (Overseas), a British overseas territories citizen, a British Overseas citizen, a British protected person or a person who under the British Nationality Act 1981 is a British subject.

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LEAVE TO ENTER AS A FRESH TALENT: WORKING IN SCOTLAND SCHEME PARTICIPANT

143B A person seeking leave to enter the United Kingdom as a Fresh Talent: Working in Scotland scheme participant may be admitted for a period not exceeding 24 months provided the Immigration Officer is satisfied that each of the requirements of paragraph 143A is met.

REFUSAL OF LEAVE TO ENTER AS A FRESH TALENT: WORKING IN SCOTLAND SCHEME PARTICIPANT

143C Leave to enter as a Fresh Talent: Working in Scotland scheme participant is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 143A is met.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A FRESH TALENT: WORKING IN SCOTLAND SCHEME PARTICIPANT

143D The requirements to be met by a person seeking an extension of stay as a Fresh Talent: Working in Scotland scheme participant are that the applicant:

- (i) meets the requirements of paragraph 143A(i) to (vii); and
- (ii) has leave to enter or remain in the United Kingdom as either:
 - (a) a student in accordance with paragraphs 57–69L of these Rules; or
 - (b) a participant in the Science and Engineering Graduates Scheme or International Graduates Scheme in accordance with paragraphs 135O–135T of these Rules; or
 - (c) a Fresh Talent: Working in Scotland scheme participant in accordance with paragraphs 143A–143F of these Rules; and
- (iii) if he has previously been granted leave as either:
 - (a) a Fresh Talent: Working in Scotland scheme participant in accordance with paragraphs 143A–143F of these Rules; and/or
 - (b) a Science and Engineering Graduates Scheme or International Graduates Scheme participant in accordance with paragraphs 135O–135T of these Rules is not seeking leave to remain under this paragraph which, when amalgamated with any previous periods of leave granted in either of these two categories, would total more than 24 months.

EXTENSION OF STAY AS A FRESH TALENT: WORKING IN SCOTLAND SCHEME PARTICIPANT

143E An extension of stay as a Fresh Talent: Working in Scotland scheme participant may be granted for a period not exceeding 24 months if the Secretary of State is satisfied that each of the requirements of paragraph 143D is met.

REFUSAL OF AN EXTENSION OF STAY AS A FRESH TALENT: WORKING IN SCOTLAND SCHEME PARTICIPANT

143F An extension of stay as a Fresh Talent: Working in Scotland scheme participant is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 143D is met.

Persons intending to establish themselves in business

**REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A PERSON
INTENDING TO ESTABLISH HIMSELF IN BUSINESS**

200 For the purpose of paragraphs 201–210 a business means an enterprise as:

- a sole trader; or
- a partnership; or
- a company registered in the United Kingdom.

201 The requirements to be met by a person seeking leave to enter the United Kingdom to establish himself in business are:

- (i) that he satisfies the requirements of either paragraph 202 or paragraph 203; and
- (ii) that he has not less than £200,000 of his own money under his control and disposable in the United Kingdom which is held in his own name and not by a trust or other investment vehicle and which he will be investing in the business in the United Kingdom; and
- (iii) that until his business provides him with an income he will have sufficient additional funds to maintain and accommodate himself and any dependants without recourse to employment (other than his work for the business) or to public funds; and
- (iv) that he will be actively involved full time in trading or providing services on his own account or in partnership, or in the promotion and management of the company as a director; and
- (v) that his level of financial investment will be proportional to his interest in the business; and
- (vi) that he will have either a controlling or equal interest in the business and that any partnership or directorship does not amount to disguised employment; and
- (vii) that he will be able to bear his share of liabilities; and
- (viii) that there is a genuine need for his investment and services in the United Kingdom; and
- (ix) that his share of the profits of the business will be sufficient to maintain and accommodate himself and any dependants without recourse to employment (other than his work for the business) or to public funds; and
- (x) that he does not intend to supplement his business activities by taking or seeking employment in the United Kingdom other than his work for the business; and
- (xi) that he holds a valid United Kingdom entry clearance for entry in this capacity.

202 Where a person intends to take over or join as a partner or director an existing business in the United Kingdom he will need, in addition to meeting the requirements at paragraph 201, to produce:

- (i) a written statement of the terms on which he is to take over or join the business; and
- (ii) audited accounts for the business for previous years; and
- (iii) evidence that his services and investment will result in a net increase in the employment provided by the business to persons settled here to the extent of creating at least 2 new full time jobs.

203 Where a person intends to establish a new business in the United Kingdom he will need, in addition to meeting the requirements at paragraph 201 above, to produce evidence:

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- (i) that he will be bringing into the country sufficient funds of his own to establish a business; and
- (ii) that the business will create full time paid employment for at least 2 persons already settled in the United Kingdom.

LEAVE TO ENTER THE UNITED KINGDOM AS A PERSON SEEKING TO ESTABLISH HIMSELF IN BUSINESS

204 A person seeking leave to enter the United Kingdom to establish himself in business may be admitted for a period not exceeding 2 years with a condition restricting his freedom to take employment provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

REFUSAL OF LEAVE TO ENTER THE UNITED KINGDOM AS A PERSON SEEKING TO ESTABLISH HIMSELF IN BUSINESS

205 Leave to enter the United Kingdom as a person seeking to establish himself in business is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY IN ORDER TO REMAIN IN BUSINESS

206 The requirements for an extension of stay in order to remain in business in the United Kingdom are that the applicant can show:

- (i) that he entered the United Kingdom with a valid United Kingdom entry clearance as a businessman; and
- (ii) audited accounts which show the precise financial position of the business and which confirm that he has invested not less than £200,000 of his own money directly into the business in the United Kingdom; and
- (iii) that he is actively involved on a full time basis in trading or providing services on his own account or in partnership or in the promotion and management of the company as a director; and
- (iv) that his level of financial investment is proportional to his interest in the business; and
- (v) that he has either a controlling or equal interest in the business and that any partnership or directorship does not amount to disguised employment; and
- (vi) that he is able to bear his share of any liability the business may incur; and
- (vii) that there is a genuine need for his investment and services in the United Kingdom; and
- (viii)
 - (a) that where he has established a new business, new full time paid employment has been created in the business for at least 2 persons settled in the United Kingdom; or
 - (b) that where he has taken over or joined an existing business, his services and investment have resulted in a net increase in the employment provided by the business to persons settled here to the extent of creating at least 2 new full time jobs; and
- (ix) that his share of the profits of the business is sufficient to maintain and accommodate him and any dependants without recourse to employment (other than his work for the business) or to public funds; and

- (x) that he does not and will not have to supplement his business activities by taking or seeking employment in the United Kingdom other than his work for the business.

206A The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a person who has leave to enter or remain for work permit employment are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a work permit holder in accordance with paragraphs 128 to 133 of these Rules; and
- (ii) meets each of the requirements of paragraph 201(i)–(x).

206B The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a highly skilled migrant are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a highly skilled migrant in accordance with paragraphs 135A to 135F of these Rules; and
- (ii) meets each of the requirements of paragraph 201(i)–(x).

206C The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a participant in the Science and Engineering Graduates Scheme or International Graduates Scheme are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a participant in the Science and Engineering Graduates Scheme or International Graduates Scheme in accordance with paragraphs 135O to 135T of these Rules; and
- (ii) meets each of the requirements of paragraph 201(i)–(x).

206D The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for an innovator are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as an innovator in accordance with paragraphs 210A to 210F of these Rules; and
- (ii) meets each of the requirements of paragraph 201(i)–(x).

206E The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a student are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a student in accordance with paragraphs 57 to 62 of these Rules; and
- (ii) has obtained a degree qualification on a recognised degree course at either a United Kingdom publicly funded further or higher education institution or a bona fide United Kingdom private education institution which maintains satisfactory records of enrolment and attendance; and
- (iii) has the written consent of his official sponsor to such self employment if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing or has recently come to an end at the time of the requested extension; and
- (iv) meets each of the requirements of paragraph 201(i)–(x).

206F The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a working holidaymaker are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a working holidaymaker in accordance with paragraphs 95 to 100 of these Rules; and

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- (ii) has spent more than 12 months in total in the UK in this capacity; and
- (iii) meets each of the requirements of paragraph 201(i)–(x).

206G The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom in the case of a person who has leave to enter or remain as a Fresh Talent: Working in Scotland scheme participant are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a Fresh Talent: Working in Scotland scheme participant in accordance with paragraphs 143A to 143F of these Rules; and
- (ii) has the written consent of his official sponsor to such employment if the studies which led to him being granted leave under the Fresh Talent: Working in Scotland scheme in accordance with paragraphs 143A to 143F of these Rules, or any studies he has subsequently undertaken, were sponsored by a government or international scholarship agency; and
- (iii) meets each of the requirements of paragraph 201(i)–(x).

206H The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a Postgraduate Doctor or Dentist are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a Postgraduate Doctor or Dentist in accordance with paragraphs 70 to 75 of these Rules; and
- (ii) has the written consent of his official sponsor to such self employment if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing or has recently come to an end at the time of the requested extension; and
- (iii) meets each of the requirements of paragraph 201(i)–(x).

206I The requirements for an extension of stay as a person intending to establish himself in business in the United Kingdom for a Tier 1 (General) Migrant are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a Tier 1 (General) Migrant; and
- (ii) meets each of the requirements of paragraph 201(i)–(x).

EXTENSION OF STAY IN ORDER TO REMAIN IN BUSINESS

207 An extension of stay in order to remain in business with a condition restricting his freedom to take employment may be granted for a period not exceeding 3 years at a time provided the Secretary of State is satisfied that each of the requirements of paragraph 206, 206A, 206B, 206C, 206D, 206E, 206F, 206G, 206H or 206I is met.

REFUSAL OF EXTENSION OF STAY IN ORDER TO REMAIN IN BUSINESS

208 An extension of stay in order to remain in business is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 206, 206A, 206B, 206C, 206D, 206E, 206F, 206G, 206H or 206I is met.

Innovators

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS AN INNOVATOR

210A The requirements to be met by a person seeking leave to enter as an innovator are that the applicant:

- (i) is approved by the Home Office as a person who meets the criteria specified by the Secretary of State for entry under the innovator scheme at the time that approval is sought under that scheme;
- (ii) intends to set up a business that will create full-time paid employment for at least 2 persons already settled in the UK; and
- (iii) intends to maintain a minimum five per cent shareholding of the equity capital in that business, once it has been set up, throughout the period of his stay as an innovator; and
- (iv) will be able to maintain and accommodate himself and any dependants adequately without recourse to public funds or to other employment; and
- (v) holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER AS AN INNOVATOR

210B A person seeking leave to enter the United Kingdom as an innovator may be admitted for a period not exceeding 2 years, provided the Immigration Officer is satisfied that each of the requirements of paragraph 210A is met.

REFUSAL OF LEAVE TO ENTER AS AN INNOVATOR

210C Leave to enter as an innovator is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 210A are met.

REQUIREMENTS FOR AN EXTENSION OF STAY AS AN INNOVATOR

210D The requirements for an extension of stay in the United Kingdom as an innovator, in the case of a person who was granted leave to enter under paragraph 210A, are that the applicant:

- (i) has established a viable trading business, by reference to the audited accounts and trading records of that business; and
- (ii) continues to meet the requirements of paragraph 210A(i) and (iv); and has set up a business that will create full-time paid employment for at least 2 persons already settled in the UK; and
- (iii) has maintained a minimum five per cent shareholding of the equity capital in that business, once it has been set up, throughout the period of his stay.

210DA The requirements for an extension of stay in the United Kingdom as an innovator, in the case of a person who has leave for the purpose of work permit employment are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a work permit holder in accordance with paragraphs 128 to 132 of these Rules; and
- (ii) meets the requirements of paragraph 210A(i)–(iv).

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210DB The requirements for an extension of stay in the United Kingdom as an innovator in the case of a person who has leave as a student are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a student in accordance with paragraphs 57 to 62 of these Rules; and
- (ii) has obtained a degree qualification on a recognised degree course at either a United Kingdom publicly funded further or higher education institution or a bona fide United Kingdom private education institution which maintains satisfactory records of enrolment and attendance; and
- (iii) has the written consent of his official sponsor to remain under the Innovator category if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing or has recently come to an end at the time of the requested extension; and
- (iv) meets the requirements of paragraph 210(i)–(iv).

210DC The requirements to be met for an extension of stay as an innovator, for a person who has leave as a working holidaymaker are that the applicant:

- (i) entered the United Kingdom as a working holidaymaker in accordance with paragraphs 95 to 96 of these Rules; and
- (ii) meets the requirements of paragraph 210A(i)–(iv).

210DD The requirements to be met for an extension of stay as an innovator, for a postgraduate doctor, postgraduate dentist or trainee general practitioner are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a postgraduate doctor, postgraduate dentist or trainee general practitioner in accordance with paragraphs 70 to 75 of these Rules; and
- (ii) has the written consent of his official sponsor to remain under the innovator category if he is a member of a government or international scholarship agency sponsorship and that sponsorship is either ongoing or has recently come to an end at the time of the requested extension; and
- (iii) meets the requirements of paragraph 210(i)–(iv).

210DE The requirements to be met for an extension of stay as an innovator, for a participant in the Science and Engineering Graduate Scheme or International Graduates Scheme are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a participant in the Science and Engineering Graduate Scheme or International Graduates Scheme in accordance with paragraphs 135O to 135T of these Rules; and
- (ii) meets the requirements of paragraph 210A(i)–(iv).

210DF The requirements to be met for an extension of stay as an innovator, for a highly skilled migrant are that the applicant:

- (i) entered the United Kingdom or was given leave to remain as a highly skilled migrant in accordance with paragraphs 135A to 135E of these Rules; and
- (ii) meets the requirements of paragraph 210A(i)–(iv)

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS AN INVESTOR

224 The requirements to be met by a person seeking leave to enter the United Kingdom as an investor are that he:

- (i)
 - (a) has money of his own under his control in the United Kingdom amounting to no less than £1 million; or
 - (b)
 - (i) owns personal assets which, taking into account any liabilities to which he is subject, have a value exceeding £2 million; and
 - (ii) has money under his control in the United Kingdom amounting to no less than £1 million, which may include money loaned to him provided that it was loaned by a financial institution regulated by the Financial Services Authority; and
- (ii) intends to invest not less than £750,000 of his capital in the United Kingdom by way of United Kingdom Government bonds, share capital or loan capital in active and trading United Kingdom registered companies (other than those principally engaged in property investment and excluding investment by the applicant by way of deposits with a bank, building society or other enterprise whose normal course of business includes the acceptance of deposits); and
- (iii) intends to make the United Kingdom his main home; and
- (iv) is able to maintain and accommodate himself and any dependants without taking employment (other than self employment or business) or recourse to public funds; and
- (v) holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER AS AN INVESTOR

225 A person seeking leave to enter the United Kingdom as an investor may be admitted for a period not exceeding 2 years with a restriction on his right to take employment, provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

REFUSAL OF LEAVE TO ENTER AS AN INVESTOR

226 Leave to enter as an investor is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY AS AN INVESTOR EXTENSION OF STAY AS AN INVESTOR

227 The requirements for an extension of stay as an investor are that the applicant:

- (i) entered the United Kingdom with a valid United Kingdom entry clearance as an investor; and
- (ii)
 - (a) has money of his own under his control in the United Kingdom amounting to no less than £1 million; or
 - (b)
 - (i) owns personal assets which, taking into account any liabilities to which he is subject, have a value exceeding £2 million; and
 - (ii) has money under his control in the United Kingdom amounting to no less than £1 million, which may include money loaned to him provided that it was loaned by a financial institution regulated by the Financial Services Authority; and

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- (iii) has invested not less than £750,000 of his capital in the United Kingdom on the terms set out in paragraph 224 (ii) above and intends to maintain that investment on the terms set out in paragraph 224 (ii); and
- (iv) has made the United Kingdom his main home; and
- (v) is able to maintain and accommodate himself and any dependants without taking employment (other than his self employment or business) or recourse to public funds.

227A The requirements to be met for an extension of stay as an investor, for a person who has leave to enter or remain in the United Kingdom as a work permit holder are that the applicant:

- (i) entered the United Kingdom or was granted leave to remain as a work permit holder in accordance with paragraphs 128 to 133 of these Rules; and
- (ii) meets the requirements of paragraph 224(i)–(iv).

227B The requirements to be met for an extension of stay as an investor, for a person in the United Kingdom as a highly skilled migrant are that the applicant:

- (i) entered the United Kingdom or was granted leave to remain as a highly skilled migrant in accordance with paragraphs 135A to 135F of these Rules; and
- (ii) meets the requirements of paragraph 224(i)–(iv).

227C The requirements to be met for an extension of stay as an investor, for a person in the United Kingdom to establish themselves or remain in business are that the applicant:

- (i) entered the United Kingdom or was granted leave to remain as a person intending to establish themselves or remain in business in accordance with paragraphs 201 to 208 of these Rules; and
- (ii) meets the requirements of paragraph 224(i)–(iv).

227D The requirements to be met for an extension of stay as an investor, for a person in the United Kingdom as an innovator are that the applicant:

- (i) entered the United Kingdom or was granted leave to remain as an innovator in accordance with paragraphs 210A to 210F of these Rules; and
- (ii) meets the requirements of paragraph 224(i)–(iv).

227E The requirements to be met for an extension of stay as an investor, for a person in the United Kingdom as a Tier 1 (General) Migrant are that the applicant:

- (i) entered the United Kingdom or was granted leave to remain as a Tier 1 (General) Migrant; and
- (ii) meets the requirements of paragraph 224(i)–(iv).

228 An extension of stay as an investor, with a restriction on the taking of employment, may be granted for a period not exceeding 3 years at a time of 3 years, provided the Secretary of State is satisfied that each of the requirements of paragraph 227, 227A, 227B, 227C, 227D or 227E is met.

REFUSAL OF EXTENSION OF STAY AS AN INVESTOR

229 An extension of stay as an investor is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 227, 227A, 227B, 227C, 227D or 227E is met.

Writers, composers and artists

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A WRITER, COMPOSER OR ARTIST

232 The requirements to be met by a person seeking leave to enter the United Kingdom as a writer, composer or artist are that he:

- (i) has established himself outside the United Kingdom as a writer, composer or artist primarily engaged in producing original work which has been published (other than exclusively in newspapers or magazines), performed or exhibited for its literary, musical or artistic merit; and
- (ii) does not intend to work except as related to his self employment as a writer, composer or artist; and
- (iii) has for the preceding year been able to maintain and accommodate himself and any dependants from his own resources without working except as a writer, composer or artist; and
- (iv) will be able to maintain and accommodate himself and any dependants from his own resources without working except as a writer, composer or artist and without recourse to public funds; and
- (v) holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER AS A WRITER, COMPOSER OR ARTIST

233 A person seeking leave to enter the United Kingdom as a writer, composer or artist may be admitted for a period not exceeding 2 years, subject to a condition restricting his freedom to take employment, provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

REFUSAL OF LEAVE TO ENTER AS A WRITER, COMPOSER OR ARTIST

234 Leave to enter as a writer, composer or artist is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A WRITER, COMPOSER OR ARTIST

235 The requirements for an extension of stay as a writer, composer or artist are that the applicant:

- (i) entered the United Kingdom with a valid United Kingdom entry clearance as a writer, composer or artist; and
- (ii) meets the requirements of paragraph 232 (ii)–(iv).

EXTENSION OF STAY AS A WRITER, COMPOSER OR ARTIST

236 An extension of stay as a writer, composer or artist may be granted for a period not exceeding 3 years with a restriction on his freedom to take employment, provided the Secretary of State is satisfied that each of the requirements of paragraph 235 is met.

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REFUSAL OF EXTENSION OF STAY AS A WRITER, COMPOSER OR ARTIST

237 An extension of stay as a writer, composer or artist is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 235 is met.]

[Immigration rules as at 26 November 2008 relating to routes deleted on 27 November 2008

A) Requirements for leave to enter as an overseas qualified nurse or midwife

69M The requirements to be met by a person seeking leave to enter as an overseas qualified nurse or midwife are that the applicant:

- (i) has obtained confirmation from the Nursing and Midwifery Council that he is eligible:
 - (a) for admission to the Overseas Nurses Programme; or
 - (b) to undertake a period of supervised practice; or
 - (c) to undertake an adaptation programme leading to registration as a midwife; and
- (ii) has been offered:
 - (a) a supervised practice placement through an education provider that is recognised by the Nursing and Midwifery Council; or
 - (b) a supervised practice placement in a setting approved by the Nursing and Midwifery Council; or
 - (c) a midwifery adaptation programme placement in a setting approved by the Nursing and Midwifery Council; and
- (iii) did not obtain acceptance of the offer referred to in paragraph 69 (ii) by misrepresentation; and
- (iv) is able and intends to undertake the supervised practice placement or midwife adaptation programme; and
- (v) does not intend to engage in business or take employment, except:
 - (a) in connection with the supervised practice placement or midwife adaptation programme; or
 - (b) part-time work of a similar nature to the work undertaken on the supervised practice placement or midwife adaptation programme; and
- (vi) is able to maintain and accommodate himself and any dependants without recourse to public funds.

LEAVE TO ENTER THE UNITED KINGDOM AS AN OVERSEAS QUALIFIED NURSE OR MIDWIFE

69N Leave to enter the United Kingdom as an overseas qualified nurse or midwife may be granted for a period not exceeding 18 months, provided the Immigration Officer is satisfied that each of the requirements of paragraph 69M is met.

REFUSAL OF LEAVE TO ENTER AS AN OVERSEAS QUALIFIED NURSE OR MIDWIFE

69O Leave to enter the United Kingdom as an overseas qualified nurse or midwife is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 69M is met.

B) Requirements for an extension of stay as an overseas qualified nurse or midwife

69P The requirements to be met by a person seeking an extension of stay as an overseas qualified nurse or midwife are that the applicant:

- (i) has leave to enter or remain in the United Kingdom as a prospective student in accordance with paragraphs 82–87 of these rules; or
- (ii) has leave to enter or remain in the United Kingdom as a student in accordance with paragraphs 57 to 69I of these rules; or
- (iii)
 - (a) has leave to enter or remain in the United Kingdom as a work permit holder in accordance with paragraphs 128 to 135 of these rules; or

C) Requirements for leave to enter the United Kingdom to take the PLAB Test

75A The requirements to be met by a person seeking leave to enter in order to take the PLAB Test are that the applicant:

- (iv) intends to leave the United Kingdom at the end of his leave granted under this paragraph unless he is successful in the PLAB Test and granted leave to remain:
 - (c) as a work permit holder for employment in the United Kingdom as a doctor in accordance with paragraphs 128 to 135.

REQUIREMENTS FOR AN EXTENSION OF STAY IN ORDER TO TAKE THE PLAB TEST

75D The requirements for an extension of stay in the United Kingdom in order to take the PLAB Test are that the applicant:

- (iv) intends to leave the United Kingdom at the end of his leave granted under this paragraph unless he is successful in the PLAB Test and granted leave to remain:
 - (c) as a work permit holder for employment in the United Kingdom as a doctor in accordance with paragraphs 128 to 135; and

REQUIREMENTS FOR LEAVE TO ENTER TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST

75G The requirements to be met by a person seeking leave to enter to undertake a clinical attachment or dental observer post are that the applicant:

- (iv) intends to leave the United Kingdom at the end of his leave granted under this paragraph unless he is granted leave to remain:
 - (b) as a work permit holder for employment in the United Kingdom as a doctor or dentist in accordance with paragraphs 128 to 135; and

REQUIREMENTS FOR AN EXTENSION OF STAY IN ORDER TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST

75K The requirements to be met by a person seeking an extension of stay to undertake a clinical attachment or dental observer post are that the applicant:

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- (iv) intends to leave the United Kingdom at the end of his period of leave granted under this paragraph unless he is granted leave to remain:
 - (b) as a work permit holder for employment in the United Kingdom as a doctor or dentist in accordance with paragraphs 128 to 135; and

D) Definition of an 'au pair' placement

88 For the purposes of these rules an 'au pair' placement is an arrangement whereby a young person:

- (a) comes to the United Kingdom for the purpose of learning the english language; and
- (b) lives for a time as a member of an english speaking family with appropriate opportunities for study; and
- (c) helps in the home for a maximum of 5 hours per day in return for a reasonable allowance and with two free days per week.

REQUIREMENTS FOR LEAVE TO ENTER AS AN 'AU PAIR'

89 The requirements to be met by a person seeking leave to enter the United Kingdom as an 'au pair' are that he:

- (i) is seeking entry for the purpose of taking up an arranged placement which can be shown to fall within the definition set out in paragraph 88; and
- (ii) is aged between 17–27 inclusive or was so aged when first given leave to enter in this capacity; and
- (iii) is unmarried and is not a civil partner; and
- (iv) is without dependants; and
- (v) is a national of one of the following countries: Andorra, Bosnia-Herzegovina, Croatia, The Faroes, Greenland, Macedonia, Monaco, San Marino or Turkey; and
- (vi) does not intend to stay in the United Kingdom for more than 2 years as an 'au pair'; and
- (vii) intends to leave the United Kingdom on completion of his stay as an 'au pair'; and
- (viii) if he has previously spent time in the United Kingdom as an 'au pair', is not seeking leave to enter to a date beyond 2 years from the date on which he was first given leave to enter the United Kingdom in this capacity; and
- (ix) is able to maintain and accommodate himself without recourse to public funds.

LEAVE TO ENTER AS AN 'AU PAIR'

90 A person seeking leave to enter the United Kingdom as an 'au pair' may be admitted for a period not exceeding 2 years with a prohibition on employment except as an 'au pair' provided the Immigration Officer is satisfied that each of the requirements of paragraph 89 is met. (a non visa national who wishes to ascertain in advance whether a proposed 'au pair' placement is likely to meet the requirements of paragraph 89 is advised to obtain an entry clearance before travelling to the United Kingdom).

REFUSAL OF LEAVE TO ENTER AS AN 'AU PAIR'

91 An application for leave to enter as an 'au pair' is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 89 is met.

E) Working holidaymakers

REQUIREMENTS FOR LEAVE TO ENTER AS A WORKING HOLIDAYMAKER

95 The requirements to be met by a person seeking leave to enter the United Kingdom as a working holidaymaker are that he:

- (i) is a national or citizen of a country listed in Appendix 3 of these rules, or a British Overseas Citizen; a British Overseas Territories Citizen; or a British National (Overseas); and
- (ii) is aged between 17 and 30 inclusive or was so aged at the date of his application for leave to enter; and
- (iii)
 - (a) is unmarried and is not a civil partner, or
 - (b) is married to, or the civil partner of, a person who meets the requirements of this paragraph and the parties to the marriage or civil partnership intend to take a working holiday together; and
- (iv) has the means to pay for his return or onward journey, and
- (v) is able and intends to maintain and accommodate himself without recourse to public funds; and
- (vi) is intending only to take employment incidental to a holiday, and not to engage in business, or to provide services as a professional sportsperson, and in any event not to work for more than 12 months during his stay; and
- (vii) does not have dependent children any of whom are 5 years of age or over or who will reach 5 years of age before the applicant completes his working holiday; and
- (viii) intends to leave the UK at the end of his working holiday; and
- (ix) has not spent time in the United Kingdom on a previous working holidaymaker entry clearance; and
- (x) holds a valid United Kingdom entry clearance, granted for a limited period not exceeding 2 years, for entry in this capacity.

LEAVE TO ENTER AS A WORKING HOLIDAYMAKER

96 A person seeking to enter the United Kingdom as a working holidaymaker may be admitted provided he is able to produce on arrival a valid United Kingdom entry clearance granted for a period not exceeding 2 years for entry in this capacity.

REFUSAL OF LEAVE TO ENTER AS A WORKING HOLIDAYMAKER

97 Leave to enter as a working holidaymaker is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

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F) Children of working holidaymakers

REQUIREMENTS FOR LEAVE TO ENTER OR REMAIN AS THE CHILD OF A WORKING HOLIDAYMAKER

101 The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the child of a working holidaymaker are that:

- (i) he is the child of a parent admitted to, and currently present in, the United Kingdom as a working holidaymaker; and
- (ii) he is under the age of 5 and will leave the United Kingdom before reaching that age; and
- (iii) he can and will be maintained and accommodated adequately without recourse to public funds or without his parent(s) engaging in employment except as provided by paragraph 95 above; and
- (iv) both parents are being or have been admitted to the United Kingdom, save where:
 - (a) the parent he is accompanying or joining is his sole surviving parent; or
 - (b) the parent he is accompanying or joining has had sole responsibility for his upbringing; or
 - (c) there are serious and compelling family or other considerations which make exclusion from the United Kingdom undesirable and suitable arrangements have been made for his care; and
- (v) he holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, was admitted with a valid United Kingdom entry clearance for entry in this capacity, and is seeking leave to a date not beyond the date to which his parent(s) have leave to enter in the working holidaymaker category.

LEAVE TO ENTER OR REMAIN AS THE CHILD OF A WORKING HOLIDAYMAKER

102 A person seeking to enter the United Kingdom as the child of working holidaymaker/s must be able to produce on arrival a valid United Kingdom entry clearance for entry in this capacity.

REFUSAL OF LEAVE TO ENTER OR REMAIN AS THE CHILD OF A WORKING HOLIDAYMAKER

103 Leave to enter or remain in the United Kingdom as the child of a working holidaymaker is to be refused if, in relation to an application for leave to enter, a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival or, in the case of an application for leave to remain, the applicant was not admitted with a valid United Kingdom entry clearance for entry in this capacity or is unable to satisfy the secretary of state that each of the requirements of paragraph 101(i)–(iv) is met.

G) Requirements for leave to enter as a teacher or language assistant under an approved exchange scheme

110 The requirements to be met by a person seeking leave to enter the United Kingdom as a teacher or language assistant on an approved exchange scheme are that he:

- (i) is coming to an educational establishment in the United Kingdom under an exchange scheme approved by the Department for Education and Skills, the Scottish or Welsh Office of Education or the Department of Education, Northern Ireland, or administered by the British Council's Education and Training Group or the League for the Exchange of Commonwealth Teachers; and
 - (ii) intends to leave the United Kingdom at the end of his exchange period; and
 - (iii) does not intend to take employment except in the terms of this paragraph; and
 - (iv) is able to maintain and accommodate himself and any dependants without recourse to public funds; and
 - (v) holds a valid United Kingdom entry clearance for entry in this capacity.
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LEAVE TO ENTER AS A TEACHER OR LANGUAGE ASSISTANT UNDER AN EXCHANGE SCHEME

111 A person seeking leave to enter the United Kingdom as a teacher or language assistant under an approved exchange scheme may be given leave to enter for a period not exceeding 12 months provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

REFUSAL OF LEAVE TO ENTER AS A TEACHER OR LANGUAGE ASSISTANT UNDER AN APPROVED EXCHANGE SCHEME

112 Leave to enter the United Kingdom as a teacher or language assistant under an approved exchange scheme is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR EXTENSION OF STAY AS A TEACHER OR LANGUAGE ASSISTANT UNDER AN APPROVED EXCHANGE SCHEME

113 The requirements for an extension of stay as a teacher or language assistant under an approved exchange scheme are that the applicant:

- (i) entered the United Kingdom with a valid United Kingdom entry clearance as a teacher or language assistant; and
- (ii) is still engaged in the employment for which his entry clearance was granted; and
- (iii) is still required for the employment in question, as certified by the employer; and
- (iv) meets the requirements of paragraph 110 (ii)–(iv); and
- (v) would not, as a result of an extension of stay, remain in the United Kingdom as an exchange teacher or language assistant for more than 2 years from the date on which he was first given leave to enter the United Kingdom in this capacity.

EXTENSION OF STAY AS A TEACHER OR LANGUAGE ASSISTANT UNDER AN APPROVED EXCHANGE SCHEME

114 An extension of stay as a teacher or language assistant under an approved exchange scheme may be granted for a further period not exceeding 12 months provided the secretary of state is satisfied that each of the requirements of paragraph 113 is met.

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REFUSAL OF EXTENSION OF STAY AS A TEACHER OR LANGUAGE ASSISTANT UNDER AN APPROVED EXCHANGE SCHEME

115 An extension of stay as a teacher or language assistant under an approved exchange scheme is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 113 is met.

H) Requirements for leave to enter for home office approved training or work experience

116 The requirements to be met by a person seeking leave to enter the United Kingdom for Home office approved training or work experience are that he:

- (i) holds a valid work permit from the Home office issued under the Training and Work experience scheme; and
- (ii) [...]
- (iii) is capable of undertaking the training or work experience as specified in his work permit; and
- (iv) intends to leave the United Kingdom on the completion of his training or work experience; and
- (v) does not intend to take employment except as specified in his work permit; and
- (vi) is able to maintain and accommodate himself and any dependants adequately without recourse to public funds; and
- (vii) holds a valid United Kingdom entry clearance for entry in this capacity except where he holds a work permit valid for 6 months or less or he is a British national (overseas), a British overseas territories citizen, a British overseas citizen, a British protected person or a person who under the British Nationality Act 1981 is a British subject.

LEAVE TO ENTER FOR HOME OFFICE APPROVED TRAINING OR WORK EXPERIENCE

117 A person seeking leave to enter the United Kingdom for the purpose of approved training or approved work experience under the Training or Work experience scheme may be admitted to the United Kingdom for a period not exceeding the period of training or work experience approved by the Home office for this purpose (as specified in his work permit), subject to a condition restricting him to that approved employment, provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity or, where entry clearance is not required, provided the Immigration Officer is satisfied that each of the requirements of paragraph 116(i)–(vi) is met.

REFUSAL OF LEAVE TO ENTER FOR HOME OFFICE APPROVED TRAINING OR WORK EXPERIENCE

118 Leave to enter the United Kingdom for Home office approved training or work experience under the Training and Work experience scheme is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival or, where entry clearance is not required, if the Immigration Officer is not satisfied that each of the requirements of paragraph 116(i)–(vi) is met.

REQUIREMENTS FOR EXTENSION OF STAY FOR HOME OFFICE APPROVED TRAINING OR WORK EXPERIENCE

119 The requirements for an extension of stay for Home office approved training or work experience are that the applicant:

- (i) entered the United Kingdom with a valid work permit under paragraph 117 or was admitted or allowed to remain in the United Kingdom as a student; and
 - (ii) has written approval from the Home office for an extension of stay in this category; and
 - (iii) meets the requirements of paragraph 116(ii)–(vi).
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EXTENSION OF STAY FOR HOME OFFICE APPROVED TRAINING OR WORK EXPERIENCE

120 An extension of stay for approved training or approved work experience under the Training and Work experience scheme may be granted for a further period not exceeding the extended period of training or work experience approved by the Home office for this purpose (as specified in his work permit), provided that in each case the secretary of state is satisfied that the requirements of paragraph 119 are met. an extension of stay is to be subject to a condition permitting the applicant to take or change employment only with the permission of the Home office.

REFUSAL OF EXTENSION OF STAY FOR HOME OFFICE APPROVED TRAINING OR WORK EXPERIENCE

121 An extension of stay for approved training or approved work experience under the Training and Work experience scheme is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 119 is met.

I) Representatives of overseas newspapers, news agencies and broadcasting organizations requirements for leave to enter as a representative of an overseas newspaper, news agency or broadcasting organisation

136 The requirements to be met by a person seeking leave to enter the United Kingdom as a representative of an overseas newspaper, news agency or broadcasting organisation are that he:

- (i) has been engaged by that organisation outside the United Kingdom and is being posted to the United Kingdom on a long term assignment as a representative; and
- (ii) intends to work full time as a representative of that overseas newspaper, news agency or broadcasting organisation; and
- (iii) does not intend to take employment except within the terms of this paragraph; and
- (iv) can maintain and accommodate himself and any dependants adequately without recourse to public funds; and
- (v) holds a valid United Kingdom entry clearance for entry in this capacity.

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LEAVE TO ENTER AS A REPRESENTATIVE OF AN OVERSEAS NEWSPAPER, NEWSAGENCY OR BROADCASTING ORGANISATION

137 A person seeking leave to enter the United Kingdom as a representative of an overseas newspaper, news agency or broadcasting organisation may be admitted for a period not exceeding 2 years, provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

REFUSAL OF LEAVE TO ENTER AS A REPRESENTATIVE OF AN OVERSEAS NEWSPAPER, NEWS AGENCY OR BROADCASTING ORGANISATION

138 Leave to enter as a representative of an overseas newspaper, news agency or broadcasting organisation is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A REPRESENTATIVE OF AN OVERSEAS NEWSPAPER, NEWS AGENCY OR BROADCASTING ORGANISATION

139 The requirements for an extension of stay as a representative of an overseas newspaper, news agency or broadcasting organisation are that the applicant:

- (i) entered the United Kingdom with a valid United Kingdom entry clearance as a representative of an overseas newspaper, news agency or broadcasting organisation; and
- (ii) is still engaged in the employment for which his entry clearance was granted; and
- (iii) is still required for the employment in question, as certified by his employer; and
- (iv) meets the requirements of paragraph 136(ii)–(iv).

EXTENSION OF STAY AS A REPRESENTATIVE OF AN OVERSEAS NEWSPAPER, NEWS AGENCY OR BROADCASTING ORGANISATION

140 An extension of stay as a representative of an overseas newspaper, news agency or broadcasting organization may be granted for a period not exceeding 3 years provided the secretary of state is satisfied that each of the requirements of paragraph 139 is met.

REFUSAL OF EXTENSION OF STAY AS A REPRESENTATIVE OF AN OVERSEAS NEWSPAPER, NEWS AGENCY OR BROADCASTING ORGANISATION

141 An extension of stay as a representative of an overseas newspaper, news agency or broadcasting organization is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 139 is met.

J) Private servants in diplomatic households

REQUIREMENTS FOR LEAVE TO ENTER AS A PRIVATE SERVANT IN A
DIPLOMATIC HOUSEHOLD

152 The requirements to be met by a person seeking leave to enter the United Kingdom as a private servant in a diplomatic household are that he:

- (i) is aged 18 or over; and
- (ii) is employed as a private servant in the household of a member of staff of a diplomatic or consular mission who enjoys diplomatic privileges and immunity within the meaning of the Vienna Convention on diplomatic and Consular relations or a member of the family forming part of the household of such a person; and
- (iii) intends to work full time as a private servant within the terms of this paragraph; and
- (iv) does not intend to take employment except within the terms of this paragraph; and
- (v) can maintain and accommodate himself and any dependants adequately without recourse to public funds; and
- (vi) holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER AS A PRIVATE SERVANT IN A DIPLOMATIC HOUSEHOLD

153 A person seeking leave to enter the United Kingdom as a private servant in a diplomatic household may be given leave to enter for a period not exceeding 12 months provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

REFUSAL OF LEAVE TO ENTER AS A PRIVATE SERVANT IN A DIPLOMATIC HOUSEHOLD

154 Leave to enter as a private servant in a diplomatic household is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A PRIVATE SERVANT IN A
DIPLOMATIC HOUSEHOLD

155 The requirements for an extension of stay as a private servant in a diplomatic household are that the applicant:

- (i) entered the United Kingdom with a valid United Kingdom entry clearance as a private servant in a diplomatic household; and
- (ii) is still engaged in the employment for which his entry clearance was granted; and
- (iii) is still required for the employment in question, as certified by the employer; and
- (iv) meets the requirements of paragraph 152(iii)-(v).

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EXTENSION OF STAY AS A PRIVATE SERVANT IN A DIPLOMATIC HOUSEHOLD

156 An extension of stay as a private servant in a diplomatic household may be granted for a period not exceeding 12 months at a time provided the secretary of state is satisfied that each of the requirements of paragraph 155 is met.

REFUSAL OF EXTENSION OF STAY AS A PRIVATE SERVANT IN A DIPLOMATIC HOUSEHOLD

157 An extension of stay as a private servant in a diplomatic household is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 155 is met.

K) Overseas government employees

REQUIREMENTS FOR LEAVE TO ENTER AS AN OVERSEAS GOVERNMENT EMPLOYEE

160 For the purposes of these rules an overseas government employee means a person coming for employment by an overseas government or employed by the United Nations organisation or other international organization of which the United Kingdom is a member.

161 The requirements to be met by a person seeking leave to enter the United Kingdom as an overseas government employee are that he:

- (i) is able to produce either a valid United Kingdom entry clearance for entry in this capacity or satisfactory documentary evidence of his status as an overseas government employee; and
- (ii) intends to work full time for the government or organisation concerned; and
- (iii) does not intend to take employment except within the terms of this paragraph; and
- (iv) can maintain and accommodate himself and any dependants adequately without recourse to public funds.

LEAVE TO ENTER AS AN OVERSEAS GOVERNMENT EMPLOYEE

162 A person seeking leave to enter the United Kingdom as an overseas government employee may be given leave to enter for a period not exceeding 2 years, provided he is able, on arrival, to produce to the Immigration Officer a valid United Kingdom entry clearance for entry in this capacity or satisfy the Immigration Officer that each of the requirements of paragraph 161 is met.

REFUSAL OF LEAVE TO ENTER AS AN OVERSEAS GOVERNMENT EMPLOYEE

163 Leave to enter as an overseas government employee is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival or if the Immigration Officer is not satisfied that each of the requirements of paragraph 161 is met.

REQUIREMENTS FOR AN EXTENSION OF STAY AS AN OVERSEAS
GOVERNMENT EMPLOYEE

164 The requirements to be met by a person seeking an extension of stay as an overseas government employee are that the applicant:

- (i) was given leave to enter the United Kingdom under paragraph 162 as an overseas government employee; and
- (ii) is still engaged in the employment in question; and
- (iii) is still required for the employment in question, as certified by the employer; and
- (iv) meets the requirements of paragraph 161(ii)–(iv).

EXTENSION OF STAY AS AN OVERSEAS GOVERNMENT EMPLOYEE

165 An extension of stay as an overseas government employee may be granted for a period not exceeding 3 years provided the secretary of state is satisfied that each of the requirements of paragraph 164 is met.

REFUSAL OF EXTENSION OF STAY AS AN OVERSEAS GOVERNMENT EMPLOYEE

166 An extension of stay as an overseas government employee is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 164 is met.

L) Requirements for leave to enter as a minister of religion, missionary, or member of a religious order

170 The requirements to be met by a person seeking leave to enter the United Kingdom as a minister of religion, missionary or member of a religious order are that he:

- (i)
 - (a) if seeking leave to enter as a Minister of Religion has either been working for at least one year as a Minister of Religion in any of the 5 years immediately prior to the date on which the application is made or, where ordination is prescribed by a religious faith as the sole means of entering the ministry, has been ordained as a Minister of Religion following at least one year's full time or two years' part time training for the ministry; or
 - (b) if seeking leave to enter as a missionary has been trained as a missionary or has worked as a missionary and is being sent to the United Kingdom by an overseas organisation; or
 - (c) if seeking leave to enter as a member of a religious order is coming to live in a community maintained by the religious order of which he is a member and, if intending to teach, does not intend to do so save at an establishment maintained by his order; and
- (ii) intends to work full time as a minister of religion, missionary or for the religious order of which he is a member; and
- (iii) does not intend to take employment except within the terms of this paragraph; and
- (iv) can maintain and accommodate himself and any dependants adequately without recourse to public funds; and

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- (iva) if seeking leave as a Minister of Religion can produce an international english language Testing system certificate issued to him to certify that he has achieved level 6 competence in spoken and written english and that it is dated not more than two years prior to the date on which the application is made.
- (v) holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER AS A MINISTER OF RELIGION, MISSIONARY, OR MEMBER OF A RELIGIOUS ORDER

171 A person seeking leave to enter the United Kingdom as a minister of religion, missionary or member of a religious order may be admitted for a period not exceeding 2 years provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

REFUSAL OF LEAVE TO ENTER AS A MINISTER OF RELIGION, MISSIONARY OR MEMBER OF A RELIGIOUS ORDER

172 Leave to enter as a minister of religion, missionary or member of a religious order is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A MINISTER OF RELIGION WHERE ENTRY TO THE UNITED KINGDOM WAS GRANTED IN THAT CAPACITY

173 The requirements for an extension of stay as a minister of religion, where entry to the United Kingdom was granted in that capacity, missionary or member of a religious order are that the applicant:

- (i) entered the United Kingdom with a valid United Kingdom entry clearance as a minister of religion, missionary or member of a religious order; and
- (ii) is still engaged in the employment for which his entry clearance was granted; and
- (iii) is still required for the employment in question as certified by the leadership of his congregation, his employer or the head of his religious order; and
- (iv)
 - (a) if he entered the United Kingdom as a minister of religion, missionary or member of a religious order in accordance with sub paragraph (i) prior to 23 August 2004 meets the requirements of paragraph 170(ii)–(iv); or
 - (b) if he entered the United Kingdom as a minister of religion, missionary or member of a religious order in accordance with sub paragraph (i), on or after 23 August 2004 but prior to 19 April 2007, or was granted leave to remain in accordance with paragraph 174B between those dates, meets the requirements of paragraph 170(ii)–(iv), and if a minister of religion met the requirement to produce an international english language Testing system certificate certifying that he achieved level 4 competence in spoken english at the time he was first granted leave in this capacity; or
 - (c) if he entered the United Kingdom as a minister of religion, missionary or member of a religious order in accordance with sub paragraph (i) on or after 19 April 2007, or was granted leave to remain in accordance with paragraph 174B on or after that date, meets the requirements of paragraph 170(ii)–(iv), and if a minister of religion met the requirement

to produce an international english language Testing system certificate certifying that he achieved level 6 competence in spoken and written english at the time he was first granted leave in this capacity.

EXTENSION OF STAY AS A MINISTER OF RELIGION, MISSIONARY OR MEMBER OF A RELIGIOUS ORDER

174 An extension of stay as a minister of religion, missionary or member of a religious order may be granted for a period not exceeding 3 years provided the secretary of state is satisfied that each of the requirements of paragraph 173 is met.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A MINISTER OF RELIGION WHERE ENTRY TO THE UNITED KINGDOM WAS NOT GRANTED IN THAT CAPACITY

174A The requirements for an extension of stay as a minister of religion for an applicant who did not enter the United Kingdom in that capacity are that he:

- (i) entered the United Kingdom, or was given an extension of stay, in accordance with these rules, except as a minister of religion or as a visitor under paragraphs 40–56 of these rules, and has spent a continuous period of at least 12 months here pursuant to that leave immediately prior to the application being made; and
- (ii) has either been working for at least one year as a minister of religion in any of the 5 years immediately prior to the date on which the application is made (provided that, when doing so, he was not in breach of a condition of any subsisting leave to enter or remain) or, where ordination is prescribed by a religious faith as the sole means of entering the ministry, has been ordained as a minister of religion following at least one year's full-time or two years part-time training for the ministry; and
- (iii) is imminently to be appointed, or has been appointed, to a position as a minister of religion in the United Kingdom and is suitable for such a position, as certified by the leadership of his prospective congregation; and
- (iv) meets the requirements of paragraph 170(ii)–(iv)

EXTENSION OF STAY AS A MINISTER OF RELIGION WHERE LEAVE TO ENTER WAS NOT GRANTED IN THAT CAPACITY

174B An extension of stay as a minister of religion may be granted for a period not exceeding 3 years at a time provided the secretary of state is satisfied that each of the requirements of paragraph 174A is met.

REFUSAL OF EXTENSION OF STAY AS A MINISTER OF RELIGION, MISSIONARY OR MEMBER OF A RELIGIOUS ORDER

175 An extension of stay as a minister of religion, missionary or member of a religious order is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 173 or 174A is met.

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M) Refusal of indefinite leave to remain for a minister of religion, missionary or member of a religious order

177 Indefinite leave to remain in the United Kingdom for a minister of religion, missionary or member of a religious order is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 176 is met.

177A For the purposes of these rules: Visiting religious workers and religious workers in non-pastoral roles

- (i) a visiting religious worker means a person coming to the UK for a short period to perform religious duties at one or more locations in the UK;
- (ii) a religious worker in a non-pastoral role means a person employed in the UK by the faith he is coming here to work for, whose duties include performing religious rites within the religious community, but not preaching to a congregation.

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A VISITING RELIGIOUS WORKER OR A RELIGIOUS WORKER IN A NON-PASTORAL ROLE

177B The requirements to be met by a person seeking leave to enter as a visiting religious worker or a religious worker in a non-pastoral role are that the applicant:

- (i) if seeking leave to enter as a visiting religious worker:
 - (i) is an established religious worker based overseas; and
 - (ii) submits a letter(s) from a senior member or senior representative of one or more local religious communities in the UK confirming that he is invited to perform religious duties as a visiting religious worker at one or more locations in the UK and confirming the expected duration of that employment; and
 - (iii) if he has been granted leave as a visiting religious worker in the last 12 months, is not seeking leave to enter which, when amalgamated with his previous periods of leave in this category in the last 12 months, would total more than 6 months; or
- (b) if seeking leave to enter as a religious worker in a non-pastoral role:
 - (i) has at least one year of full time training or work experience, or a period of part time training or work experience equivalent to one year full time training or work experience, accrued in the five years preceding the application in the faith with which he has employment in the UK; and
 - (ii) can show that, at the time of his application, at least one full-time member of staff of the local religious community which the applicant is applying to join in the UK has a sufficient knowledge of english; and
 - (iii) submits a letter from a senior member or senior representative of the local religious community which has invited him to the UK, confirming that he has been offered employment as religious worker in a non-pastoral role in that religious community, and confirming the duration of that employment; and
 - (ii) does not intend to take employment except as a visiting religious worker or religious worker in a non-pastoral role, whichever is the basis of his application; and
 - (iii) does not intend to undertake employment as a Minister of religion, Missionary or Member of a religious order, as described in paragraphs 169–177 of these rules; and
 - (iv) is able to maintain and accommodate himself and any dependants without recourse to public funds, or will, with any dependants, be maintained and accommodated adequately by the religious community employing him; and

- (v) intends to leave the UK at the end of his leave in this category; and
- (vi) holds a valid entry clearance for entry in this capacity except where he is a British national (overseas), a British overseas territories citizen, a British overseas citizen, a British protected person or a person who under the British nationality act 1981 is a British subject.

LEAVE TO ENTER AS A VISITING RELIGIOUS WORKER OR A RELIGIOUS WORKER IN A NON-PASTORAL ROLE

177C Leave to enter the United Kingdom as a visiting religious worker or a religious worker in a non-pastoral role may be granted:

- (a) as a visiting religious worker, for a period not exceeding 6 months; or
- (b) as a religious worker in a non-pastoral role, for a period not exceeding 12 months; provided the Immigration Officer is satisfied that each of the requirements of paragraph 177B is met.

REFUSAL OF LEAVE TO ENTER AS A VISITING RELIGIOUS WORKER OR A RELIGIOUS WORKER IN A NON-PASTORAL ROLE

177D Leave to enter as a visiting religious worker or a religious worker in a non pastoral role is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 177B is met.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A VISITING RELIGIOUS WORKER OR A RELIGIOUS WORKER IN A NON PASTORAL ROLE

177E The requirements to be met by a person seeking an extension of stay as a visiting religious worker or a religious worker in a non-pastoral role are that the applicant:

- (i) entered the United Kingdom with a valid entry clearance in this capacity or was given leave to enter as a visiting religious worker or a religious worker in a non-pastoral role; and
- (ii) intends to continue employment as a visiting religious worker or a religious worker in a non-pastoral role; and
- (iii) if seeking an extension of stay as a visiting religious worker:
 - (a) meets the requirement of paragraph 177B(i)(a)(i) above; and
 - (b) submits a letter from a senior member or senior representative of one or more local religious communities in the UK confirming that he is still wanted to perform religious duties as a visiting religious worker at one or more locations in the UK and confirming the expected duration of that employment; and
 - (c) would not, as the result of an extension of stay, be granted leave as a visiting religious worker which, when amalgamated with his previous periods of leave in this category in the last 12 months, would total more than 6 months; or
- (iv) if seeking an extension of stay as a religious worker in a non-pastoral role:
 - (a) meets the requirements of paragraph 177B(i)(b)(i) and (ii); and
 - (b) submits a letter from a senior member or senior representative of the local religious community for which he works in the UK confirming that his employment as a religious worker in a non-pastoral role in that religious community will continue, and confirming the duration of that employment; and

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- (c) would not, as the result of an extension of stay, remain in the UK for a period of more than 24 months as a religious worker in a non-pastoral role; and
- (v) meets the requirements of paragraph 177B(ii) to (v); and

EXTENSION OF STAY AS A VISITING RELIGIOUS WORKER OR A RELIGIOUS WORKER IN A NON-PASTORAL ROLE

177F An extension of stay as a visiting religious worker or a religious worker in a non-pastoral role may be granted:

- (a) as a visiting religious worker, for a period not exceeding 6 months; or
- (b) as a religious worker in a non-pastoral role, for a period not exceeding 24 months; if the secretary of state is satisfied that each of the requirements of paragraph 177E is met.

REFUSAL OF AN EXTENSION OF STAY AS A VISITING RELIGIOUS WORKER OR A RELIGIOUS WORKER IN A NON PASTORAL ROLE

177G An extension of stay as a visiting religious worker or a religious worker in a non-pastoral role is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 177E is met.

N) Airport based operational ground staff of overseas-owned airlines

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS-OWNED AIRLINE

178 The requirements to be met by a person seeking leave to enter the United Kingdom as a member of the operational ground staff of an overseas owned airline are that he:

- (i) has been transferred to the United Kingdom by an overseas-owned airline operating services to and from the United Kingdom to take up duty at an international airport as station manager, security manager or technical manager; and
- (ii) intends to work full time for the airline concerned; and
- (iii) does not intend to take employment except within the terms of this paragraph; and
- (iv) can maintain and accommodate himself and any dependants without recourse to public funds; and
- (v) holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER AS A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS OWNED AIRLINE

179 A person seeking leave to enter the United Kingdom as a member of the operational ground staff of an overseas owned airline may be given leave to enter for a period not exceeding 2 years, provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

REFUSAL OF LEAVE TO ENTER AS A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS OWNED AIRLINE

180 Leave to enter as a member of the operational ground staff of an overseas owned airline is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS OWNED AIRLINE

181 The requirements to be met by a person seeking an extension of stay as a member of the operational ground staff of an overseas owned airline are that the applicant:

- (i) entered the United Kingdom with a valid United Kingdom entry clearance as a member of the operational ground staff of an overseas owned airline; and
- (ii) is still engaged in the employment for which entry was granted; and
- (iii) is still required for the employment in question, as certified by the employer; and
- (iv) meets the requirements of paragraph 178(ii)–(iv).

EXTENSION OF STAY AS A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS OWNED AIRLINE

182 An extension of stay as a member of the operational ground staff of an overseas owned airline may be granted for a period not exceeding 3 years, provided the secretary of state is satisfied that each of the requirements of paragraph 181 is met.

REFUSAL OF EXTENSION OF STAY AS A MEMBER OF THE OPERATIONAL GROUND STAFF OF AN OVERSEAS OWNED AIRLINE

183 An extension of stay as a member of the operational ground staff of an overseas owned airline is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 181 is met.

O) Retired persons of independent means

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A RETIRED PERSON OF INDEPENDENT MEANS

263 The requirements to be met by a person seeking leave to enter the United Kingdom as a retired person of independent means are that he:

- (i) is at least 60 years old; and
- (ii) has under his control and disposable in the United Kingdom an income of his own of not less than £25,000 per annum; and
- (iii) is able and willing to maintain and accommodate himself and any dependants indefinitely in the United Kingdom from his own resources with no assistance from any other person and without taking employment or having recourse to public funds; and
- (iv) can demonstrate a close connection with the United Kingdom; and
- (v) intends to make the United Kingdom his main home; and

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- (vi) holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER AS A RETIRED PERSON OF INDEPENDENT MEANS

264 A person seeking leave to enter the United Kingdom as a retired person of independent means may be admitted subject to a condition prohibiting employment for a period not exceeding 5 years, provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

REFUSAL OF LEAVE TO ENTER AS A RETIRED PERSON OF INDEPENDENT MEANS

265 Leave to enter as a retired person of independent means is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A RETIRED PERSON OF INDEPENDENT MEANS

266 The requirements for an extension of stay as a retired person of independent means are that the applicant:

- (i) entered the United Kingdom with a valid United Kingdom entry clearance as a retired person of independent means; and
- (ii) meets the requirements of paragraph 263(ii)–(iv); and
- (iii) has made the United Kingdom his main home.

EXTENSION OF STAY AS A RETIRED PERSON OF INDEPENDENT MEANS

266A The requirements for an extension of stay as a retired person of independent means for a person in the United Kingdom as a work permit holder are that the applicant:

- (i) entered the United Kingdom or was granted leave to remain as a work permit holder in accordance with paragraphs 128 to 133 of these rules; and
- (ii) meets the requirements of paragraph 263(i)–(v).

266B The requirements for an extension of stay as a retired person of independent means for a person in the United Kingdom as a highly skilled migrant are that the applicant:

- (i) entered the United Kingdom or was granted leave to remain as a highly skilled migrant in accordance with paragraphs 135A to 135F of these rules; and
- (ii) meets the requirements of paragraph 263(i)–(v).

266C The requirements for an extension of stay as a retired person of independent means for a person in the United Kingdom to establish themselves or remain in business are that the applicant:

- (i) entered the United Kingdom or was granted leave to remain as a person intending to establish themselves or remain in business in accordance with paragraphs 201 to 208 of these rules; and
- (ii) meets the requirements of paragraph 263(i)–(v).

266D The requirements for an extension of stay as a retired person of independent means for a person in the United Kingdom as an innovator are that the applicant:

- (i) entered the United Kingdom or was granted leave to remain as an innovator in accordance with paragraphs 210A to 210F of these rules; and
- (ii) meets the requirements of paragraph 263(i)–(v).

266E The requirements for an extension of stay as a retired person of independent means for a person in the UK as a Tier 1 (General) Migrant, Tier 1 (Entrepreneur) Migrant or Tier 1 (Investor) Migrant are that the applicant:

- (i) entered the UK or was granted leave to remain as a Tier 1 (General) Migrant, Tier 1 (Entrepreneur) Migrant or Tier 1 (investor) Migrant; and
- (ii) meets the requirements of paragraphs 263(i) to (v).

267 An extension of stay as a retired person of independent means, with a prohibition on the taking of employment, may be granted so as to bring the person's stay in this category up to a maximum of 5 years in aggregate, provided the secretary of state is satisfied that each of the requirements of paragraph 266 is met. an extension of stay as a retired person of independent means, with a prohibition on the taking of employment, may be granted for a maximum period of 5 years, provided the secretary of state is satisfied that each of the requirements of paragraph 266A, 266B, 266C, 266D or 266E is met.

REFUSAL OF EXTENSION OF STAY AS A RETIRED PERSON OF INDEPENDENT MEANS

268 An extension of stay as a retired person of independent means is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 266, 266A, 266B, 266C, 266D or 266E is met.

INDEFINITE LEAVE TO REMAIN FOR A RETIRED PERSON OF INDEPENDENT MEANS

269 Indefinite leave to remain may be granted, on application, to a person admitted as a retired person of independent means provided he:

- (i) has spent a continuous period of 5 years in the United Kingdom in this capacity; and
- (ii) has met the requirements of paragraph 266 throughout the 5 year period and continues to do so.

REFUSAL OF INDEFINITE LEAVE TO REMAIN FOR A RETIRED PERSON OF INDEPENDENT MEANS

270 Indefinite leave to remain in the United Kingdom for a retired person of independent means is to be refused if the secretary of state is not satisfied that each of the requirements of paragraph 269 is met.]

Appendix 5 Immigration Rules

[Immigration rules as at 30 March 2009 relating to Students, Student Nurses, Students Re-sitting an Examination, Students Writing Up a Thesis, Postgraduate Doctors or Dentists, Sabbatical Officers and applicants under the Sectors-Based Scheme

Specified forms and procedures for applications or claims in connection with immigration

34B Where an application form is specified, it must be sent by prepaid post to the *United Kingdom Border Agency* of the Home Office, or submitted in person at a public enquiry office of the *United Kingdom Border Agency* of the Home Office, save for the following exceptions:

- (i) an application may not be submitted at a public enquiry office of the *United Kingdom Border Agency* of the Home Office if it is an application for:
 - (f) limited leave to remain as a Tier 5 (Temporary Worker) Migrant.

Requirements for leave to enter as a student

57 The requirements to be met by a person seeking leave to enter the United Kingdom as a student are that he:

- (i) has been accepted for a course of study, or a period of research, which is to be provided by or undertaken at an organisation which is included on the Register of Education and Training Providers, and is at either;
 - (a) a publicly funded institution of further or higher education which maintains satisfactory records of enrolment and attendance of students and supplies these to the *United Kingdom Border Agency* when requested; or
 - (b) a bona fide private education institution; or (c) an independent fee paying school outside the maintained sector which maintains satisfactory records of enrolment and attendance of students and supplies these to the *United Kingdom Border Agency* when requested; and
- (ii) is able and intends to follow either:
 - (a) a recognised full-time degree course or postgraduate studies at a publicly funded institution of further or higher education; or
 - (b) a period of study and/or research in excess of 6 months at a publicly funded institution of higher education where this forms part of an overseas degree course; or
 - (c) a weekday full-time course involving attendance at a single institution for a minimum of 15 hours organised daytime study per week of a single subject, or directly related subjects; or
 - (d) a full-time course of study at an independent fee paying school; and
- (iii) if under the age of 16 years is enrolled at an independent fee paying school on a full time course of studies which meets the requirements of the Education Act 1944; and
- (iv) if he has been accepted to study externally for a degree at a private education institution, he is also registered as an external student with the UK degree awarding body; and
- (v) he holds a valid Academic Technology Approval Scheme (ATAS) clearance certificate from the Counter-Proliferation Department of the Foreign and Commonwealth Office which relates to the course, or area of research, he intends to undertake and the institution at which he wishes to undertake it; if he intends to undertake either,

- (i) postgraduate studies leading to a Doctorate or Masters degree by research in one of the disciplines listed in paragraph 1 of Appendix 6 to these Rules; or
- (ii) postgraduate studies leading to a taught Masters degree in one of the disciplines listed in paragraph 2 of Appendix 6 to these Rules; or
- (iii) a period of study or research, as described in paragraph 57(ii)(b), in one of the disciplines listed in paragraph 1 or 2 of Appendix 6 to these Rules, that forms part of an overseas postgraduate qualification; and
- (vi) intends to leave the United Kingdom at the end of his studies; and
- (vii) does not intend to engage in business or to take employment, except part-time or vacation work undertaken with the consent of the Secretary of State; and
- (viii) is able to meet the costs of his course, and accommodation and the maintenance of himself and any dependants without taking employment or engaging in business or having recourse to public funds; and
- (ix) holds a valid United Kingdom entry clearance for entry in this capacity.

Leave to enter as a student

58 A person seeking leave to enter the United Kingdom as a student may be admitted for an appropriate period depending on the length of his course of study and his means, and with a condition restricting his freedom to take employment, provided he is able to produce to the Immigration Officer on arrival a valid United Kingdom entry clearance for entry in this capacity.

Refusal of leave to enter as a student

59 Leave to enter as a student is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 57 is met.

Requirements for an extension of stay as a student

60 The requirements for an extension of stay as a student are that the applicant:

- (i)
 - (a) was last admitted to the United Kingdom in possession of a valid student entry clearance in accordance with paragraphs 57–62 or valid prospective student entry clearance in accordance with paragraphs 82–87 of these Rules; or
 - (b) has previously been granted leave to enter or remain in the United Kingdom to re-sit an examination in accordance with paragraphs 69A–69F of these Rules; or
 - (c) if he has been accepted on a course of study at degree level or above, has previously been granted leave to enter or remain in the United Kingdom in accordance with paragraphs 87A–87F, 128–135, 135O–135T and 143A to 143F or 245V to 245ZA of these Rules; or
 - (d) has valid leave as a student in accordance with paragraphs 57–62 of these Rules; and
- (ii) meets the requirements for admission as a student set out in paragraph 57(i) – (viii); and
- (iii) has produced evidence of his enrolment on a course which meets the requirements of paragraph 57; and

Appendix 5 Immigration Rules

- (iv) can produce satisfactory evidence of regular attendance during any course which he has already begun; or any other course for which he has been enrolled in the past; and
- (v) can show evidence of satisfactory progress in his course of study including the taking and passing of any relevant examinations; and (vi) would not, as a result of an extension of stay, spend more than 2 years on short courses below degree level (ie courses of less than 1 years duration, or longer courses broken off before completion); and
- (vii) has not come to the end of a period of government or international scholarship agency sponsorship, or has the written consent of his official sponsor for a further period of study in the United Kingdom and satisfactory evidence that sufficient sponsorship funding is available.

Extension of stay as a student

61 An extension of stay as a student may be granted, subject to a restriction on his freedom to take employment, provided the Secretary of State is satisfied that the applicant meets each of the requirements of paragraph 60.

Refusal of extension of stay as a student

62 An extension of stay as a student is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 60 is met.

Student nurses

DEFINITION OF STUDENT NURSE

63 For the purposes of these Rules the term student nurse means a person accepted for training as a student nurse or midwife leading to a registered nursing qualification.

REQUIREMENTS FOR LEAVE TO ENTER AS A STUDENT NURSE

64 The requirements to be met by a person seeking leave to enter the United Kingdom as a student nurse are that the person:

- (i) comes within the definition set out in paragraph 63 above; and
- (ii) has been accepted for a course of study in a recognised nursing educational establishment offering nursing training which meets the requirements of the Nursing and Midwifery Council.
- (iii) did not obtain acceptance on the course of study referred to in (ii) above by misrepresentation;
- (iv) is able and intends to follow the course; and
- (v) does not intend to engage in business or take employment except in connection with the training course; and
- (vi) intends to leave the United Kingdom at the end of the course; and
- (vii) has sufficient funds available for accommodation and maintenance for himself and any dependants without engaging in business or taking employment (except in connection with the training course) or having recourse to public funds. The possession of a Department of Health bursary may be taken into account in assessing whether the student meets the maintenance requirement.

LEAVE TO ENTER THE UNITED KINGDOM AS A STUDENT NURSE

65 A person seeking leave to enter the United Kingdom as a student nurse may be admitted for the duration of the course, with a restriction on his freedom to take employment, provided the Immigration Officer is satisfied that each of the requirements of paragraph 64 is met.

REFUSAL OF LEAVE TO ENTER AS A STUDENT NURSE

66 Leave to enter as a student nurse is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 64 is met.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A STUDENT NURSE

67 The requirements for an extension of stay as a student nurse are that the applicant:

- (i) was last admitted to the United Kingdom in possession of a valid student entry clearance, or valid prospective student entry clearance in accordance with paragraphs 82 to 87 of these Rules, if he is a person specified in Appendix 1 to these Rules; and
- (ii) meets the requirements set out in paragraph 64(i)–(vii); and
- (iii) has produced evidence of enrolment at a recognised nursing educational establishment; and
- (iv) can provide satisfactory evidence of regular attendance during any course which he has already begun; or any other course for which he has been enrolled in the past; and
- (v) would not, as a result of an extension of stay, spend more than 4 years in obtaining the relevant qualification; and
- (vi) has not come to the end of a period of government or international scholarship agency sponsorship, or has the written consent of his official sponsor for a further period of study in the United Kingdom and evidence that sufficient sponsorship funding is available.

EXTENSION OF STAY AS A STUDENT NURSE

68 An extension of stay as a student nurse may be granted, subject to a restriction on his freedom to take employment, provided the Secretary of State is satisfied that the applicant meets each of the requirements of paragraph 67.

REFUSAL OF EXTENSION OF STAY AS A STUDENT NURSE

69 An extension of stay as a student nurse is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 67 is met.

Re-sits of examinations

REQUIREMENTS FOR LEAVE TO ENTER TO RE-SIT AN EXAMINATION

69A The requirements to be met by a person seeking leave to enter the United Kingdom in order to re-sit an examination are that the applicant:

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- (i)
 - (a) meets the requirements for admission as a student set out in paragraph 57(i)–(viii); or
 - (b) met the requirements for admission as a student set out in paragraph 57(i)–(iii) in the previous academic year and continues to meet the requirements of paragraph 57(iv)–(viii) save, for the purpose of paragraphs (i) (a) or (b) above, where leave was last granted in accordance with paragraphs 57–62 of these Rules before 30 November 2007, the requirements of paragraph 57(v) do not apply; and
- (ii) has produced written confirmation from the education institution or independent fee paying school which he attends or attended in the previous academic year that he is required to re-sit an examination; and
- (iii) can provide satisfactory evidence of regular attendance during any course which he has already begun; or any other course for which he has been enrolled in the past; and
- (iv) has not come to the end of a period of government or international scholarship agency sponsorship, or has the written consent of his official sponsor for a further period of study in the United Kingdom and satisfactory evidence that sufficient sponsorship funding is available; and
- (v) has not previously been granted leave to re-sit the examination.

LEAVE TO ENTER TO RE-SIT AN EXAMINATION

69B A person seeking leave to enter the United Kingdom in order to re-sit an examination may be admitted for a period sufficient to enable him to re-sit the examination at the first available opportunity with a condition restricting his freedom to take employment, provided the Immigration Officer is satisfied that each of the requirements of paragraph 69A is met.

REFUSAL OF LEAVE TO ENTER TO RE-SIT AN EXAMINATION

69C Leave to enter to re-sit an examination is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 69A is met.

REQUIREMENTS FOR AN EXTENSION OF STAY TO RE-SIT AN EXAMINATION

69D The requirements for an extension of stay to re-sit an examination are that the applicant:

- (i) was admitted to the United Kingdom with a valid student entry clearance if he was then a visa national; and
- (ii) meets the requirements set out in paragraph 69A(i)–(v).

EXTENSION OF STAY TO RE-SIT AN EXAMINATION

69E An extension of stay to re-sit an examination may be granted for a period sufficient to enable the applicant to re-sit the examination at the first available opportunity, subject to a restriction on his freedom to take employment, provided the Secretary of State is satisfied that the applicant meets each of the requirements of paragraph 69D.

REFUSAL OF EXTENSION OF STAY TO RE-SIT AN EXAMINATION

69F An extension of stay to re-sit an examination is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 69D is met.

Writing up a thesis

REQUIREMENTS FOR LEAVE TO ENTER TO WRITE UP A THESIS

69G The requirements to be met by a person seeking leave to enter the United Kingdom in order to write up a thesis are that the applicant:

- (i)
 - (a) meets the requirements for admission as a student set out in paragraph 57(i)–(viii); or
 - (b) met the requirements for admission as a student set out in paragraph 57(i)–(iii) in the previous academic year and continues to meet the requirements of paragraph 57(iv)–(viii) save, for the purpose of paragraphs (i)(a) or (b) above, where leave was last granted in accordance with paragraphs 57–62 of these Rules before 30 November 2007, the requirements of paragraph 57(v) do not apply; and
- (ii) can provide satisfactory evidence that he is a postgraduate student enrolled at an education institution as either a full time, part time or writing up student; and
- (iii) can demonstrate that his application is supported by the education institution; and
- (iv) has not come to the end of a period of government or international scholarship agency sponsorship, or has the written consent of his official sponsor for a further period of study in the United Kingdom and satisfactory evidence that sufficient sponsorship funding is available; and
- (v) has not previously been granted 12 months leave to write up the same thesis.

LEAVE TO ENTER TO WRITE UP A THESIS

69H A person seeking leave to enter the United Kingdom in order to write up a thesis may be admitted for 12 months with a condition restricting his freedom to take employment, provided the Immigration Officer is satisfied that each of the requirements of paragraph 69G is met.

REFUSAL OF LEAVE TO ENTER TO WRITE UP A THESIS

69I Leave to enter to write up a thesis is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 69G is met.

REQUIREMENTS FOR AN EXTENSION OF STAY TO WRITE UP A THESIS

69J The requirements for an extension of stay to write up a thesis are that the applicant:

- (i) was admitted to the United Kingdom with a valid student entry clearance if he was then a visa national; and

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- (ii) meets the requirements set out in paragraph 69G(i)–(v).

EXTENSION OF STAY TO WRITE UP A THESIS

69K An extension of stay to write up a thesis may be granted for 12 months subject to a restriction on his freedom to take employment, provided the Secretary of State is satisfied that the applicant meets each of the requirements of paragraph 69J.

REFUSAL OF EXTENSION OF STAY TO WRITE UP A THESIS

69L An extension of stay to write up a thesis is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 69J is met.

Postgraduate doctors, dentists and trainee general practitioners

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM AS A POSTGRADUATE DOCTOR OR DENTIST

70 The requirements to be met by a person seeking leave to enter the UK as a postgraduate doctor or dentist are that the applicant:

- (i) has successfully completed and obtained a recognised UK degree in medicine or dentistry from either:
 - (a) a UK publicly funded institution of further or higher education; or
 - (b) a UK bona fide private education institution which maintains satisfactory records of enrolment and attendance; and
- (ii) has previously been granted leave:
 - (a) in accordance with paragraphs 57 to 69L of these Rules for the final academic year of the studies referred to in (i) above; and
 - (b) as a student under paragraphs 57 to 62 of these Rules for at least one other academic year (aside from the final year) of the studies referred to in (i) above; and
- (iii) holds a letter from the Postgraduate Dean confirming he has a full-time place on a recognised Foundation Programme; and
- (iv) intends to train full time in his post on the Foundation Programme; and
- (v) is able to maintain and accommodate himself and any dependants without recourse to public funds; and
- (vi) intends to leave the United Kingdom if, on expiry of his leave under this paragraph, he has not been granted leave to remain in the United Kingdom as:
 - (a) a doctor or dentist undertaking a period of clinical attachment or a dental observer post in accordance with paragraphs 75G to 75M of these Rules; or
 - (b) a Tier 2 Migrant
 - (c) a Tier 1 (General) Migrant or Tier (1) (Entrepreneur) Migrant; and
- (vii) if his study at medical school or dental school, or any subsequent studies he has undertaken, were sponsored by a government or international scholarship agency, he has the written consent of his sponsor to enter or remain in the United Kingdom as a postgraduate doctor or dentist; and
- (viii) if he has not previously been granted leave in this category has completed his medical or dental degree in the 12 months preceding this application; and

- (ix) if he has previously been granted leave as a postgraduate doctor or dentist, is not seeking leave to enter to a date beyond 3 years from that date on which he was first granted leave to enter or remain in this category; and
- (x) holds a valid entry clearance for entry in this capacity except where he is a British National (Overseas), a British Overseas Territories Citizen, a British Overseas Citizen, a British Protected Person or a person who under the British Nationality Act 1981 is a British Subject.

LEAVE TO ENTER AS A POSTGRADUATE DOCTOR OR DENTIST

71 Leave to enter the United Kingdom as a postgraduate doctor or dentist may be granted for the duration of the Foundation Programme, for a period not exceeding 26 months, provided the Immigration Officer is satisfied that each of the requirements of paragraph 70 is met.

REFUSAL OF LEAVE TO ENTER AS A POSTGRADUATE DOCTOR OR DENTIST

72 Leave to enter as a postgraduate doctor or dentist is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 70 is met.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A POSTGRADUATE DOCTOR OR DENTIST

73 The requirements to be met by a person seeking an extension of stay as a postgraduate doctor or dentist are that the applicant:

- (i) meets the requirements of paragraph 70(i) to (vii); and
- (ii) has leave to enter or remain in the United Kingdom as either:
 - (a) a student in accordance with paragraphs 57 to 69L of these Rules; or
 - (b) as a postgraduate doctor or dentist in accordance with paragraphs 70 to 75 of these Rules; or
 - (c) as a doctor or dentist undertaking a period of clinical attachment or a dental observer post in accordance with paragraphs 75G to 75M of these Rules.
- (iii) if he has not previously been granted leave in this category, has completed his medical or dental degree in the last 12 months;
- (iv) would not, as a result of an extension of stay, remain in the United Kingdom as a postgraduate doctor or dentist to a date beyond 3 years from the date on which he was first given leave to enter or remain in this capacity.

EXTENSION OF STAY AS A POSTGRADUATE DOCTOR OR DENTIST

74 An extension of stay as a postgraduate doctor or dentist may be granted for the duration of the Foundation Programme, for a period not exceeding 3 years, provided the Secretary of State is satisfied that each of the requirements of paragraph 73 is met.

REFUSAL OF AN EXTENSION OF STAY AS A POSTGRADUATE DOCTOR OR DENTIST

75 An extension of stay as a postgraduate doctor or dentist is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 73 is met.

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REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM TO TAKE THE PLAB TEST

75A The requirements to be met by a person seeking leave to enter in order to take the PLAB Test are that the applicant:

- (i) is a graduate from a medical school and intends to take the PLAB Test in the United Kingdom; and
- (ii) can provide documentary evidence of a confirmed test date or of his eligibility to take the PLAB Test; and
- (iii) meets the requirements of paragraph 41 (iii) – (vii) for entry as a visitor; and
- (iv) intends to leave the United Kingdom at the end of his leave granted under this paragraph unless he is successful in the PLAB Test and granted leave to remain:
 - (a) as a postgraduate doctor or trainee general practitioner in accordance with paragraphs 70 to 75; or
 - (b) to undertake a clinical attachment in accordance with paragraphs 75G to 75M of these Rules; or

LEAVE TO ENTER TO TAKE THE PLAB TEST

75B A person seeking leave to enter the United Kingdom to take the PLAB Test may be admitted for a period not exceeding 6 months, provided the Immigration Officer is satisfied that each of the requirements of paragraph 75A is met.

REFUSAL OF LEAVE TO ENTER TO TAKE THE PLAB TEST

75C Leave to enter the United Kingdom to take the PLAB Test is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 75A is met.

REQUIREMENTS FOR AN EXTENSION OF STAY IN ORDER TO TAKE THE PLAB TEST

75D The requirements for an extension of stay in the United Kingdom in order to take the PLAB Test are that the applicant:

- (i) was given leave to enter the United Kingdom for the purposes of taking the PLAB Test in accordance with paragraph 75B of these Rules; and
- (ii) intends to take the PLAB Test and can provide documentary evidence of a confirmed test date; and
- (iii) meets the requirements set out in paragraph 41 (iii)–(vii); and
- (iv) intends to leave the United Kingdom at the end of his leave granted under this paragraph unless he is successful in the PLAB Test and granted leave to remain:
 - (a) as a postgraduate doctor or trainee general practitioner in accordance with paragraphs 70 to 75; or
 - (b) to undertake a clinical attachment in accordance with paragraphs 75G to 75M of these Rules; or
- (v) would not as a result of an extension of stay spend more than 18 months in the United Kingdom for the purpose of taking the PLAB Test.

EXTENSION OF STAY TO TAKE THE PLAB TEST

75E A person seeking leave to remain in the United Kingdom to take the PLAB Test may be granted an extension of stay for a period not exceeding 6 months, provided the Secretary of State is satisfied that each of the requirements of paragraph 75D is met.

REFUSAL OF EXTENSION OF STAY TO TAKE THE PLAB TEST

75F Leave to remain in the United Kingdom to take the PLAB Test is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 75D is met.

REQUIREMENTS FOR LEAVE TO ENTER TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST

75G The requirements to be met by a person seeking leave to enter to undertake a clinical attachment or dental observer post are that the applicant:

- (i) is a graduate from a medical or dental school and intends to undertake a clinical attachment or dental observer post in the United Kingdom; and
- (ii) can provide documentary evidence of the clinical attachment or dental observer post which will:
 - (a) be unpaid; and
 - (b) only involve observation, not treatment, of patients; and
- (iii) meets the requirements of paragraph 41 (iii) – (vii) of these Rules; and
- (iv) intends to leave the United Kingdom at the end of his leave granted under this paragraph unless he is granted leave to remain:
 - (a) as a postgraduate doctor, dentist or trainee general practitioner in accordance with paragraphs 70 to 75;
- (v) if he has previously been granted leave in this category, is not seeking leave to enter which, when amalgamated with those previous periods of leave, would total more than 6 months.

LEAVE TO ENTER TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST

75H A person seeking leave to enter the United Kingdom to undertake a clinical attachment or dental observer post may be admitted for the period of the clinical attachment or dental observer post, up to a maximum of 6 weeks at a time or 6 months in total in this category, provided the Immigration Officer is satisfied that each of the requirements of paragraph 75G is met.

REFUSAL OF LEAVE TO ENTER TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST

75J Leave to enter the United Kingdom to undertake a clinical attachment or dental observer post is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 75G is met.

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REQUIREMENTS FOR AN EXTENSION OF STAY IN ORDER TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST

75K The requirements to be met by a person seeking an extension of stay to undertake a clinical attachment or dental observer post are that the applicant:

- (i) was given leave to enter or remain in the United Kingdom to undertake a clinical attachment or dental observer post or:
 - (a) for the purposes of taking the PLAB Test in accordance with paragraphs 75A to 75F and has passed both parts of the PLAB Test;
 - (b) as a postgraduate doctor, dentist or trainee general practitioner in accordance with paragraphs 70 to 75; or
 - (c) as a work permit holder for employment in the UK as a doctor or dentist in accordance with paragraphs 128 to 135; and
- (ii) is a graduate from a medical or dental school and intends to undertake a clinical attachment or dental observer post in the United Kingdom; and
- (iii) can provide documentary evidence of the clinical attachment or dental observer post which will:
 - (a) be unpaid; and
 - (b) only involve observation, not treatment, of patients; and
- (iv) intends to leave the United Kingdom at the end of his period of leave granted under this paragraph unless he is granted leave to remain:
 - (a) as a postgraduate doctor, dentist or trainee general practitioner in accordance with paragraphs 70 to 75; or
- (v) meets the requirements of paragraph 41 (iii) – (vii) of these Rules; and
- (vi) if he has previously been granted leave in this category, is not seeking an extension of stay which, when amalgamated with those previous periods of leave, would total more than 6 months.

EXTENSION OF STAY TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST

75L A person seeking leave to remain in the United Kingdom to undertake a clinical attachment or dental observer post up to a maximum of 6 weeks at a time or 6 months in total in this category, may be granted an extension of stay for the period of their clinical attachment or dental observer post, provided that the Secretary of State is satisfied that each of the requirements of paragraph 75K is met.

REFUSAL OF EXTENSION OF STAY TO UNDERTAKE A CLINICAL ATTACHMENT OR DENTAL OBSERVER POST

75M Leave to remain in the United Kingdom to undertake a clinical attachment or dental observer post is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 75K is met.

Requirements for leave to enter as a prospective student

82 The requirements to be met by a person seeking leave to enter the United Kingdom as a prospective student are that he:

- (i) can demonstrate a genuine and realistic intention of undertaking, within 6 months of his date of entry:

- (b) a supervised practice placement or midwife adaptation course which would meet the requirements for an extension of stay as an overseas qualified nurse or midwife under paragraphs 69P to 69R of these Rules; and
- (ii) intends to leave the United Kingdom on completion of his studies or on the expiry of his leave to enter if he is not able to meet the requirements for an extension of stay:
 - (b) as an overseas qualified nurse or midwife in accordance with paragraph 69P of these Rules; and

Students' unions sabbatical officers •

REQUIREMENTS FOR LEAVE TO ENTER AS A SABBATICAL OFFICER

87A The requirements to be met by a person seeking leave to enter the United Kingdom as a sabbatical officer are that the person:

- (i) has been elected to a full-time salaried post as a sabbatical officer at an educational establishment at which he is registered as a student;
- (ii) meets the requirements set out in paragraph 57(i)–(ii) or met the requirements set out in paragraph 57(i)–(ii) in the academic year prior to the one in which he took up or intends to take up sabbatical office; and
- (iii) does not intend to engage in business or take employment except in connection with his sabbatical post; and
- (iv) is able to maintain and accommodate himself and any dependants adequately without recourse to public funds; and
- (v) at the end of the sabbatical post he intends to:
 - (a) complete a course of study which he has already begun; or
 - (b) take up a further course of study which has been deferred to enable the applicant to take up the sabbatical post; or
 - (c) leave the United Kingdom; and
- (vi) has not come to the end of a period of government or international scholarship agency sponsorship, or has the written consent of his official sponsor to take up a sabbatical post in the United Kingdom; and
- (vii) has not already completed 2 years as a sabbatical officer.

LEAVE TO ENTER THE UNITED KINGDOM AS A SABBATICAL OFFICER

87B A person seeking leave to enter the United Kingdom as a sabbatical officer may be admitted for a period not exceeding 12 months on conditions specifying his employment provided the Immigration Officer is satisfied that each of the requirements of paragraph 87A is met.

REFUSAL OF LEAVE TO ENTER THE UNITED KINGDOM AS A SABBATICAL OFFICER

87C Leave to enter as a sabbatical officer is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 87A is met.

REQUIREMENTS FOR AN EXTENSION OF STAY AS A SABBATICAL OFFICER

87D The requirements for an extension of stay as a sabbatical officer are that the applicant:

Appendix 5 Immigration Rules

- (i) was admitted to the United Kingdom with a valid student entry clearance if he was then a visa national; and
- (ii) meets the requirements set out in paragraph 87A(i)–(vi); and
- (iii) would not, as a result of an extension of stay, remain in the United Kingdom as a sabbatical officer to a date beyond 2 years from the date on which he was first given leave to enter the United Kingdom in this capacity.

EXTENSION OF STAY AS A SABBATICAL OFFICER

87E An extension of stay as a sabbatical officer may be granted for a period not exceeding 12 months on conditions specifying his employment provided the Secretary of State is satisfied that the applicant meets each of the requirements of paragraph 87D.

REFUSAL OF EXTENSION OF STAY AS A SABBATICAL OFFICER

87F An extension of stay as a sabbatical officer is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 87D is met.

REQUIREMENTS FOR LEAVE TO ENTER THE UNITED KINGDOM FOR THE PURPOSE OF EMPLOYMENT UNDER THE SECTORS-BASED SCHEME

135I The requirements to be met by a person seeking leave to enter the United Kingdom for the purpose of employment under the Sectors-Based Scheme are that he:

- (i) holds a valid Home Office immigration employment document issued under the Sectors-Based Scheme; and
- (ii) is aged between 18 and 30 inclusive or was so aged at the date of his application for leave to enter; and
- (iii) is capable of undertaking the employment specified in the immigration employment document; and
- (iv) does not intend to take employment except as specified in his immigration employment document; and
- (v) is able to maintain and accommodate himself adequately without recourse to public funds; and
- (vi) intends to leave the United Kingdom at the end of his approved employment; and
- (vii) holds a valid United Kingdom entry clearance for entry in this capacity.

LEAVE TO ENTER FOR THE PURPOSE OF EMPLOYMENT UNDER THE SECTORS-BASED SCHEME

135J A person seeking leave to enter the United Kingdom for the purpose of employment under the Sectors-Based Scheme may be admitted for a period not exceeding 12 months (normally as specified in his work permit), subject to a condition restricting him to employment approved by the Home Office, provided the Immigration Officer is satisfied that each of the requirements of paragraph 135I is met.

REFUSAL OF LEAVE TO ENTER FOR THE PURPOSE OF EMPLOYMENT UNDER THE SECTORS-BASED SCHEME

135K Leave to enter the United Kingdom for the purpose of employment under the Sectors-Based Scheme is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 135I is met.

REQUIREMENTS FOR AN EXTENSION OF STAY FOR SECTOR-BASED EMPLOYMENT

135L The requirements for an extension of stay for Sector-Based employment are that the applicant:

- (i) entered the United Kingdom with a valid Home Office immigration employment document issued under the sectors-Based Scheme and;
- (ii) has written approval from the Home Office for the continuation of his employment under the Sectors-Based Scheme; and
- (iii) meets the requirements of paragraph 135I (ii) to (vi); and
- (iv) would not, as a result of the extension of stay sought, remain in the United Kingdom for Sector-Based Scheme employment to a date beyond 12 months from the date on which he was given leave to enter the United Kingdom on this occasion in this capacity.

EXTENSION OF STAY FOR SECTORS-BASED SCHEME EMPLOYMENT

135M An extension of stay for Sectors-Based Scheme employment may be granted for a period not exceeding the period of approved employment recommended by the Home Office provided the Secretary of State is satisfied that each of the requirements of paragraph 135L are met. An extension of stay is to be subject to a condition restricting the applicant to employment approved by the Home Office.

REFUSAL OF EXTENSION OF STAY FOR SECTORS-BASED SCHEME EMPLOYMENT

135N An extension of stay for Sector-Based Scheme employment is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 135L is met.

245ZG Period and conditions of grant

- (b) *The cases referred to in paragraph (a) are those where the applicant has, or was last granted, entry clearance, leave to enter or leave to remain as:*
 - (iii) a Minister of Religion, Missionary or Member of a Religious Order, provided he is still working for the same employer,

Attributes for Tier 1 (Investor) Migrants

47 *A regulated financial institution is one which is regulated by the appropriate regulatory body for the country in which the financial institution operates. For example, where a financial institution does business in the UK, the appropriate regulator is the Financial Services Authority.]*

Appendix 5 Immigration Rules

Note

Appendix F inserted by HC 607.

Text from heading 'Immigration rules as at 26 November 2008 relating to routes deleted on 27 November 2008' to the end of Appendix F inserted by HC 1113.

Text from 'Immigration rules as at 30 March 2009' to 'the appropriate regulator is the Financial Services Authority' inserted by HC 314.

[APPENDIX G

COUNTRIES PARTICIPATING IN THE TIER 5 YOUTH MOBILITY SCHEME

Australia

Canada

Japan

New Zealand]

Note

Appendix G inserted by HC 1113.

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[all references are to paragraph number]

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